United States Department of Labor
Employees' Compensation Appeals Board

RONALD R. KUTZKE, Appellant	)	
and	)	**Docket No. 03-2237**
	)	**Issued: December 22, 2003**
U.S. POSTAL SERVICE, SAN DIEGO, CA, Employer	)	

Appearances:
Ronald R. Kutzke, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 15, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 18, 2003. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of his federal duties.

FACTUAL HISTORY

On May 8, 2002 appellant, then a 58-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on April 30, 2002 while driving a postal vehicle he was exposed to toxic emissions that caused him to have severe and continuous headaches and upper respiratory irritation. The employing establishment controverted appellant's claim, stating on the reverse of the claim form that it had the vehicle inspected and no toxic emissions were found.

In an April 30, 2002 statement, appellant noted that he reported to work that morning and was directed to drive vehicle No. 338 as his regular truck was not available. Appellant objected to driving the vehicle as he had experienced emissions problems with it in the past. After a short time on his shift, appellant returned to the employing establishment complaining that emissions from the vehicle made him sick and that he could no longer drive. Appellant went home with a severe headache, chest restriction, coughing and wheezing. In an April 30, 2002 statement, Thomas Gavaghan, the supervisor for transportation, noted that he drove No. 338 for 30 minutes with the windows up and down and experienced no fumes. In a May 2, 2002 letter, appellant's wife indicated that appellant returned home from work early on April 30, 2002. At that time, he was coughing, clearing his throat, had red eyes and complained of a headache. In a May 8, 2002 letter, Bruce Ballard, a coworker, indicated that on April 30, 2002 he observed appellant approaching himself and another worker. Appellant was smiling and gave the thumbs up sign and said he was ill and would be out of there shortly.

In a May 10, 2002 report, Dr. Lindy O'Leary, a specialist in occupational medicine, diagnosed reactive airways bronchial constriction precipitated by exposure to emissions or vapors from postal truck 338. He noted that it is very likely that appellant had preexisting asthma which was flared up by certain exposures, such as the emissions and vapor from the old Volvo trucks numbered 338, 169 and 150. Appellant was released to work with restrictions of no driving.

In a May 16, 2002 statement, Douglas Bernd, a driving instructor, noted that he drove Volvo truck No. 169 for three days and did not experience any fumes. In a May 21, 2002 statement, Richard Fellows of vehicle maintenance, indicated that he performed a diesel smoke test on three Volvo trucks, numbers 169, 338 and 150, and all three were in compliance.

In a May 20, 2002 report, Dr. O'Leary stated that appellant presented with itchy eyes and a headache, but his examination was otherwise normal. Dr. O'Leary released appellant to regular duty and referred him to have his allergies checked. In a May 30, 2002 report, Dr. O'Leary noted that appellant presented with dry cough and a headache. Appellant stated that he was tired from the prior day's exposure and could not go to work. Appellant's examination was otherwise normal. Dr. O'Leary diagnosed headache and cough, etiology unknown, possible exposure to vehicle exhaust.

In a May 27, 2002 statement, appellant alleged that other employees experienced the same problems with the Volvos but feared retaliation if they came forward; noting that when he returned to work after two days off, he was treated in a hostile manner by his supervisor.[1] He also stated that, due to his headache, cough and chest tightness, he did not recall gesturing to Mr. Ballard. He contended that Mr. Ballard might be retaliating against him as he had previously reported him for driving recklessly.

In a June 25, 2002 decision, the Office denied appellant's claim finding that he had failed to establish that the incident occurred as alleged. The Office found that evidence of record failed to establish that appellant was exposed to toxic fumes while in the performance of his duties.

[1] Appellant missed a total of three days work after the alleged incident.

