United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 07-678**
	)	**Issued: June 8, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2007 appellant filed a timely appeal of a June 20, 2006 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an injury in the performance of duty and a November 16, 2006 nonmerit decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a hip injury in the performance of duty on December 8, 2005, as alleged; and (2) whether the Office properly denied his request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 28, 2006 appellant, then a 63-year-old building equipment mechanic, filed a traumatic injury claim alleging that on December 8, 2005 he hurt his hips while performing electrical work about 20 feet from the floor on a scissors lift. He stated that the lift was hit by a

forklift which caused his lift to sway intensely. Appellant stopped work on April 2, 2006 and returned to work on April 23, 2006.

Sarvjit Singh, appellant's supervisor, controverted appellant's claim, stating that it was not filed within 30 days of the date of the alleged injury. Mr. Singh indicated that he received notice of the injury on April 28, 2006.

By letters dated May 18, 2006, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the factual and medical evidence that he needed to submit to support his claim of injury.

On May 22, 2006 the Office received a March 31, 2006 report of Dr. Brian Barnett, a chiropractor, who stated that appellant sustained a lumbar nerve root compression and that he may not return to work. In an April 21, 2006 report, Dr. Barnett stated that appellant was seen on March 31, 2006 for injuries he sustained in a work-related accident. He further stated that the date of injury was sometime in mid December 2005. Dr. Barnett indicated that x-rays were taken of the full spine which revealed no new fracture and prior compression at L4. He related that appellant was treated for lumbar and cervical radiculitis. Dr. Barnett noted that his conditions had improved but that he suffered from residual low back pain and stiffness. He opined that appellant could return to full-duty work.

In a letter dated May 17, 2006 and received by the Office on May 22, 2006, Robert G. Sutkoff, an employing establishment injury compensation specialist, controverted appellant's claim. Mr. Sutkoff stated that appellant did not file his claim until almost five months after the alleged December 8, 2005 injury. He further stated that, although appellant sought medical treatment from a chiropractor for lumbar and cervical radiculitis on March 31, 2006, he still did not report the alleged injury until April 28, 2006. Mr. Sutkoff contended that, based on the lapse of five months between the date of the alleged injury and the filing of a claim, it was possible that appellant suffered from a personal condition during this time. He concluded by noting that the chiropractic treatment provided, before the alleged injury was reported, did not coincide with the alleged injured body parts.

By letter dated June 5, 2006, the Office advised appellant that the medical evidence of record was insufficient to authorize chiropractic treatment. It addressed the additional medical evidence that he needed to submit within 30 days to obtain authorization for such treatment. Appellant did not respond within the allotted time period.

By decision dated June 20, 2006, the Office denied appellant's claim on the grounds that he did not establish that the claimed employment incident occurred at the time, place and in the manner alleged.

In a letter dated October 31, 2006, appellant requested reconsideration. He reiterated his prior description of how the alleged injury occurred. Appellant also stated that an incident report was filed by his supervisor and a safety captain. He indicated that he was later found without fault based on a review of the alleged incident.

In a November 16, 2006 decision, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a merit review of its prior decision.[1]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his 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.[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] Establishing that a federal employee has sustained a traumatic injury in the performance of duty involves two components. 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]

An employee who claims benefits under the Act 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.[8] 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.[9] An employee has not met

[1] Following the issuance of the Office's November 16, 2006 decision, the Office received additional medical evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

[2] 5 U.S.C. §§ 8101-8193.

