U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TED A. OFF and DEPARTMENT OF DEFENSE,
BUCKLEY ANG BASE, Aurora, Colo.

Docket No. 96-536; Submitted on the Record;
Issued February 5, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty.

On April 11, 1995 appellant, then a 36-year-old electronics mechanic, filed a notice of traumatic injury, claiming that at 3:00 p.m. on April 7, 1995 he strained his right shoulder and arm while getting out of a helicopter when his right foot slipped. Appellant was initially treated by Dr. Mark P. Hayman, Board-certified in family practice, on April 8, 1995 for neck and right shoulder pain. He diagnosed a cervical strain, neuropathy, and paresthesia. Dr. Hayman's April 11, 1995 notes indicated that appellant "after some thought, thinks that some of [the] pain was caused by work."

Dr. Hayman related that appellant slipped while getting out of a helicopter, caught himself, and hurt his right arm. In a note dated April 14, 1995, Dr. Hayman referred appellant to Dr. Julie W. Colliton, Board-certified in physical medicine and rehabilitation "for evaluation and definition of injuries related to auto[mobile] accident and recent workers' compensation injury."

In a report dated April 26, 1995, Dr. Colliton related appellant's account of the incident at work—that he felt a popping and tearing sensation in his right shoulder but thought at the time that the pain could have been the result of a previous automobile accident and realized only over the next few days that this was a new injury. Dr. Colliton concluded that, based on what appellant had told her, his right shoulder complaint was a new, work-related accident. She diagnosed a possible rotator cuff tear and dislocation and recommended a magnetic resonance imaging (MRI) scan.

Subsequently, Dr. Colliton reported that the MRI scan to rule out impingement, rotator cuff tear, biceps tendinitis, and Bankart lesion was "entirely within normal limits." She noted that the medication she had prescribed was "helping [appellant] tremendously" and recommended physical therapy for the pain.

The employing establishment controverted the claim on the basis of a supervisor's statement that appellant was with him at 3:00 p.m. and took the rest of the day off. The

employing establishment noted that appellant had been treated by a chiropractor at 11:15 a.m. on April 7, 1995 for a previous auto[mobile] injury[1] and had complained to a coworker of pain in his neck and shoulders "throughout the day."

On May 18, 1995 the Office of Workers' Compensation Programs informed appellant that unless he submitted additional evidence his claim would be disallowed because his supervisor, Michael L. Uknavage, stated that appellant was with him at the time of the alleged incident and because the medical evidence showed no injury. The Office also requested more detailed information from the employing establishment.

Mr. Uknavage responded by letter dated May 26, 1995. He stated that appellant had told him at 9:30 a.m. on April 7, 1995 that he had a doctor's appointment and needed leave. Mr. Uknavage told appellant to place a leave form on his desk. About 10:45 a.m. another employee told Mr. Uknavage that appellant had just driven away from the parking lot. Mr. Uknavage stated that he next saw appellant at 2:30 p.m. and was "surprised" because appellant had requested leave from 2:00 p.m. until 5:00 p.m. Appellant replied that he had gone to the doctor, had returned at 12:30 p.m., and was leaving for the rest of the day at 3:00 p.m.

Mr. Uknavage told appellant to submit two separate leave forms "to reflect a more accurate accounting of his actual leave time." At 2:45 p.m. Mr. Uknavage paged appellant who arrived at the avionics office within a few minutes with another employee, Eddie Clayton. Appellant gave Mr. Uknavage the two leave forms and was given back the leave form he had placed on Mr. Uknavage's desk that morning. Appellant and Mr. Clayton remained in the avionics office until 3:00 p.m. when appellant left the facility on official leave. Mr. Uknavage stated that during the 10 to 12 minutes the 3 of them discussed leave policy and the need for appellant to request leave prior to his actual use of it.

