# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **O.J., Appellant** | ) | |
| **and** | ) | **Docket No. 07-966** |
| | ) | **Issued: August 16, 2007** |
| **U.S. POSTAL SERVICE, POST OFFICE, San Juan, PR, Employer** | ) | |

*Appearances:*
*Appellant, 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 February 26, 2007 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated May 5, 2006 denying his claim for compensation and a January 27, 2007 decision denying his request for merit review. Pursuant to 20 C.F.R §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of this claim.

### ***ISSUES***

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on February 10, 2006, as alleged; and (2) whether the Office properly denied his request for reconsideration.

### ***FACTUAL HISTORY***

On February 13, 2006 appellant, then a 48-year-old lead sales and service associate, filed a traumatic injury claim alleging that he fell on February 10, 2006 while standing up from his chair. His right foot got tangled between the desk and the base of the chair causing appellant to

lose his balance. Appellant fell on his right side and hit the edge of his desk with his shoulder and neck.

By letter dated February 17, 2006, the employing establishment controverted the claim. Appellant's manager stated that the incident could not have occurred as alleged, as upon observations of other employees doing appellant's job, almost every employee pulls back the chair to stand up and the others put their hands on the desk before standing. She noted that there was plenty of space in the office to move the chairs around when standing and that there was no possible opportunity to get tangled and fall from one's feet without extending arms for support. The manager noted that appellant had been under medication for a medical condition that was not work related and that he told her the day before that all he wanted was to file for disability retirement and take care of his health. She noted that appellant's supervisor had a nearby Office and did not hear any noise and that appellant never told his supervisor of falling. Appellant's supervisor stated that appellant did not report the accident to her, rather she learned of it when he was talking to another employee and that, when he approached appellant, he reported the accident.

By letters dated February 28 and April 5, 2006, the Office requested that appellant submit further information, including statements from persons who witnessed the injury and a detailed medical report. No new evidence was received.

By decision dated May 5, 2006, the Office denied appellant's claim because the factual evidence was not sufficient to establish that the incident occurred as alleged. The Office also noted that no medical evidence existed to show that appellant sustained an injury in connection with the alleged work incident.

By letter dated October 12, 2006, appellant requested reconsideration and submitted further information. He submitted a February 10, 2006 routing slip on which he indicated that, while he was working in his office, he fell on his right side and hit the border of his desk with his right shoulder and neck. Appellant noted that his feet got tangled in the chair.

Appellant also submitted a statement that he filed for disability retirement, indicating that he has been disabled since October 2005 due to muscle pain in neck, shoulders, chest, back of thigh, legs, joints, ankles toes and hands. He noted that he suffered from fibromyalgia, major depression and nerve problems. Appellant indicated that he had requested a reasonable accommodation from his employer. The record also contains an April 4, 2006 determination that the employing establishment denied appellant's request for an accommodation as it found that his condition imposed limitations so severe that they could not be accommodated.

In a medical report dated February 15, 2006, Dr. Luis E. Faura Clavell, a rheumatologist, conducted an electromyography. In a February 15, 2006 duty limitation form, the employing establishment stated that appellant alleged that he lost his balance and hurt his shoulder and neck. In the physician's portion of the form, Dr. Clavell indicated that the history given to him by appellant corresponded with this history. He also noted painful and limited range of motion. Dr. Clavell diagnosed trauma to appellant's right shoulder and neck as a result of the injury. In a note dated February 28, 2006, Dr. Clavell indicated that appellant was diagnosed with severe cervical and lumbar sprain with radiculitis and was to remain on strict bed rest. In a note dated

September 10, 2006, Dr. Clavell indicated that appellant had been diagnosed with fibromyalgia and myositis. In a medical report dated October 2, 2006, Dr. Clavell noted that he first evaluated appellant on April 20, 2005. He noted appellant's current conditions as fibromyalgia, L5-S1 disc protrusion small central producing mild impression upon the thecal sac, L3 and L5 radiculopathy, bilateral; C5 and C6 radiculopathy, bilateral; severe anxiety -- depression; osteoarthritis changes thoracic and lumbar vertebral, mild facet -- joint vertebra hypertrophy at L4-5 and L5-S1; and anterior osteopathic changes osteophytes C4, C5 and C6 left neural foramen narrowing.

Appellant also submitted magnetic resonance imaging (MRI) scan results from May 17, 2006 and nerve conduction velocity studies dated February 15, 2006. The record also contains a decision by the Department of Veterans Affairs noting that appellant suffered from service-related lumbar myositis and peritendinitis in his left shoulder.

By decision dated January 27, 2007, the Office found that the evidence was immaterial in nature and not sufficient to warrant review of the prior decision.

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

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim, including the fact that an 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first 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.[3] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[4]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to a specific condition of employment.[5] An award of

[1] 5 U.S.C. § 8122(a).

