U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN W. TERPENNING and DEPARTMENT OF THE AIR FORCE, AIR FORCE SYSTEMS COMMAND, HILL AIR FORCE BASE, Utah

Docket No. 97-675; Submitted on the Record;
Issued March 18, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury in the performance of duty on October 25, 1995.

The Board has duly reviewed the case record and finds that appellant has not met his burden of proof in this case.

In a traumatic injury case, in order to determine whether an employee actually sustained an injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. 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.[1]

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the 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. However, an employee's statement alleging

[1] *Louise F. Garrett,* 47 ECAB 639 (1996).

that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.[2]

To accept fact of injury in a traumatic injury case, the Office of Workers' Compensation Programs, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an injury.[3] The Office denied appellant's claim by decisions dated February 13 and July 25, 1996 and January 9, 1997 on the grounds that fact of injury was not established. The Office found that, while an incident did occur in the performance of appellant's employment on October 25, 1995, the evidence did not establish that the incident occurred exactly as appellant alleged, or that it caused appellant's injury.

In the present case, appellant filed a notice of traumatic injury that he had sustained a neck injury in the performance of his federal employment, which occurred on October 25, 1995. Appellant alleged that he had sustained a neck injury because his upper neck was forced back suddenly, when a radar sextant rotated and almost hit him in the face. Appellant stated that he felt his neck pop and felt a numbing sensation. A coworker who witnessed this incident stated that he remembered the sextant elevation coming up fast, appellant yelling out in fright, and appellant continuing with the mission thereafter. The Office found that the evidence of record did establish that the radar apparatus lurched and suddenly gained in elevation; however, it was not clear whether this actually affected appellant.

The Board concurs in the Office's finding that the evidence of record does establish that a sextant with which appellant was working suddenly lurched in elevation on October 25, 1995; however, the evidence both factually and medically is insufficient to establish that appellant sustained a neck injury as a result of this incident.

In this regard, the Board notes appellant's coworker's statement that he remembered the sextant elevation rising, appellant yelling in fright, and appellant then continuing on with his work. In a subsequent statement, this coworker clarified that on October 24, 1995, he was asked to assist appellant on the sextant 94 as a electronics tech. On that day he had noted that while receiving tekus data the mount would jump violently. The coworker further stated that on October 25, 1995 while repeating their assignments, appellant's sextant jumped violently once because appellant's foot slipped and hit the radar foot switch. These statements do not establish that the sextant struck appellant, that appellant made any physical maneuvers to avoid the sextant, or that appellant complained of injury or pain following the sextant's elevation. The Board also notes that, in a statement from appellant's supervisor, the supervisor noted that appellant had some trouble with the Cine-sextant during a mission on October 25, 1995 and that appellant had stated that the sextant flew up in his face. Appellant's supervisor also noted that he had asked appellant at the mission debrief after this incident whether he was alright and appellant had indicated that he was fine. During the ensuing weeks appellant reiterated that he was not injured.

[2] *Nathaniel Cooper*, 46 ECAB 1053 (1995).

[3] *Cheryl L. Veale*, 47 ECAB 607 (1996).

Other statements were received from coworkers. A coworker identified himself as the "Photo Control" during the mission in question and indicated that he had conducted the debriefing session following. He stated that appellant had discussed a malfunction on his sextant and had advised everyone to be careful, but indicated that he had not been injured as a result of the malfunction. In another statement, the chief of the range management section noted that he had a conversation on November 15, 1995 with appellant concerning his employment conditions. The range management section chief indicated that appellant mentioned an incident concerning his Cine-sextant and had indicated that if his seat had been locked in a more forward position he could have been hurt, but that he was not injured because he moved his head back. The factual record therefore contains inconsistencies as to whether the incident actually occurred exactly as appellant alleged.

The medical evidence of record is also insufficient to establish that appellant sustained an injury resulting from the accepted incident. The record indicates that appellant first saw Dr. Philip V. Savia, Jr. on November 16, 1995 for cervical complaints. Dr. Savia noted that appellant had related a history of hyperextension injury to his neck due to a sudden jolt on October 25, 1995 from an improper setup of an optical tracking unit. Dr. Savia diagnosed headaches and neck strain. Dr. Savia repeated appellant's history of injury, but did not provide any of his own medical rationale explaining how the alleged incident would have caused the symptoms for which he finally sought treatment some weeks later. The Board has held that an opinion is not dispositive simply because it is offered by a physician. To be of probative value to appellant's claim, the physician must provide a proper factual background and must provide medical rationale which explains the medical issue at hand, be that whether the current condition is disabling or whether the current condition is causally related to the accepted employment injury.[4] Where no such rationale is present, the medical opinion is of diminished probative value. As Dr. Savia did not provide a rationalized medical opinion causally relating the diagnosed conditions to the accepted incident, his opinion is of limited probative value.[5]

[4] *See Michael Stockert*, 39 ECAB 1186 (1988).

[5] There is evidence of record that appellant was receiving chiropractic care before and after the alleged injury. As the x-ray examination of record indicates that there was no evidence of cervical subluxation, the Office had found that the chiropractor was not a "physician" pursuant to the Act. 5 U.S.C. § 8101(2) defines "physician" to include chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.

The decisions of the Office of Workers' Compensation Programs dated July 25, 1996 and January 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
March 18, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member