Subsequently, Mr. Uknavage verified that appellant had visited the chiropractor at 11:15 a.m. on April 7, 1995 for treatment of injuries received in an automobile accident in May 1994. Mr. Uknavage added that he had interviewed Mr. Clayton on April 11, 1995 and that Mr. Clayton related that appellant had complained of pain in his shoulder throughout the day of April 7, 1995.[2] Mr. Uknavage recalled that on April 11, 1995 he talked with employees in the avionics shop about the incident on April 7, 1995 and one of them stated that appellant had told him a week ago that he was going to file a disability claim.

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[1] Appellant was injured in an automobile accident on May 30, 1994 when his vehicle was rear-ended. On June 22, 1994 he had a spinal fusion at C6-7 because of a herniated disc, right-sided unilateral facet dislocation, and a subluxation. None of these injuries was work related.

[2] Mr. Clayton's statement dated May 16, 1995 related that he entered the hangar "around" 3:00 p.m. on April 7, 1995 and appellant was sitting on a helicopter removing his boot. Appellant stated that he had slipped out of the helicopter and hurt his foot. He added that he had hurt his shoulder as well when he caught himself while falling. Subsequently, Mr. Clayton stated on May 24, 1995 that he could not be sure of the exact time since appellant left work at 3:00 p.m. on April 7, 1995. Mr. Clayton related the details of how and when appellant asked him to write the May 16, 1995 statement and noted appellant's complaints that the May 16, 1995 statement sounded like Mr. Clayton was siding with Mr. Uknavage because Mr. Clayton did not "place enough emphasis" on the hurt shoulder. Mr. Clayton added that appellant had been complaining about his shoulder in the morning and periodically throughout the day of April 7, 1995.

In a letter dated May 25, 1995, Skip Wardall stated that appellant told him on April 11, 1995 when he completed a claim form that he had "reinjured his shoulder from the car wreck" and that he should never have come back to work so soon since his shoulder had not healed. Mr. Wardall related appellant's remark that his car insurance would pay for any time off work since the injury was from the car wreck.[3] Mr. Wardall added that appellant claimed that his injury happened at 3:00 p.m. on April 7, 1995, but "I personally observed him in the avionics shop at 1445 (2:45 p.m.) through 1500 (3:00 p.m.) when he left the facility."

On June 19, 1995 the Office denied the claim on the grounds that the evidence was insufficient to establish that appellant had sustained an injury as alleged. The Office noted that appellant had failed to respond to its letter requesting clarification of the time, place and manner in which the incident had occurred.

In a letter dated June 27, 1995, appellant stated that he had sent all the information requested by the Office and asked that the Office review all of the findings and statements from doctors and coworkers, including his May 23, 1995 letter.[4] The Office responded in a letter dated July 13, 1995 that appellant should review the appeal rights enclosed with the June 19, 1995 decision and let the Office or the Board know of his choice. On July 22, 1995 appellant requested a copy of the file, which was sent on August 3, 1995.

The Board finds that appellant has failed to meet his burden of proof in establishing that the claimed incident occurred in the time, place and manner alleged.

An employee seeking benefits under the Federal Employees' Compensation Act[5] 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 of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is 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 upon a traumatic injury or occupational disease.[7]

In a claim for compensation based on a traumatic injury, the employee must establish fact of injury by submitting proof that he or she actually experienced the employment accident or

[3] In a statement dated May 24, 1995, Johnnie E. Hudson related that appellant had initially told him on April 11, 1997 that his injury on April 7, 1995 was a reinjury of a previous injury, but remarked after filling out the paperwork that the injury had to be treated as a new injury.

[4] A copy of appellant's cover letter dated May 23, 1995 and received by the Office on June 30, 1995 is in the file. Appellant stated that he was not with Mr. Uknavage at 1500 (3:00 p.m.) on May 7, 1995 and that "the time was only an approximation." The incident "occurred just prior to my leaving at approximately 1510 hours for the day." Appellant added that he was preparing to leave and thus remembered the time "so precisely."

[5] 5 U.S.C. §§ 8101-8193 (1974).

