United States Department of Labor
Employees' Compensation Appeals Board

ALVIN V. GADD, Appellant	)	
and	)	**Docket No. 05-1596**
	)	**Issued: October 25, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Alvin V. Gadd, 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' April 18, 2005 merit decision denying his claim that he sustained an employment-related injury on February 17, 2005. 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 respiratory condition in the performance of duty on February 17, 2005.

FACTUAL HISTORY

On March 7, 2005 appellant, then a 36-year-old customer service representative, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury in the performance of duty on February 17, 2005 at 12:15 a.m.[1] Regarding the cause of the injury, appellant stated,

[1] Appellant stopped work on February 23, 2005.

"Air freshener sprayed in the area; happens semi-regularly in the area; management is always made aware of each occurrence; left area for approximately 30 minutes to get some fresh air." Regarding the nature of the injury, he noted, "Breathed the aerosol that was sprayed; immediately noticed restriction in my airways and lungs." Appellant's supervisor, Rebecca Davison, provided a response on the Form CA-1, stating "The employee reported that someone had sprayed air freshener and he was having trouble breathing." Ms. Davison indicated that appellant reported that he had bronchitis and noted:

> "[Appellant] reported the use of air freshener in the area. I neither saw anyone using it nor smelled it when it was reported. [Appellant] reports to me each occasion that he smells air freshener. This happens, on average, once every two weeks. Sometimes he can stay at his desk and continue to work. Sometimes he needs to take a short break. I have no way of knowing whether, in this instance, his bronchitis was caused by the air freshener."

By letter dated March 17, 2005, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted a March 10, 2005 statement in which Michelle Jones, a coworker, stated, "On the date and time in question, I do recall a foul odor in the area. [Appellant] asked if I smelled something and I said yes. I don't recall exactly what type or the source of the odor." Appellant submitted two notes in which attending physicians indicated that he had acute bronchitis. A February 23, 2005 note indicated that appellant had been under medical care since February 22, 2005 and could return to work on February 28, 2005; an undated note stated that appellant had been under medical care from February 28 to March 4, 2005 and could return to work on March 9, 2005.

The record contains a March 22, 2005 report in which Dr. George A. Benbow, an osteopath, Board-certified in emergency medicine, and physician for the employing establishment, indicated that appellant reported experiencing asthmatic bronchitis due to some kind of fumes in the workplace. The existence of a specific substance which might have caused or aggravated such a condition had not been identified. He posited that asthmatic bronchitis could be caused or aggravated by a number of substances outside the workplace.

By decision dated April 18, 2005, the Office denied appellant's claim that he sustained a respiratory condition in the performance of duty on February 17, 2005. It found that he did not establish that a specific event, incident or exposure occurred at the time, place and in the manner alleged. The Office determined that there was no evidence that appellant was exposed to a specific agent or contaminant at work on February 17, 2005.

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

[2] 5 U.S.C. §§ 8101-8193.

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 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]

ANALYSIS

Appellant alleged that he sustained a respiratory condition when he was exposed to air freshener in aerosol form at work on February 17, 2005. However, appellant has not established the factual aspect of his claim. He has not submitted sufficient evidence to establish that he actually experienced an employment incident at a given time and place and in a given manner.[8]

Appellant did not indicate that any particular coworkers were using air freshener at the time and place alleged and the basis for his claiming the existence of such a substance in the workplace remains unclear. The evidence of record does not provide support for his claim that he was exposed to air freshener fumes at work on February 17, 2005. Ms. Jones, a coworker, indicated that she recalled a "foul odor in the area" but that she did not "recall exactly what type or the source of the odor."[9] Appellant's supervisor, Ms. Davison, indicated that appellant reported on February 17, 2005 that someone had sprayed air freshener, but she noted she "neither saw anyone using it nor smelled it when it was reported." Moreover, appellant did not specify

[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).

[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] *See supra* note 5 and accompanying text.

[9] It should be noted that Ms. Jones did not identify the specific date she smelled the unidentified substance but rather stated that she smelled it on "the date and time in question."

such details as the extent and duration of exposure to the alleged employment factors.[10] Given that appellant was unable to identify the source or actual nature of the substance which he believed caused injury or the extent and duration to which he sustained exposure, he has not provided sufficient specific information to establish that he experienced an employment factor in the performance of duty.[11] Appellant was provided an opportunity to perfect the factual aspect of his claim but he failed to do so.

Under these circumstances, appellant's assertion that he was exposed to air freshener fumes at work on February 17, 2005 must be considered vague and unsubstantiated. Because appellant has not established the factual aspect of his claim, it is not necessary for the Board to consider the medical evidence of record.[12]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a respiratory condition in the performance of duty on February 17, 2005.

[10] *See generally Tracey P. Spillane*, 54 ECAB ___ (Docket No. 02-2190, issued June 12, 2003). In *Spillane*, the Board noted that the claimant made vague references to having a reaction to certain substances or objects, but she did not adequately specify the implicated employment factors or describe such details as the extent and duration of exposure to any given employment factors.

[11] For example, appellant did not provide any description of the type of smell emanating from the alleged air freshener.

[12] *See supra* notes 5 and 6 and accompanying text. Appellant submitted additional evidence after the Office's April 18, 2005 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 18, 2005 decision is affirmed.

Issued: October 21, 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