In a July 2, 2002 letter, appellant requested a hearing. The employing establishment submitted an August 21, 2002 statement from James Piraino, manager of the transportation network, who noted that all vehicles were given regular preventative maintenance every six weeks which included vehicle emissions tests. The trucks were inspected and nothing was found to be wrong with their emissions. Appellant submitted a September 21, 1997 statement in which he complained of emission problems at that time. He submitted three vehicle repair tags indicating that three Volvo trucks had been tagged for repair due to bad smells and fumes in their cabins. A vehicle repair tag dated April 30, 2002 indicated that appellant reported a bad smell in the cabin of vehicle No. 338. In an October 25, 2002 statement, appellant stated that he spoke with David Waiter, a well-respected mechanic who told appellant that he thought the road draft tube, located under the driver's seat, was the cause of the emissions and that vehicle No. 338 had a leaky injector pump which exacerbated the problem. At the March 18, 2003 hearing, appellant testified that the employing establishment had harassed him and placed him in danger by requiring him to drive unsafe trucks. He noted that truck No. 338 was in the shop just prior to the alleged April 30, 2002 incident and had been parked for weeks.

In a June 18, 2003 decision, the Office hearing representative affirmed the June 25, 2002 decision finding that appellant had not established that he was exposed to toxic fumes, as alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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.[3] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. 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.[5] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident

[2] 5 U.S.C. § 8101 *et seq.*

[3] *Elaine Pendleton,* 40 ECAB 1143, 1145 (1989).

[4] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[5] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

caused a personal injury.[6] The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[7]

Traumatic injury means a wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence. The injury must be caused by a specific event or incident, or series of events or incidents within a single workday or work shift.[8]

Although an injury does not have to be supported by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, as alleged, the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[9] Such circumstances such 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 in connection therewith, may, if otherwise unexplained, cast sufficient doubt on a claimant's statements in determining whether the claimant has established a *prima facie* case.[10] The employee has the burden to establish that the injury occurred at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[11]

ANALYSIS

Appellant has not established that he actually experienced the employment incident at the time, place and in the manner alleged. Appellant alleged that he was exposed to toxic fumes while in the performance of his federal duties. However, the Board finds that the evidence of record does not establish his allegations. The record indicates that appellant reported headaches, coughing and other symptoms after driving vehicle No. 338. But the evidence does not substantiate that appellant was ever exposed to fumes from the postal vehicle on April 30, 2002.

The preponderance of the evidence does not establish that fumes emanated from the postal vehicle, as alleged. The record contains statements and results of automotive testing that there were no emissions from the vehicle in question. Douglas Bernd stated that he drove the vehicle for three days, eight hours a day and had no problems with any emissions or fumes. Mr. Gavaghan noted that he drove the vehicle shortly after appellant's complaints and

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[6] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[7] *Elaine Pendleton, supra* note 3; 20 C.F.R. § 10.5(a)(14).

[8] *William Taylor,* 50 ECAB 234 (1999).

[9] *See Theodore W. Manginen,* 15 ECAB 57 (1963).

[10] *George W. Glavis,* 5 ECAB 363 (1953).

[11] *Charles A.J. Cooley,* 15 ECAB 115 (1963).

experienced no emissions problem. Richard Fellows stated that he tested the emissions and found them to be in compliance with environmental standards.

Appellant stated that he experienced bad smelling fumes in vehicle No. 338. He also signed a vehicle repair tag on April 30, 2002 reporting that the cabin had a bad smell. However, appellant's allegations were refuted by the employing establishment. Moreover, on April 30, 2002 appellant was observed by Mr. Ballard as not being in any obvious physical distress. Mr. Ballard stated that appellant smiled at him, gave a thumbs up and said he was ill. These circumstances cast serious doubt on appellant's allegations that he was exposed to exhaust fumes on April 30, 2002. Appellant has not established the first component of fact of injury.

CONCLUSION

The Board finds that appellant has not met his burden of proof in this case to establish an injury in the performance of duty on April 30, 2002.

ORDER

IT IS ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2003 is affirmed.

Issued: December 22, 2003
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member