

appellant initially went outside for air because of his headache and then went to the clinic. She related that he was not injured at his duty station but complained of a headache.

On January 22, 2009 appellant received treatment at the employing establishment's clinic from Dr. James E. Bruckart, Board-certified in family and preventive medicine, for complaints of a headache and difficulty breathing. Dr. Bruckart noted that appellant came to work with a severe headache that increased after cleaning personnel arrived. At the clinic appellant "fell to the floor with apparent decrease in consciousness for approximately [one] minute."¹

Appellant received treatment at the hospital on January 22, 2009.² On January 29, 2009 Dr. Bruckart requested updated medical restrictions. He stated:

"[Appellant] has experienced headaches and difficulty breathing while engaged in occupational duties. He feels that paint fumes, perfumes and other allergens in the workplace are causing migraine headaches, sinus congestion and difficulty breathing. Last week [appellant] experienced a syncopal episode that required ambulance transport from the workplace."

On February 3, 2009 the employing establishment controverted the claim, noting that appellant had not identified any fumes or smells that he was exposed to at work and that the medical reports did not indicate that he sustained an injury to his head or elbow.

On August 12, 2009 the Office requested that appellant provide detailed factual information regarding his exposure to fumes and his fall and a rationalized medical report addressing the relationship between the identified work factors and any diagnosed condition.³ Also on that date, it requested that the employing establishment provide his exposure to fumes, dust or chemicals and the results of any available air samples. The Office further requested information regarding air circulation and ventilation.

¹ In statements dated January 22, 2009, Marjorie Sexton and Penny Hockenberry, nurses with the employing establishment, described appellant's fall to the floor of the clinic on that date.

² In an emergency room report dated January 22, 2009, Dr. David M. Ebbit, Board-certified in emergency medicine, noted that appellant experienced the "gradual onset of a headache which he states began this morning while he was at work." Appellant noted that he had a history of headaches generally "triggered by fumes" and that he experienced a syncopal episode at the employing establishment's clinic. In a January 22, 2009 hospital report, Dr. David A. Hoffman, an osteopath who is Board-certified in family medicine, listed the history of injury as appellant having "environmental allergens at work for the last couple of years. [Appellant] was at work today and was exposed to some type of toxic fumes that trigger his asthma. He had an asthma attack with wheezing." Dr. Hoffman diagnosed an "environmental asthma attack and headache with syncope from vagal response."

³ The record contains numerous reports addressing the relationship between occupational exposure to irritants and appellant's headaches and shortness of breath. The reports, however, do not specifically address the January 22, 2009 alleged work incident. In a report dated September 8, 2009, Dr. Samuel O. Bricker, Board-certified in family medicine, discussed his treatment of appellant following a syncopal episode on January 22, 2009. He stated, "I feel [appellant's] headaches and asthmatic symptoms for which he was seen in the [e]mergency [d]epartment are from his exposure to fumes at his workplace."

By letter dated September 6, 2009, appellant related that when he arrived at work on January 22, 2009 he smelled what appeared to be “cleaning products and perfumes mixed together.”⁴ He began to have a headache and went outside. Ms. Amerson agreed that there was a strong odor. She told appellant that it smelled like perfume. Appellant’s headache worsened and, with Ms. Amerson’s permission, he went to the health clinic. The smell of the floor cleaner at the clinic worsened his condition. Appellant fell down in a faint when he tried to stand. When he regained consciousness his right arm was numb below the elbow. Appellant attributed his fainting to exposure at work to fumes and smells, which he believed to be a mixture of cleaning products and perfume. He indicated that he had a history of difficulty with irritants both occupational and outside of his employment. Appellant described his past history of working in a building with no ventilation and diesel forklifts operating continuously inside the building. In August 2006, he began having occupational asthma. Appellant enclosed the material safety data sheets of the chemicals he was exposed to at the employing establishment.

By decision dated September 14, 2009, the Office denied appellant’s claim that he sustained an injury on January 22, 2009. It determined that he had not established exposure to fumes or smells as alleged.

On October 6, 2009 appellant, through his attorney, requested a telephone hearing. At the telephonic hearing, held on January 14, 2010, counsel noted that appellant had filed both occupational disease and traumatic injury claims, one of which had recently been remanded for the employing establishment to provide further factual information on workplace exposure. Appellant related that on January 22, 2009 he smelled cleaning products, perfumes and scented candles. He told Ms. Amerson who informed him that she could also smell the scents. Ms. Amerson joined appellant outside and “she told me that to her it was a very strong smell of perfume. She said it [is] almost as if someone took a bath in it, overpowering.” Appellant related that he worked in a office setting with an attached loading dock that had operating diesel and propane forklifts. He also indicated that he specifically worked in an area with numerous cubicles and that many employees had scented candles and jars of scented oil. Next to appellant a coworker had scented oil with 10 wicks. When he returned to work after the January 22, 2009 incident, the coworker had sealed the jar.

In a letter dated March 16, 2010, Ms. Amerson denied that she told appellant on January 22, 2009 that she could smell any odors or aromas. She also challenged his description of the work area, noting that he was only near six cubicles and situated far from the loading dock area. Ms. Amerson further indicated that there were no diesel fumes. She maintained that “only one employee had scented oil on her desk and I requested she put it away because of [appellant’s] condition.”

By decision dated April 13, 2010, the hearing representative affirmed the September 14, 2009 decision. He found that appellant had not established exposure to strong scents from perfume or diesel fumes on January 22, 2009. The hearing representative additionally determined that he had established that appellant fell on the floor of the employing

⁴ In another letter of the same date, appellant discussed his occupational exposure to irritants at work beginning in 2005 and 2006.

establishment's clinic but that there was no medical evidence showing an injury resulting from the fall.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁵ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁹ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.¹⁰

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.¹¹ 20 C.F.R. § 10.118(a) states: "The employer is responsible for submitting to [the Office] all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time."

ANALYSIS

Appellant alleged that on January 22, 2009 he developed a headache and fainted striking his head and elbow as a result of exposure to fumes and smells from perfume and cleaning

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁷ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁹ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹⁰ *Id.*

¹¹ *Phillip L. Barnes*, 55 ECAB 426 (2004).

products at his workstation. He asserted that many of his coworkers had scented oil and candles in their cubicles. Appellant further maintained that his supervisor, Ms. Amerson, agreed that there was a strong odor that day at work. He related that a coworker in an adjacent cubicle had scented oil with 10 wicks. The Office requested that the employing establishment address whether appellant was exposed to fumes, dust or chemicals and to submit evidence regarding air circulation and ventilation. In response, Ms. Amerson denied that she told him that she smelled any odor at work. She further indicated that only one employee had scented oil and that she had requested that the employee remove the oil because of appellant's condition. Ms. Amerson did not address, however, whether the scented oil was on the employee's desk at the time of appellant's claimed exposure on January 22, 2009. The employing establishment further did not comply with the Office's request for detailed information about his exposure to fumes at work. Although it is appellant's burden to establish his claim, the Office is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹² On remand, it should further develop the factual evidence to determine whether he was exposed to fumes, including scented oil or cleaning products, at work on January 22, 2009. Following this and any further development deemed necessary to determine whether he sustained an injury in the performance of duty, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² *R.E.*, 59 ECAB 323 (2008); *Claudia A. Dixon*, 47 ECAB 168 (1995).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 18, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board