U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN T. HORRIGAN and DEPARTMENT OF AGRICULTURE, OFFICE OF THE INSPECTOR GENERAL, Denver, CO

Docket No. 98-586; Submitted on the Record;
Issued January 31, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an injury to his head or right ear on August 3, 1996, as alleged.

On September 3, 1996 appellant, then a 49-year-old special agent, filed a claim for an injury sustained on August 3, 1996 when he lost his balance and fell in a shower while traveling in connection with his employment. The Office of Workers' Compensation Programs accepted that appellant sustained a right shoulder strain, but by decision dated August 14, 1997 found that the evidence was not sufficient to establish that he sustained a head or ear injury on August 3, 1996.

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.[1] 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.[2] An employee's statement that an incident 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.[3]

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[1] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

[2] *Dorothy Kelsey*, 32 ECAB 998 (1981).

[3] *Thelma S. Buffington*, 34 ECAB 104 (1982).

The Board finds that appellant has established that the August 3, 1996 incident occurred as he alleged.

In an attachment to his claim form filed on September 3, 1996, appellant described the August 3, 1996 incident, in which he lost his balance in a shower, concluding by stating: "I fell about 'three' feet landing on my right shoulder. I hit had [sic] on the tub causing a whiplash to my neck." In a statement dated July 15, 1997, appellant explained that he mistakenly typed "had" instead of the intended "head" in the September 3, 1996 statement.[4] While there were no eyewitness to the August 3, 1996 incident, appellant did submit a statement from the special agent with whom he was traveling on August 3, 1996. In this statement, which is dated July 14, 1997, appellant's fellow special agent stated he talked to appellant about 6:00 a.m. on August 3, 1996, that appellant told him he was going to take a shower after which they would meet at the car to continue their return trip to Denver, that about 6:30 a.m. appellant met him at the car and "looked like he was hurting" and when asked what was wrong, told the other special agent "that he had fallen in the shower, striking his head and shoulder area. He was having trouble with his arm and was holding his hand over his ear. … I was concerned that he might have sustained a whiplash or a concussion." This account of appellant's statements and actions on the date of the August 3, 1996 incident is highly persuasive and, coupled with appellant's statements, is sufficient to establish that the August 3, 1996 incident occurred as alleged.

Appellant did not report the August 3, 1996 incident to the physician he saw on September 4 and October 22, 1996. These visits, however, were to an orthopedic surgeon for appellant's right shoulder problem, which was accepted by the Office. Although appellant's statements indicate he was experiencing dizziness by the time of these visits, his right shoulder was appellant's primary problem at that time and it was treated by an injection into his subacromial space and anti-inflammatory medications. The earliest medical report in the case record that mentions the incident of August 3, 1996 is the February 24, 1997 report of Dr. Barbara Esses, a Board-certified otolaryngologist, who concluded in a May 6, 1997 report that "it is likely that he has a perilymphatic fistula of the right ear secondary to his head trauma from slipping in a tub three weeks prior to the onset of his symptoms." Appellant has stated that in November 1996 he was first examined by Dr. Scott Green, his family physician, for dizziness and treated unsuccessfully for almost two months for an inner ear infection, then seen by an ear, nose and throat specialist who referred him to Dr. Esses.

To accept fact of injury in a traumatic injury case, the Office, 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." The term "injury" as defined by the Federal Employees' Compensation Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[5] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[6]

[4] This explanation is at least equally plausible to the Office's conclusion in its August 14, 1997 decision that appellant intended to type "hard" when he typed "had."

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

The Board finds that the medical evidence is not sufficient to establish that the August 3, 1996 employment injury resulted in a personal injury to the head or ear.

As noted above, Dr. Esses stated in a May 6, 1997 report that "it is likely that he has a perilymphatic fistula of the right ear secondary to his head trauma from slipping in a tub three weeks prior to the onset of his symptoms." This report is insufficient to establish that appellant sustained a head or right ear injury on August 3, 1996 because it does not provide any rationale explaining how the fall in the shower resulted in the perilymphatic fistula.[7] The case record contains no other medical evidence that addresses a possible causal relationship between any medical condition and appellant's August 3, 1996 employment incident.

The decision of the Office of Workers' Compensation Programs dated August 14, 1997 is modified to reflect that the August 3, 1996 incident occurred as alleged; the decision is affirmed as modified.

Dated, Washington, D.C.
January 31, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).