



vehicle in the parking lot of the employing establishment at 5:30 a.m. and slipped on black ice, sustaining injury to his lower back. On the reverse of the form, Raymond Caskman, appellant's supervisor indicated that appellant was not injured in the performance of duty as it occurred while exiting his vehicle in the employing establishment parking lot. He stated that appellant did not stop work following the incident, noted that appellant's work hours were from 5:50 a.m. until 1:10 p.m. and contended that appellant had not reported the injury at the time it occurred. Mr. Caskman indicated that appellant first sought medical treatment in February 2005. On December 8, 2005 the employing establishment controverted appellant's claim for continuation of pay.

The Office requested additional evidence in support of appellant's claim on December 17, 2005. Appellant did not respond to this request. By decision dated January 26, 2006, the Office found that he had failed to submit the necessary factual evidence to establish that the employment incident occurred as alleged.

Appellant requested reconsideration on March 1, 2006 and submitted medical evidence in support of his claim. In a report dated February 21, 2005, Dr. Eddy Garrido, a Board-certified neurosurgeon, provided a history that appellant's left leg pain began in November 2004. She stated that there was no traumatic onset of pain and diagnosed lumbar spondylosis. Appellant underwent a magnetic resonance imaging (MRI) scan on February 24, 2005 which demonstrated bulging and herniated discs. Dr. Garrido recommended surgery on March 16, 2005. On April 13, 2005 appellant underwent a decompressive laminectomy and foraminotomy at L4-5 on the left and removal of a herniated disc at L5-S1. Dr. Garrido examined appellant following his surgery on May 9 and June 20, 2005.

By decision dated May 8, 2006, the Office denied further review of the merits, finding that he had failed to submit relevant new evidence to necessary reopen his claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee who claims benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action. 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 cast doubt on an employee's statements in determining whether he or she has established a prima facie case. An employee has not met his or her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. However, an employee's statement alleging that an injury occurred at a given time and in a given

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, appellant has not submitted evidence that establishes that he sustained an injury at the time, place and in the manner alleged. Appellant contends that he slipped and fell on ice while in the performance of duty during the month of February 2004. However, appellant did not file his claim until December 7, 2005, almost two years after the alleged incident occurred and could not provide a specific date of injury. Appellant's supervisor, Mr. Caskman, disputed his claim, noting that appellant did not stop work following the injury, that he first sought medical treatment in February 2005 and failed to report his injury to anyone until December 7, 2005. At the time of the Office's January 26, 2006 merit decision, appellant had failed to submit any factual or medical evidence in support of his claim. There was no evidence supporting that appellant's allegation of injury was consistent with his subsequent course of action. Instead, appellant provided late notification, continued to work without apparent difficulty following the alleged injury and failed to submit any evidence that he obtained medical treatment for any condition resulting from the alleged incident. As appellant's conduct is not consistent with his claimed injury, this casts serious doubt on the validity of his claim. The Office properly found that appellant has not met his burden of proof in establishing that he sustained an injury in February 2004, as alleged.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>3</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>5</sup>

### **ANALYSIS -- ISSUE 2**

In support of his request for reconsideration, appellant submitted a series of medical reports from Dr. Garrido, a Board-certified neurosurgeon, detailing treatment for his diagnosed lumbar spondylosis. Dr. Garrido first examined appellant on February 21, 2005 and did not record a history or discuss any traumatic incident or onset of symptoms during February 2004. Her reports are not contemporaneous with the alleged employment incident in February 2004 and do not address the underlying issue in this case; whether appellant sustained the employment

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<sup>2</sup> *Michelle Kunzwiler*, 51 ECAB 334, 335 (2000).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> 20 C.F.R. § 10.608(b).

incident in February 2004. These reports are not relevant to the issue of whether appellant sustained an employment incident in February 2004 and are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

**CONCLUSION**

The Board finds that appellant did not submit sufficient factual evidence to establish that his claimed employment incident occurred as alleged. Furthermore, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits based on the submitted medical evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 8 and January 26, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 18, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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