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

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

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.[10] 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.[11] 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.[12]

ANALYSIS -- ISSUE 1

Appellant filed a timely claim alleging that he sustained an injury to his hips while in the performance of duty. On April 28, 2006 he filed a traumatic injury claim alleging that, while he was performing electrical work from a scissors lift on December 8, 2005, he hurt his hips when a forklift hit his lift causing it to sway intensely. The Board finds that appellant established that the employment incident occurred on December 8, 2005, as alleged. The Board finds that there are not such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that he experienced an employment incident on December 8, 2005. As noted, appellant alleged that he sustained an injury to his hips while in the performance of duty on December 8, 2005. Although he did not submit medical evidence contemporaneous to the date of his alleged injury, Dr. Barnett's April 21, 2006 report provided a history that appellant was evaluated on March 31, 2006 for injuries he sustained in a work-related accident. Dr. Barnett related that the date of injury was sometime in mid December 2005. He noted that x-rays of appellant's full spine revealed no new fracture and prior compression at L4. Dr. Barnett stated that appellant's previously diagnosed lumbar and cervical radiculitis conditions had been treated and improved but he suffered from residual low back pain and stiffness.

Mr. Singh and Mr. Sutkoff stated that appellant did not promptly report the December 8, 2005 incident, noting that he did not report the incident until April 28, 2006.[13] Mr. Sutkoff further stated that, although appellant sought chiropractic treatment for lumbar and cervical radiculitis on March 31, 2006, he did not report the alleged injury until April 28, 2006. He contended that the chiropractic treatment appellant received prior to reporting his injury was inconsistent with the alleged injured body parts.

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

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

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

[13] Regarding the contention that appellant did not promptly report the alleged injury, the Board notes that for purposes of timeliness, 5 U.S.C. § 8122 provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. The Board finds that, although appellant did not file his traumatic injury claim until April 28, 2006, more than four months after the alleged injury, it was timely filed within three years of December 8, 2005.

Based on appellant's statement and Dr. Barnett's April 21, 2006 report which provide a consistent statement of injury, the Board finds that the employment incident in the form of being hit by a forklift while working on a scissors lift on December 8, 2005 did in fact occur.

The Board, however, finds that appellant did not submit sufficient medical evidence to establish that he sustained an injury to his hips due to the accepted December 8, 2005 employment incident. As noted, Dr. Barnett's April 21, 2006 report provided a history of the December 8, 2005 employment incident. In this report, as well as, his previous report dated March 31, 2006, Dr. Barnett stated that appellant sustained a lumbar nerve root compression. In the April 21, 2006 report, he indicated that the diagnosis was based on an x-ray. Dr. Barnett also indicated that appellant's lumbar and cervical radiculitis conditions had been treated and improved. He stated that appellant suffered from residual low back pain and stiffness but released him to return to full-duty work. Section 8101(2) of the Act[14] defines the term "physician," to include chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[15] As Dr. Barnett did not diagnose subluxation as demonstrated by x-ray, the Board finds that he is not a physician under the Act.[16] Therefore, his March 31 and April 21, 2006 reports are insufficient to establish appellant's claim.

Appellant has not submitted rationalized medical evidence establishing that he sustained an injury to his hips in the performance of duty on December 8, 2005. He has failed to meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[17] the Office's regulation provide that 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.[18] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review

[14] 5 U.S.C. § 8101(2).

[15] *See* 20 C.F.R. § 10.400(e) (defining reimbursable chiropractic services). *See Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

[16] 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[17] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(1)-(2).

within one year of the date of that decision.[19] 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 of the merits.

ANALYSIS -- ISSUE 2

As previously stated, the Board has found the evidence of record sufficient to establish that the December 8, 2005 incident occurred as alleged, but insufficient to establish that appellant sustained an injury to his hips causally related to this accepted work incident. The relevant underlying issue is whether appellant sustained an injury to his hips causally related to the December 8, 2005 employment incident.

Appellant did not submit any relevant or pertinent new evidence not previously considered by the Office in support of his request for reconsideration. Further, he did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Appellant's request merely contended that the December 8, 2005 employment incident occurred as alleged. He did not submit any evidence or argument to the Office to support his request. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he was not entitled to a merit review.[20]

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a hip injury in the performance of duty on December 8, 2005, as alleged. The Board further finds that the Office properly denied his request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

[19] *Id*. at § 10.607(a).

[20] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the November 16 and June 20, 2006 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Issued: June 8, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board