[6] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[7] *Id.*

event in the performance of duty and that such accident or event caused an injury as defined in the Act and its regulations.[8]

In determining whether an employee sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components considered in conjunction with one another.[9] The first component to be established is that the employee actually experienced the employment incident at the time, place and manner alleged. In some cases, this first component can be established by an employee's uncontroverted statement. An alleged work incident need not be confirmed by witnesses but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[10]

While the burden is on a claimant to establish the employment incident at the time and in the manner alleged, his statement alleging that an injury occurred at a given time and in given manner is of great probative value and will stand unless refuted by substantial evidence.[11] The second component, whether the employment incident caused a personal injury, generally must be established by medical evidence.[12]

In this case, appellant alleged on his claim form that the incident in which he hurt his shoulder occurred at 3:00 p.m. Mr. Clayton's statement also noted the time of the incident as 3:00 p.m. This time was refuted by appellant's supervisor who stated that all three were discussing the appropriate use of leave at that time and that appellant left the facility at 3:00 p.m. on compensatory time, as he had intended to do all that day.

Weeks later, appellant denied that he was with Mr. Uknavage at 3:00 p.m. on May 7, 1995 (appellant obviously confused the date with April 7, 1995); appellant stated that the 3:00 p.m. time was only approximate and that the incident actually happened at 3:10 p.m., just before he left for the day, which is why he remembered the time "so precisely." Yet Mr. Clayton's later statement indicated that he was unsure what the actual time was.

The Office asked appellant on May 18, 1995 to provide a full explanation if he disagreed with Mr. Uknavage's account of April 7, 1995, yet in his May 23, 1995 letter appellant did not deny either his visit to a chiropractor for treatment of neck and shoulder pain that morning, Mr. Uknavage's statements regarding appellant's inappropriate use of leave forms, or Mr. Clayton's statements that appellant had been complaining of shoulder pain all day. Further, appellant did not state when completing his claim form that he had hurt his foot, yet Mr. Clayton reported on May 16, 1995 that he was asked to check out appellant's foot.

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[8] *Gene A. McCracken*, 46 ECAB ___ (Docket No. 93-2227, issued March 9, 1995).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995); *see Elaine Pendleton*, 40 ECAB 1143, 1147 (1989).

[10] *Edgar L. Colley*, 34 ECAB 1691, 1695 (1983).

[11] *Virgil F. Clark*, 40 ECAB 575, 584 (1989).

[12] *John J. Carlone*, 41 ECAB 354, 357 (1989).

The Board finds that the inconsistencies and unexplained discrepancies in the record diminish the probative value of appellant's statements regarding the events of April 7, 1995.[13] Inasmuch as appellant has failed to establish the first component of his claim, that the incident occurred in the time, place and manner alleged, the Board need not review the medical evidence.[14] Therefore, the Board finds that appellant has failed to meet his burden of proof in establishing entitlement to compensation.[15]

The June 19, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 5, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[13] *See Gene A. McCracken, supra* note 8 (finding that inconsistencies in the record cast serious doubt on whether appellant injured his back moving boxes and bags prior to delivering his route); *cf., Neal C. Evins*, 48 ECAB ___ (Docket No. 95-558, issued December 24, 1996) (finding that despite conflicting accounts of whether the incident occurred in the time, place, and manner alleged, appellant's statements on his claim form and to his physicians were not refuted by substantial evidence).

[14] Dr. Colliton's conclusion that appellant's shoulder pain was work related was based solely on his account to her of the April 7, 1995 incident and preceded the results of the MRI scan which was negative. Further, Dr. Hayman's April 8, 1995 treatment note contained no description of the April 7, 1995 incident while his April 11, 1995 note indicated that appellant "after some thought" attributed his shoulder pain to a fall while getting out of a helicopter on April 7, 1995.

[15] *See O. Paul Gregg*, 46 ECAB ___ (Docket No. 94-635, issued March 20, 1995) (finding that when an employee claims an injury under the Act, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time and in the place and manner alleged, and that the event, incident, or exposure caused an "injury" as defined by the Act).