

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN W. McMAHON and DEPARTMENT OF TRANSPORTATION,
U.S. COAST GUARD, Honolulu, Hawaii

*Docket No. 96-702; Submitted on the Record;
Issued February 20, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on November 8, 1993, as alleged.

On November 8, 1993 appellant, then a 55-year-old, commercial fishing vessel examiner, filed a notice of traumatic injury (Form CA-1) alleging that he suffered a right hip injury. Appellant gave place of injury as "unknown -- on fishing vessel." He gave cause of injury as "unknown -- probably while inspecting a fishing vessel." No specific date of injury was given by appellant. On the reverse side of the form the employing establishment indicated that it received notice of injury on October 24, 1993 and a date of injury was indicated as September 29, 1993.

On June 22, 1994 the record was supplemented to include five reports from Dr. Calvin S. Oishi. In a November 9, 1993 report, he stated that he saw appellant for complaints of "acute right hip pain." Dr. Oishi went on to say that "[Appellant] ... noticed insidious onset of right thigh and groin pain for approximately [four to five] weeks." Dr. Oishi noted that a bone scan by another physician was consistent with avascular necrosis and "The patient presents here now for further evaluation." Dr. Oishi diagnosed early avascular necrosis, right hip. The date of injury was given as November 8, 1993. In a November 26, 1993 report, Dr. Oishi also gave date of injury as November 8, 1993 and again stated "clinical findings, as well as bone scan and laboratory results all seem to point toward avascular necrosis." In a December 13, 1993 report, Dr. Oishi stated that surgery for a core decompression was cancelled as appellant's pain had dissipated for over a week. In a March 3, 1994 report, Dr. Oishi reported his findings of a followup examination that "[Appellant] has redeveloped right groin pain." Dr. Oishi diagnosed stable ficat I-II avascular necrosis. In an April 5, 1994 report, Dr. Oishi diagnosed "stable avascular necrosis of the right hip" and return for reevaluation in four weeks. All of Dr. Oishi's reports gave November 8, 1993 as the date of injury.

On September 7, 1994 the Office of Workers' Compensation Programs received an August 18, 1994 report by Dr. Oishi, in which he diagnosed "stable avascular necrosis right hip" with return in two months. On September 28, 1994 the Office received October 26 and November 2, 1993 reports by Dr. Denise L. Parnell, a Board-certified internist. In the October 26, 1993 report, Dr. Parnell stated that she saw appellant for a three-week history of right groin pain of gradual onset. Dr. Parnell diagnosed "right hip joint pain, probably secondary to osteoarthritis." In the November 2, 1993 report, Dr. Parnell stated that appellant still has so much discomfort. Dr. Parnell reported the findings of her examination and diagnosed "Possible DJD of the right hip versus avascular necrosis. [Appellant] is rather atypical in that he gets pain with all movements."

In an October 27, 1994 report,¹ Dr. Oishi again diagnosed stable avascular necrosis.

In a December 20, 1994 report, Dr. Oishi reported that "pain still persists, but at a tolerable level." Dr. Oishi diagnosed stable avascular necrosis of the hip.

By letter dated January 10, 1995, the Office requested additional factual and medical information from appellant.

On March 27, 1995 the record was supplemented to include a November 4, 1993 bone scan survey by Dr. R. Nordyke, Board-certified in nuclear medicine. Dr. Nordyke stated the reason for test as "pain, right hip, [two] weeks." Dr. Nordyke diagnosed "Abnormal osteogenesis and abnormal venous pooling in right femoral head and (less intense) in intertrochanteric areas with essentially normal arterial flow. This most likely represents aseptic necrosis, although septic arthritis cannot be ruled out completely (no clinical evidence). A similar pattern is sometimes seen in degenerative arthritis (low probability)."

On February 16, 1995 the Office received appellant's response to its January 10, 1995 request for information. Appellant stated that "I fell on three fishing vessels in September 1993 on three different occasions. The falls were a result of slippery, greasy decks. The falls were no greater than [three] feet and one fall was a result of attempting to climb up a stair ladder also slippery. Each fall resulted in hitting the deck on the right side."

On August 1, 1995 the Office received appellant's additional response to the Office's January 10, 1995 request for information. Appellant stated that "I slipped and fell on [two] fishing vessels. First vessel, I was going up an outside ladder and slipped due to excessive grease or oil on the ladder rungs. This caused me to fall back, landing sideways onto my right side. The fall was approximately [three] feet. Second fall, slipped on the deck, landed on my right side." Appellant went on to say "I notified my supervisor of the two falls although after the fact because the pain, etc., did not manifest itself until about 10 to 14 days after the two incidents. By then I was on vacation in Europe. By the time I returned to Honolulu I could not walk and went to doctors."

¹ The October 27, 1994 report by Dr. Oishi refers to an injury on April 12, 1994.

