

as new injury November 13, 2004.” In a statement accompanying his claim, appellant indicated that on May 11, 2004 he noted trouble sleeping, working and lifting because of pain in his left shoulder. Appellant indicated that the pain was similar to problems he had previously with his right shoulder. He noted that his injury occurred “while working in flats cases, lifting tubs, sorting mail, pushing trucks, keying mail.” He also noted that it occurred while working “sometimes 6 or 8 hours in flats or 8 or 6 in letters 40 [hours] a week.”

In a letter dated November 17, 2004, the employing establishment controverted the claim. The employing establishment contended that, although appellant alleged that he was injured while at work lifting and pulling tubs and dispatching mail 8 hours a day, 40 hours a week, appellant had been off work for several injuries since August 2002, had worked a total of 30 hours out of 480 from March 20 to June 9, 2004 and that, on May 11, 2004, the date he alleged that he became aware of the injury, he had not been working for 7 weeks. The employing establishment also noted that appellant was on limited duty from another injury when the alleged new injury occurred. In support thereof, the employing establishment submitted appellant’s absence analysis, which indicated that he was on leave for eight hours a day from March 20 through June 2, 2004 with the exception of May 8, 2004, when he worked 3.96 hours. For the week commencing June 5, 2004, this record indicates that appellant worked 4 hours on June 5, 6.75 hours on June 6, 4.12 hours on June 7, 7.82 hours on June 8 and 3.49 hours on June 9.

In a medical report dated November 5, 2004, Dr. Jacob Salomon, a Board-certified orthopedic surgeon, discussed his treatment of appellant for his left shoulder injury. He noted that these problems were “first noted on approximately May 11, 2004.” Dr. Salomon also refers to an earlier report that he wrote. In a medical report requested by the employing establishment dated November 9, 2004, Dr. Paul D. Belich, a Board-certified orthopedic surgeon, indicated that appellant stated that “around May 7, 2004, while at work, [appellant] began having aching in the left shoulder....”

By letter dated December 15, 2004, the Office asked appellant to answer questions with regard to his case. Appellant responded in a letter dated December 27, 2004, wherein he indicated that, while he was working on limited duty sorting flats, his left shoulder started to get sore and that by the end of the day the pain was unbearable. He further noted that the symptoms were similar to the condition he had in his right shoulder for which he received surgery on April 1, 2003. Appellant indicated that he received treatment on May 11, 2004 from Dr. Salomon.

In a letter dated December 28, 2004, the employing establishment reiterated that appellant was not at work at the time of his alleged injury on May 11, 2004. The employing establishment also noted that the injury was not reported to a supervisor until November 2, 2004, almost six months later, although appellant saw his doctor on May 11, 2004 and returned to work on June 5, 2004. In support thereof, the employing establishment submitted further records regarding appellant’s work schedule. In one of these records, the “Employee Everything Report,” appellant had the same amounts allocated for work and leave without pay as the earlier absence analysis.

In a medical report dated January 15, 2005, Dr. Salomon indicated that appellant first became aware of his injury approximately on May 7, 2004, that he first saw Dr. Minnis on May 11, 2004 and then saw Dr. Ansari on May 12, 2004.

In a decision dated February 14, 2005, the Office denied appellant's claim. The Office found that appellant had failed to establish that the event occurred as alleged. The Office indicated that, based on the inaccuracies in the factual history, a review of the medical aspect of the fact of injury component was not warranted.

On March 8, 2005 appellant requested reconsideration. In a statement of the same date but received by the Office on April 14, 2005, appellant indicated that he could not remember the exact date in June of his injury. He indicated that, when discussing the claim with his supervisor, she instructed him to put the date of injury as May 11, 2004. He further indicated that when he received the Office's decision he forwarded it to Dr. J. Michael Morgenstern, an orthopedist, who informed him that he had given him a statement in June that gives the date of injury as when he was at work in June. In support thereof, appellant submitted a report by Dr. Morgenstern dated February 23, 2005. In this report, Dr. Morgenstern indicated that appellant had been evaluated by Dr. Edward Forman, who indicated that, when appellant returned to work in June 2004, he injured his shoulder.

By decision dated May 24, 2005, the Office determined that, although the new evidence was sufficient to warrant merit review, it was insufficient to modify the prior decision, as none of the factual evidence presented for review establishes that appellant sustained an injury due to work factors in the specific way that is stated by appellant due to conflicting histories in the record. Further, the Office found that the medical evidence was insufficient to establish appellant's entitlement to benefits.

LEGAL PRECEDENT

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹

The employee has the burden of establishing the occurrence of the alleged injury 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.²

¹ *Solomon Polen*, 51 ECAB 441 (2000); see also *Michael E. Smith*, 50 ECAB 313 (1999).

² *Michael W. Hicks*, 50 ECAB 325 (1999).

ANALYSIS

In the instant case, the Board finds that the Office properly determined that appellant had failed to establish fact of injury due to numerous inconsistencies in the record. In his claim, appellant indicated that he first noticed the connection between his injury to his left shoulder and his employment on May 11, 2004. He noted that on May 11, 2004 he had trouble sleeping, working and lifting because of pain in his left shoulder and noted that the injury occurred while he was working “sometimes 6 or 8 hours in flats or 8 or 6 in letters 40 [hours] a week.” However, the pay records submitted by the employing establishment indicate that appellant was in a leave without pay status on May 11, 2004, a fact that would conflict with his original statement regarding how the injury occurred. In fact, the records indicate that on May 11, 2004 appellant had not been working for seven weeks. The pay records also contradict Dr. Belich’s comment that appellant injured himself around May 7, 2004 while at work. Although the record indicates that appellant first sought medical treatment on May 11, 2004, there is no copy of this report in the record.³ The Board is not persuaded by appellant’s comment that he just put May 11, 2004 as the date because his supervisor told him to do so. Appellant did more than simply put May 11, 2004 as his date of awareness on his claim form, he also used this date when answering questions and discussing his medical treatment. Due to these inconsistencies, the Board finds that appellant has not established employment factors that caused or contributed to the presence of the disease or condition. Accordingly, the Office properly denied appellant’s claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he suffered an injury to his left shoulder causally related to factors of his federal employment.

³ By letter dated December 15, 2004, the Office asked appellant various questions and also indicated that there was a lack of factual and medical evidence that provided a consistent and accurate history of the left shoulder injury. However, the Office did not specifically note that the discrepancy was caused by the employing establishment’s pay records that indicated that appellant was not working at the time he so alleged. However, any error in failing to give appellant an opportunity to respond at that time is harmless due to the fact that appellant had a chance to make an argument with regard to this matter on reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 24 and February 14, 2005 are affirmed.

Issued: November 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board