

In a report dated March 25, 2002, appellant's supervisor, Arthur Perkins, stated that on Tuesday, March 5, 2002, at 7:45 a.m., appellant arrived at the cemetery and told him that he was not well enough to work" Mr. Perkins noted that appellant stated that his right shoulder was hurting from the futon bed he slept on and requested sick leave for the day. Appellant also requested sick leave on March 6, 2002 annual leave on March 7 and March 8, 2002 and a combination of sick and annual leave for the week of March 11, 2002, when he went to his grandfather's funeral which was held out of state. He stated that appellant arrived at the cemetery on March 7, 2002 to fill out a form and was wearing a neck brace and walking with a cane. Appellant returned to work on March 18, 2002 and on March 22, 2002 complained to Mr. Perkins of shoulder pain. He stated that appellant indicated that he "never reported" a work-related injury because he felt he could work through it. Appellant approached the union president, Glenn D'Addario, and the cemetery director, Arthur Smith. Mr. Perkins stated that appellant told Mr. Smith that he hurt himself a few weeks prior while shoveling dirt from the lid of a concrete vault and that Michael J. Olenic, a coworker, was working with him when he was hurt. Appellant did not remember the grave site where the injury occurred.

In a letter dated March 26, 2002, Mr. Smith stated that on March 22, 2002 appellant met with management to discuss the pain he experienced in his right shoulder. Appellant stated that he injured his shoulder on the job several weeks prior on March 1, 2002 while shoveling dirt. Mr. Smith stated that this was the first time appellant had told management that he sustained an injury to his right shoulder while on the job. On March 5, 2002 appellant had told his supervisor that he hurt his right shoulder while sleeping on a futon bed at his home. Mr. Smith stated that, when asked why he had not reported the injury at the time it occurred, appellant stated that he tried to work through the pain. Mr. Smith noted that on March 7, 2002, when appellant arrived at work with a cane and a neck brace, he did not mention that he had hurt himself at work. Appellant worked from March 18 to 22, 2002, without complaint of any injury.

In a letter dated March 22, 2002, Mr. Olenic stated that he worked with appellant on interments three or four weeks prior and that on one of the days, appellant complained that he hurt his shoulder or his arm. He did not recall what section they were in when it happened.

In a report dated March 27, 2002, Dr. William A. Healy, an attending Board-certified orthopedic surgeon, noted that appellant stated that he was employed at the cemetery, digging graves and had an onset of severe pain to his right shoulder occurring approximately on March 1, 2002. The physician diagnosed "probable rotator cuff tear."

In a report dated March 29, 2002, Dr. Paul R. Alongi, an attending Board-certified orthopedic surgeon, indicated that he stated that on March 1, 2002 appellant developed pain in his neck and right shoulder while digging in the cemetery. The physician diagnosed cervical strain and a right shoulder injury. Dr. Alongi opined that appellant's symptoms were being referred from his right shoulder injury, that he had some mild neck discomfort, which was most likely musculoligamentous in nature. He stated that, to ensure that there was no underlying disc disease or nerve root impingement, he would like to obtain a magnetic resonance imaging scan of the cervical spine.

By letter dated April 12, 2002, the Office requested additional information from appellant, including reasons for the delay in reporting his injury and whether he sustained any other injury on or off duty between the date of the alleged injury and the date it was first reported to his physician.

A progress note dated March 23, 2002 from Dr. Clifford M. Weingarten, an attending Board-certified internist, noted that on February 1, 2002 while shoveling dirt appellant “[illegible] and ripped muscle [illegible] side of back” and went to the Veterans Administration Hospital. In a New York State workers’ compensation form dated April 18, 2002, Dr. Weingarten noted that appellant suffered severe pain while shoveling dirt and sought treatment on March 23, 2002.