In a February 7, 1995 report, Dr. Oishi again diagnosed stable avascular necrosis. In an April 28, 1995 report, Dr. Gregg K. Satow, a Board-certified orthopedic surgeon, stated:

“[Appellant] apparently has had two separate injuries, the first in September 1993 when he fell while walking up some stairs causing trauma to his right hip. It did not sound as if this was a severe trauma-type injury. There was no acute abduction or twisting of the hip and definitely no dislocation which happened. He then, apparently, was going on vacation for about three weeks and was limping or hobbling around when he had increasing pain and presented on November 8, 1993 for an evaluation of his right hip. He apparently at that time had pain and x-ray evidence of a lesion in the superolateral femoral head. Eventually a bone scan was performed which showed the probability of avascular necrosis early on and through subsequent treatments and evaluation, it appeared that this area improved and healed and that his pain became much less.”

Dr. Satow went on to say that appellant states: “The right hip occasionally bothers him, but is not significantly painful most of the time.” He reported the findings of his examination and assessed that “I am questioning his current diagnosis of right hip avascular necrosis as his current x-rays appear to be quite normal. He did have limitation of motion or an asymmetric motion on the right side, which I feel was probably related to a femoral head fracture when he hit this. It seems more likely that he had a femoral head fracture lateral to the fovea and it basically healed over time. There was evidence of this on bone scan; however, this could be incorrect. It may just be avascular necrosis secondary to trauma.”

On October 23, 1995 appellant stated “To clarify what you asked in paragraph [two] concerning the number of falls I had in September 1993. After rereading both references you cited in your October 10, 1995 letter, I do not know why I stated I had fallen three times. I only remember slipping (not falling) twice. Once on an outside deck ladder and once on the deck.” “The attending doctor told me that there [were] three ways one normally develops avascular necrosis. The only category that fit me was the slip [and] fall incidents, slipping and making contact with my right hip.”

By decision dated December 14, 1995, the Office denied appellant’s claim on the grounds that fact of injury was not established as there were such inconsistencies as to cast serious doubt on the validity of the claim.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on November 8, 1993, as alleged.

An employee seeking benefits under the Federal Employees’ Compensation Act² 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 and that the claim was filed within the applicable time limitations of the Act.³ An individual seeking disability

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

compensation must also establish that an injury was sustained at the time, place and in the manner alleged,⁴ that the injury was sustained while in the performance of duty⁵ and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.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 traumatic injury case, the employee must establish by the weight of reliable, probative and substantial evidence that the occurrence of an injury is in the performance of duty at the time, place and in the manner alleged and that the injury resulted from a specific event or incident.⁸ The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁹

Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹⁰ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹¹

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Appellant did not notify his supervisor until October 23, 1993, approximately one month after the alleged incidents, he never mentioned the incidents to anyone, he continued to work without apparent difficulty following the alleged incident and he failed to obtain medical treatment until October 26, 1993, approximately one month after the alleged incident. While appellant stated that he did not immediately suffer pain and was on vacation several weeks after the alleged incident, this does not explain why appellant did not provide a specific date of injury and specific details concerning how the falls he alleged happened. Appellant alleged that he suffered a right hip injury from slipping and falling on more than one occasion on a greasy, oily deck and an outside ladder on fishing vessels while performing his duties as a commercial fishing vessel examiner, always landing on his right side. However, in an October 3, 1995 letter, appellant stated: "To clarify" regarding the number of

⁴ *Robert A. Gregory*, 40 ECAB 478 (1989).

⁵ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *Steven R. Piper*, 39 ECAB 312 (1987).

⁷ *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *See Joshua Fink*, 35 ECAB 822, 823-24 (1984).

⁹ *Eric J. Koke*, 43 ECAB 638 (1992); *Mary Joan Cappolino*, 43 ECAB 988 (1992).

¹⁰ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

¹¹ *Robert A. Gregory*, *supra* note 4; *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

falls “I do n[o]t know why I stated I had fallen three times. I only remember slipping (not falling) twice. Once on an outside deck ladder and once on the deck.” It is appellant’s responsibility to establish how, when and where he sustained injury. The factual evidence of record does not establish the incident as alleged. In addition, none of the medical evidence submitted provided an accurate history of injury or related a medical condition to any employment-related incident, either on November 8, 1993 or in September 1993. Appellant was given the opportunity to clarify the discrepancies in the details of the alleged injury, but failed to do so.

In view of the inconsistencies in appellant’s statements regarding how, where and when he sustained his injury and the lack of contemporaneous medical evidence, the Board finds that there is insufficient evidence to establish that appellant sustained an injury to his right hip in the performance of duty on November 8, 1993, as alleged.

The decision of the Office of Workers’ Compensation Programs dated December 14, 1995 is affirmed.¹²

Dated, Washington, D.C.
February 20, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² The Board notes that the record indicates that appellant’s claim for an April 12, 1994 traumatic injury was accepted by the Office.