[2] *Id.*

[3] *John J. Carlone*, 41 ECAB 345 (1989).

[4] *Shirley A. Temple*, 48 ECAB 404 (1997).

[5] *Katherine J. Friday*, 47 ECAB 591, 591 (1996).

compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[6] The mere manifestation of a condition during a period of employment does not raise an inference of causal relationship between the condition and the employment.[7] Neither the fact that a condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.

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

In its decision dated May 5, 2006, the Office denied appellant's claim for the reason that it had not received a clear statement from him with regard to the basis of his claim. Appellant had indicated that, when he stood up he got his right foot tangled between the desk and the base of his chair causing him to lose his balance and fall hitting the edge of his desk with his shoulder and neck. However, the employing establishment controverted the claim. Appellant's manager argued that it was not possible for appellant to have injured himself in this manner. Appellant's manager indicated that, upon observing appellant's colleagues at work, the incident could not have occurred as alleged. His manager also noted that he had complained about a nonwork-related medical condition the day before the accident, told her that he was not feeling well and was going to file for disability retirement. Finally, the manager noted that a supervisor in a nearby office did not hear any noise that date and that appellant never told him that he fell, but noted that he heard it from another employee.

The Office denied appellant's claim because he failed to establish that the incident occurred on the date, at the time and/in the manner he alleged. The Board finds that appellant failed to establish that the incident occurred as alleged. The employing establishment noted that a supervisor sitting near appellant on that date did not hear the fall. The supervisor also noted that appellant did not promptly notify his supervisor. Furthermore, the employing establishment noted that appellant had talked about filing for disability the prior day and also argued that the incident could not have occurred as alleged.

Appellant was given the opportunity to respond by submitting further information in support of his claim, but he declined to do so in a timely manner. Although an injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] Such circumstances as lack of confirmation of the injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.[9] Appellant, despite being given an opportunity, submitted no further documentation in support of his allegation as to how the alleged incident occurred. Despite his close proximity to other

[6] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz, Jr.*, 30 ECAB 567 (1979).

[7] *Nicolelette R. Kelstrom*, 54 ECAB 570 (2003).

[8] *See Gene A. McCracken*, 46 ECAB 593 (1995).

[9] *Linda S. Christian*, 46 ECAB 598 (1995).

employees, there are no statements in support of his claim. This, in combination with appellant's failure to immediately notify his supervisor, the fact that he had been talking about disability retirement the day before, the questionable nature of how he sustained his injury, the fact that appellant submitted no medical evidence indicating that he received treatment and the fact that appellant did not respond to the Office's request for further information are sufficient to cast doubt on the validity of his claim. Accordingly, the Board finds that the Office properly denied appellant's claim for failure to establish that the incident occurred as alleged.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previous considered by the Office; or (3) constitutes relevant and pertinent new evidence not previous considered by the Office.[10]

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

Appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. However, he did submit relevant and pertinent new evidence not previously considered by the Office. With regard to whether appellant established that the incident occurred, he submitted a new statement dated February 10, 2004 that was not previously in the record. Appellant reiterates that he fell onto his right side and hit the border of his desk with his right shoulder and then with his neck. This is new evidence relevant to the issue of whether the incident occurred. Furthermore, appellant has submitted new medical evidence. Although most of this evidence does not address the issue of whether the alleged incident resulted in a medical condition, the record does contain a February 15, 2006 duty limitation report wherein Dr. Clavell indicated that the history of appellant losing his balance and hurting his right shoulder and neck in a work-related incident on February 10, 2006 was consistent with what appellant told him. He also noted that appellant sustained a trauma to his right shoulder and right neck as a result thereof. This is medical information that should be considered with regard to whether appellant sustained an injury as a result of the alleged employment incident.

In denying appellant's request for reconsideration, the employing establishment noted that this evidence was irrelevant or immaterial to the issue. However, the concerns of the Office with regard to this evidence is a matter that goes to the weight that should be accorded this evidence. The evidence is relevant or material to the issue of whether a fact of injury occurred.

Accordingly, as appellant has submitted pertinent new relevant and material evidence with his request for reconsideration, the Office must review his claim on the merits. Therefore, the Office improperly denied appellant's request for reconsideration.

[10] 20 C.F.R. § 10.606(b)(2)(i-iii).

## ***CONCLUSION***

In the May 5, 2006 decision, the Board finds that the Office properly found that appellant failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on February 10, 2006, as alleged. However, the Board finds that the Office did not properly deny appellant's request for reconsideration.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 27, 2007 decision of the Office of Workers' Compensation Programs denying reconsideration is reversed and the case remanded for further consideration consistent with this opinion; however, the Board affirms the May 5, 2006 decision.

Issued: August 16, 2007
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