A nurse’s note dated March 5, 2002 from the Veterans Administration Medical Center emergency room stated that appellant had pain in his right shoulder which he stated “was spontaneous” over the past two days. A physician’s note dated March 5, 2002 stated that appellant had pain in his right shoulder for two days and there was no trauma.

In a statement dated April 25, 2002, appellant explained that on March 1, 2002 he and Mr. Olenic were assigned a grave site to prepare for vault removal. Appellant stated that, as he was shoveling, he felt “a pull of [his] right shoulder area and a twist of [his] neck.” He did not think anything of it at the time and did not say anything to anyone on that day. He stated that he did not sustain any other injury on or off duty between March 1, 2002 and the date he sought treatment or reported it to his supervisor. He stated that he delayed seeking medical attention because he was not “the type of worker to take off for any little injury.” When he got home on March 1, 2002, he took a hot shower and rubbed Flexall and Tiger Balm on his right shoulder to stop the pain and stiffness he was feeling.

In an undated physician’s report received by the Office on May 7, 2002, Dr. Weingarten indicated that on March 1, 2002 appellant felt a pull in his right shoulder and twisted his neck while digging a grave. Dr. Weingarten stated that this was appellant’s third injury on the job and diagnosed acute back strain regarding the “cervical and shoulder.”

By decision dated May 21, 2002, the Office denied appellant’s claim, finding that he did not establish that he experienced a work incident at the time, place and in the manner alleged.

In a letter dated May 28, 2002, appellant stated that on March 4, 2002 he told Mr. Perkins that he hurt himself on Friday (*i.e.*, March 1) and that he just needed to work through his injury. Appellant told Mr. Perkins that he tried to sleep on his futon because it was a flat surface and he also tried sleeping on the floor. Appellant stated that Mr. Perkins was busy with paperwork while he was talking to him and he did not think Mr. Perkins paid full attention to his conversation.

On May 28, 2002 appellant requested an oral hearing before an Office hearing representative, which was held on December 17, 2002. At the hearing, appellant stated that he sustained a shoulder injury with a bicep tear and a possible torn rotator cuff. Appellant testified that on March 1, 2002 he was throwing soil onto the rim of a grave and felt a sharp pain and a

twist of his neck. At that instant, he climbed up out of the grave and rubbed his arm and shoulder area. Appellant returned to work and did not mention the problem to his coworker because he did not want to burden him. He told Mr. Perkins on March 3, 2002 that he had injured himself and waited two days because he felt “it was just like a muscle strain” and he “felt [he] could deal with it.” Appellant told Mr. Perkins that he felt he “messed [his] muscle up” and said he might have slept wrong. Appellant stated that he mentioned the futon because he was not sure what had caused the problem but when he thought more about it, he realized it had occurred at work. He returned to work on March 18, 2002 but after four days it became too hard to work due to the right shoulder pain. In order to function at work during the week of March 18, 2002, he used his left hand to perform his duties. He saw Dr. Weingarten on March 23, 2002 and, contrary to Dr. Weingarten’s note, he told Dr. Weingarten he injured himself on March 1, 2002.

By letter dated August 1, 2002, Mr. D’Addario stated that appellant told him that he hurt himself when he was digging in a concrete vault and did not report it because he thought it was just a muscle pinching and “no big deal.”

By letter dated August 24, 2002, appellant stated that “on the first day of the pain,” he had a conversation with Mr. Perkins and told him that he did not want to blame the job because he “slept wrong the night before.” Appellant stated that at the time he could not remember that he had felt “pitching and twisting of [his] neck” and when appellant did he “spoke on it.” Appellant stated that he did have a conversation with Mr. Perkins stating that he “slept wrong” on his futon.

A medical note from the Veterans Administration Medical Center dated October 3, 2002 stated that appellant had shoulder pain starting around March 1, 2002, while working as a grave digger and digging a grave. Another medical note dated October 15, 2002 stated that appellant had right shoulder pain for several months, which was aggravated by grave digging. A medical note dated November 7, 2002 stated that appellant injured his right shoulder while exhuming a body from a grave and was working light duty. He was being treated for adhesive capsulitis and biceps tendinitis. A medical note dated December 4, 2002 stated that appellant had adhesive capsulitis, that his symptoms had improved and that he was scheduled for physical therapy. The note stated that appellant had stopped working as a grave digger and worked on light duty picking flowers.

