United States Department of Labor
Employees' Compensation Appeals Board

BRIAN S. WINTER, Appellant	)	
and	)	**Docket No. 05-1604**
	)	**Issued: November 1, 2005**
DEPARTMENT OF THE ARMY, COMBINED SUPPORT MAINTENANCE, Annsville, PA, Employer	)	

Appearances:
Brian S. Winter, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 25, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 13, 2005 merit decision denying his back injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a back injury in the performance of duty.

FACTUAL HISTORY

On April 8, 2005 appellant, then 35-year-old optical instrument repairer, filed a traumatic injury claim alleging that he sustained an employment-related injury on August 10, 2004. Regarding the cause of the injury, appellant stated: "Was doing normal duties and progressively pain worsened as continue [sic] to stand. [Form] CA-2 was filed for reoccurrence, which was denied. In turn I filed a [Form] CA-1 as instructed by [the Office]." Regarding the nature of the

injury, appellant noted, "Sharp troubling pain in lower back." The claim form indicates that appellant first sought medical treatment on August 25, 2005.

By letter dated May 10, 2005, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted an undated statement in which he asserted that he delayed filing a Form CA-1 for the claimed August 10, 2004 injury, because he initially filed a recurrence of disability claim, but the recurrence claim was denied. He was then instructed to file a Form CA-1.[1] He indicated that he injured himself on August 10, 2004 when he was working on rebuilding M-249 machine gun covers, which involved reaching down into a basket on the floor to get a cover, fitting the cover onto the jig, flipping the jig, drilling holes, removing the cover and then passing the cover to a coworker. Appellant asserted that it became more difficult for him to stand and perform these duties on August 10, 2004. He indicated that he delayed seeking medical treatment for a period because he self-medicated himself and was able to perform light-duty work.

In an email transmission dated June 10, 2005, specialist Justin Clover, indicated that he worked with appellant in the M-249 assembly area on a day in August 2004 and witnessed him in a considerable amount of back pain. In a statement dated June 1, 2005 and entitled "Reference to [appellant's] injury claim dated August 10, 2004," Sergeant Major Bettinger, a supervisor, stated that appellant came to him saying that he had low back pain and indicated that appellant was standing upright at his workbench when the pain occurred.

Appellant submitted a June 10, 2005 report in which Dr. Deanne S. Endy, an attending osteopath, stated that she had been seeing him since September 15, 2000, when he reported experiencing lumbar and left leg pain while getting prepared for physical training testing. Dr. Endy detailed other instances when she treated appellant for various complaints, including an occasion on July 21, 2003 when he complained of back pain after lifting a mortar into a stand. She indicated that on September 1, 2004 appellant complained of right S1 pain "at work sitting, same assembly" and stated:

> "In summary, [appellant] filed a claim on August 15, 2004, then sought treatment from me September 1, 2004 for a lumbar injury after lifting a mortar into a stand. As evident by my records, [appellant] had not seen me since his previous back injury, September 2001. Consequently, his new pain was sustained after his August 15, 2004 injury at work, which is consistent with his complaints of his workers' compensation claim."[2]

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[1] In an April 20, 2005 statement, appellant stated that he initially filed a Form CA-2a for a recurrence of disability, but that after the claim was denied he filed a Form CA-1 as he initially had been instructed to do. In a notation on the letter, Sergeant Major Roy Bettinger indicated that he initially instructed appellant to file a Form CA-1. It is unclear from the record what prior work injury appellant sustained such that he would file a Form CA-2a.

[2] In a note dated September 1, 2004, Dr. Endy indicated, "[o]ff [September 2 and 3, 2005] for injury, pain low back."

Appellant also submitted several reports, dated in September and October 2004, of Craig M. Wilson, an attending chiropractor. The reports indicated that appellant had "asymmetry/misalignment/subluxations" of the back and cervical spine. However, the reports do not provide any indication that these conditions were demonstrated by x-ray testing to exist.

By decision dated June 13, 2005, the Office denied appellant's claim that he sustained a back injury in the performance of duty on August 10, 2004. The Office found that appellant did not demonstrate that a specific event, incident or exposure occurred at the time, place and in the manner alleged because he had not identified a specific work incident believed to be the cause of his claimed condition.[3]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] 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.[5] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

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.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8] 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.[9]

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[3] The Office also indicated that appellant had not shown that a diagnosed medical condition was connected to an accepted trauma or exposure.

[4] 5 U.S.C. §§ 8101-8193.

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

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

[7] *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).

[8] *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).

