United States Department of Labor
Employees' Compensation Appeals Board

W.O., Appellant	)	
and	)	**Docket No. 12-1066**
	)	**Issued: November 19, 2012**
DEPARTMENT OF VETERANS AFFAIRS, NEBRASKA/WESTERN IOWA HEALTH CARE, Omaha, NE, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2012 appellant filed a timely appeal from a February 17, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant established that he sustained a right shoulder injury on December 4, 2011 in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the February 17, 2012 decision, OWCP received additional evidence. Appellant also submitted new evidence with his appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On December 7, 2011 appellant, then a 56-year-old housekeeping aide, filed a traumatic injury claim alleging that on December 4, 2011 he injured his right shoulder when he slipped and fell on ice in the back dock area while transporting trash. He indicated that the incident occurred at 7:45 a.m.

In a December 4, 2011 e-mail, Roger A. Lowis, weekend supervisor informed Abe Soto, Environmental Management Services (EMS) Assistant Chief, that appellant called him about 7:47 a.m. to inform him of the incident. Appellant related that the incident occurred after he had emptied the trash, began walking down the ramp, slipped on ice and jammed his shoulder against the railing when he fell. According to appellant the ice was one to one and a half inches thick with no ice melt on the sidewalk. Mr. Lowis related taking photos of the area and he found the dock area to be covered in water and a little slush.

In a December 9, 2011 memorandum, Ron E. Feather, Assistant Chief of Police, stated that he reviewed video footage of the loading dock on December 4, 2011 from 5:30 a.m. to 8:00 a.m. Mr. Feather noted that the door is propped open with a cone at 7:37 a.m., but no one exits. At 7:43 a.m. an individual was seen arriving at the loading dock, securing the door by removing the cone and at 7:45 a.m. put ice melt along the loading dock area. At 7:50 a.m. an EMS supervisor was seen arriving at the loading dock and leaving at about 7:53 a.m. He reported that video footage showed no employee falling on the loading dock during this period and that no snow had been disturbed on the railing. The EMS supervisor was seen arriving on the loading dock at approximately 7:50 a.m.

In a December 15, 2011 memorandum, William J. Gaynor, Chief, EMS, controverted appellant's claim based on a review of photos and videotape surveillance. He related that Mr. Feather reviewed a videotape for December 4, 2011 from 5:30 a.m. to approximately 8:00 a.m. A review of the videotape showed appellant propping open a loading dock door, disappearing and returning "with what appears to be a bucket of possibly ice melt" which he spread onto the loading dock at about 7:30 a.m. Mr. Lowis was seen shortly after 8:00 a.m. checking out the condition and location in which appellant claimed he was injured.

On December 27, 2011 OWCP received medical evidence from appellant. In a December 4, 2011 emergency room report, Dr. Scott F. Menolascino, an examining Board-certified internist, reported seeing appellant that day due to his slipping on ice and striking his shoulder on a dumpster. An x-ray interpretation showed no acute bony abnormality. Dr. Menolascino diagnosed a right shoulder injury possible a strain versus a sprain.

OWCP also received a December 20, 2011 outpatient note from Dr. Sandeep Mukherjee, an examining internist, indicating that appellant was seen for a follow-up from an emergency room visit for a right shoulder injury sustained by a fall. Dr. Mukherjee reported active problems including rotator cuff sprain and sprains and strains of other and unspecified parts of the back.

In a January 17, 2012 letter, OWCP informed appellant that the factual and medical evidence was insufficient to establish his claim. It noted that the employing establishment submitted videotape and photographic evidence. Appellant was advised to submit medical and

factual evidence, including a detailed statement of the alleged incident. He was given 30 days to provide the requested information. No evidence was received.

By decision dated February 17, 2012, OWCP denied appellant's claim as he failed to establish fact of injury. It found that the lack of corroboration from the surveillance video, photos or his supervisors and his failure to provide a more detailed description of the incident failed to establish that the claimed December 4, 2011 incident occurred at the time, place and in the manner alleged. OWCP also found the medical evidence insufficient as there was no medical diagnosis associated with the alleged incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of FECA; 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.[4] 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.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.[6] First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

ANALYSIS

As noted above, the first element of fact of injury requires that appellant submit evidence establishing that an incident occurred at the time, place and in the manner alleged.[9] The Board finds that he has failed to meet his burden of proof.

[3] 5 U.S.C. § 8101 *et seq.*

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 4.

[7] *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[8] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 4.

[9] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002).

Appellant asserted that he injured his right shoulder on December 4, 2011 at 7:45 a.m. when he slipped and fell on ice in the back dock area while transporting trash. Dr. Menolascino, in a December 4, 2011 emergency room report, noted that appellant related injuring his right shoulder when he slipped on ice and struck his shoulder on a dumpster. However, appellant did not state that he struck his shoulder on a dumpster on his claim form. In a December 20, 2011 note, Dr. Mukherjee stated that appellant was seen for a follow-up visit for a right shoulder injury sustained as the result of a fall. Dr. Mukherjee provided no details as to the date or how the shoulder injury occurred.

The employing establishment submitted surveillance video and photographs of the back dock area and argued that the incident did not occur in the manner appellant alleged. Mr. Feather and Mr. Gaynor explained that the surveillance video take from 7:00 a.m. to approximately 8:00 a.m. on December 4, 2011 showed an individual putting ice melt along the loading dock at approximately 7:45 a.m. At no time during the time in question is an employee seen falling on the loading dock. In addition, Mr. Lowis related that following appellant's informing him at 7:47 a.m. of his slipping and falling on ice in the dock area and that he went out to the dock area to check it out. He saw that the dock area was covered in ice melt or water and little slush and took photos of the area for future reference. The Board finds that due to the conflicting evidence regarding the time, place and manner in which the alleged incident occurred, that appellant has not established his claim.[10]

By letter dated January 17, 2012, OWCP informed appellant of the discrepancies in his claim and that the employing establishment was controverting his claim. Appellant failed to submit to OWCP's detailed statement regarding the incident or witness statement corroborating his account. Therefore, given the inconsistencies in the evidence regarding whether the incident occurred as alleged, the Board finds that there is insufficient evidence to establish that the incident occurred as alleged.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a traumatic injury to his right shoulder in the performance of duty on December 4, 2011.

[10] *See S.P.*, 59 ECAB 184 (2007); *Caroline Thomas*, 51 ECAB 451, 455 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2012 is affirmed.

Issued: November 19, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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