By decision dated February 14, 2002, the Office hearing representative affirmed the May 21, 2002 decision.

LEGAL PRECEDENT

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.¹ Second, the

¹ *Robert J. Krstyen*, 44 ECAB 227, 229 (1992); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.²

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an 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 or her subsequent course of action.³ An employee has not met his burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁴ 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 had been established.⁵ However, an employee's statement alleged 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.⁶

ANALYSIS

There are many discrepancies in the evidence regarding the time, place and in the manner of appellant's alleged back injury. Appellant alleged on his claim form and at the hearing that on March 1, 2002 he injured his back while pulling a vault and shoveling dirt out of the grave at work. However, he delayed in reporting the incident to management until March 22, 2002. Mr. Perkins, appellant's supervisor, stated that on March 5, 2002 appellant told him that his right shoulder hurt from sleeping on his futon and that he requested leave that day. Mr. Perkins stated that on March 7, 2002, while on annual leave, appellant came into the office to fill out a form and was wearing a neck brace and walking with a cane. Mr. Perkins stated that on March 22, 2000 appellant complained of shoulder pain and met with the union president and the cemetery undertaker. Appellant stated that he injured himself a few weeks earlier while shoveling dirt from the concrete vault but did not remember the grave site where it happened. Mr. Smith stated that the first time appellant told management about the alleged injury to his right shoulder at work was on March 22, 2002 at the meeting that day. Mr. Smith noted that on March 7, 2002 appellant arrived at work with a cane and a neck brace, he did not mention that he hurt himself at work and from March 18 to 22, 2002, did not complain of any injuries. In a March 22, 2002 statement, appellant's coworker noted that three or four weeks prior appellant complained that he hurt his shoulder or his arm but the coworker did not recall the date of injury or the section they were in when it happened.

The medical evidence is conflicting regarding the date, place and in the manner appellant was injured. In reports dated March 27 and 29, 2002, respectively, Dr. Healy and Dr. Alongi

² *Id.*

³ *Edward W. Malaniak*, 51 ECAB 280 (2000).

⁴ *Tia L. Love*, 40 ECAB 586, 590 (1989).

⁵ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987).

⁶ *Edward W. Malaniak*, *supra* note 3; *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

stated that appellant injured himself while digging at the cemetery on March 1, 2002. In a March 23, 2002 report, Dr. Weingarten stated that appellant injured his back on February 1, 2002 while shoveling dirt. In the New York State Workers' Compensation form dated April 18, 2002, Dr. Weingarten noted that appellant suffered severe pain while shoveling dirt on March 23, 2002. In a May 7, 2002 report, the physician stated that appellant pulled his right shoulder and twisted his neck while digging a grave on March 1, 2002. The March 5, 2002 note from the Veterans Administration Medical Center emergency room stated that appellant had pain in his right shoulder, which was "spontaneous" over the prior two days. A physician's note dated March 5, 2002 indicated that appellant had pain in his right shoulder for two days and there was no trauma. A medical note from the Veterans Administration Medical Center dated October 3, 2002 stated that appellant experienced shoulder pain while digging a grave on March 1, 2002 but was not contemporaneous to the incident. The November 7, 2002 medical note stated that appellant injured his right shoulder while digging a grave but did not provide a date.

CONCLUSION

The numerous discrepancies in the medical evidence and the statements by appellant, his coworker and management regarding the occurrence of the alleged back injury on March 1, 2002 cast serious doubt that the incident occurred in the manner, place and at the time alleged. The Board finds that appellant failed to establish that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2003 and May 21, 2002 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: May 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member