[9] *Elaine Pendleton, supra* note 5; 20 C.F.R. § 10.5(a)(14).

An employee must show the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[10] 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.[11] An employee has not met his or her 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.[12] 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 has been established.[13] However, an employee's statement alleging 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.[14]

ANALYSIS

Appellant filed a claim alleging that he sustained a back injury in the performance of duty on August 10, 2004. By decision dated June 13, 2005, the Office denied appellant's claim on the grounds that he did not demonstrate that a specific event, incident or exposure occurred at the time, place and in the manner alleged.

The Board finds that appellant established the occurrence of employment incidents on August 10, 2004, but did not submit sufficient medical evidence to show that he sustained a medical condition due to those incidents. The Board notes that there are no such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim. Appellant initially provided a vague account on his Form CA-1 about how he felt he sustained an employment-related injury on August 10, 2004 when he stated: "Was doing normal duties and progressively pain worsened as continue [sic] to stand." However, he later provided further detail of his duties on that date, noting that he was working on rebuilding M-249 machine gun covers while standing, a task which involved reaching down into a basket on the floor to get a cover, fitting the cover onto the jig, flipping the jig, drilling holes, removing the cover and then passing the cover to a coworker. Appellant explained that he delayed filing a Form CA-1 for the claimed August 10, 2004 injury because he initially filed a recurrence of disability claim. The recurrence claim was denied and he was instructed to file a Form CA-1. He also explained that he delayed seeking medical treatment until August 25, 2004, because he self-medicated himself and was able to perform light-duty work.[15] Appellant's account of his work on August 10, 2004 is not

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[10] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[11] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.,* 35 ECAB 1175, 1179 (1984).

[12] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[13] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[14] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[15] The record also contains a statement from a supervisor indicating that the injury was reported at the time it was alleged to have been sustained.

refuted by strong or persuasive evidence and therefore he has shown that he experienced employment factors on August 10, 2004 in the form of rebuilding M-249 machine gun covers while standing.

Although appellant established the occurrence of employment incidents on August 10, 2004, he did not submit sufficient medical evidence to show that he sustained a medical condition due to those incidents.

Appellant submitted a June 10, 2005 report in which Dr. Endy, an attending osteopath, indicated that appellant filed a claim on August 15, 2004, that he complained on September 1, 2004 of right S1 pain "at work sitting, same assembly," and that he sought treatment on September 1, 2004 for a lumbar injury after lifting a mortar into a stand. Dr. Endy stated: "As evident by my records, [appellant] had not seen me since his previous back injury, September 2001. Consequently, his new pain was sustained after his August 15, 2004 injury at work, which is consistent with his complaints of his workers' compensation claim." This report is of limited probative value on the relevant issue of the present case because Dr. Endy did not indicate that appellant sustained an employment injury on the date alleged, *i.e.*, August 10, 2004.[16] She seemed to indicate that appellant reported sustaining injury on August 15 or September 1, 2004, but appellant has not filed such a claim. Moreover, she gave a confusing account of what actions appellant reported had caused back pain on August 15 or September 1, 2004, when she alternatively noted that he was "at work sitting, same assembly" and that he lifted a mortar into a stand.[17] Dr. Endy did not provide any indication of what condition appellant might have sustained and she did not otherwise provide a rationalized opinion that he sustained a back injury in the performance of duty on August 10, 2004.[18]

Appellant also submitted several reports, dated in September and October 2004, of Dr. Craig M. Wilson, an attending chiropractor. The reports indicated that he had "asymmetry/misalignment/subluxations" of the back and cervical spine, but they do not constitute probative medical evidence on the relevant issue of the present case because they do not provide any indication that subluxations were demonstrated by x-ray testing to exist. Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[19]

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[16] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[17] *See Leonard J. O'Keefe,* 14 ECAB 42, 48 (1962); *James P. Reed,* 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal is of limited probative value regarding the issue of causal relationship).

[18] In a note dated September 1, 2004, Dr. Endy indicated, "[o]ff [September 2 and 3, 2005] for injury, pain low back." However, Dr, Endy did not identify the cause of appellant's pain.

[19] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

Because appellant did not show that he sustained a medical condition due to the accepted employment incidents, he did not establish that he sustained a back injury in the performance of duty on August 10, 2004.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a back injury in the performance of duty. Appellant established the occurrence of employment incidents on August 10, 2004, but did not show that he sustained a medical condition due to those incidents.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 13, 2005 decision is affirmed as modified to reflect that appellant established the occurrence of employment incidents on August 10, 2004, but did not show that he sustained a medical condition due to those incidents.

Issued: November 1, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board