United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 07-1266**
	)	**Issued: October 3, 2007**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 15, 2007 appellant filed a timely appeal from a July 24, 2006 Office of Workers' Compensation Programs' hearing representative's decision affirming the denial of his traumatic injury claim. The Board also has jurisdiction over a February 5, 2007 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained a right knee injury in the performance of duty on December 5, 2005; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 10, 2005 appellant, then a 53-year-old aircraft maintenance worker, filed a traumatic injury claim alleging that on December 5, 2005 he injured his right knee when he stepped on an unstable floorboard in a C-130 plane. He returned to work on December 7, 2005.

The Office received factual and medical information including treatment and work status reports dated December 5 and 14, 2005;[1] a statement with witness names; a December 5, 2005 injury/accident report and the December 15, 2005 health record by Dr. Anna M. Abrigo, an employing establishment physician. He also submitted statements by Greg L. Cashel, a coworker, Michael Frank, a supervisor, James M. Wilkins, a coworker and Alonso Chavota, a coworker.

In a December 5, 2005 treatment and work status report, Dr. David Rosenberg, a Board-certified radiologist, diagnosed right lateral meniscus injury and knee pain and indicated that appellant could return to work on December 7, 2005 with restrictions. On December 14, 2005 he indicated that appellant could work with restrictions and prescribed conservative treatment. A December 20, 2005 magnetic resonance imaging scan was interpreted by Dr. Rosenberg as showing a torn lateral meniscus with degenerative disease.

In a December 5, 2005 report, Dr. Abrigo noted that appellant injured his right knee when the temporary floorboard he stepped on gave way. She diagnosed right knee sprain and contusion with intact skin surface. On December 14, 2005 Dr. Abrigo diagnosed right knee pain, right knee joint effusion, knee/tibia/fibula/patella hydrarthrosis. Appellant related being seen by a Dr. Malone who provided restrictions.

In a December 5, 2005 statement, Mr. Frank stated that he had investigated appellant's allegation that three coworkers saw him fall and twist his knee when the wooden floorboard corner collapsed. He stated that none of the three employees he talked with had seen appellant fall and, thus, he did not believe appellant's injury occurred at work. Mr. Cashel noted that he was working with appellant and two other employees on that date prepping the installation for floorboard. He related that about 9:30 a.m. appellant informed him that his knee hurt and he was going to his car to get his medicine. Around 10.15 a.m., Mr. Frank informed Mr. Cashel that appellant had been injured. In response to Mr. Frank's inquiry Mr. Cashel stated that "no one got hurt that [he] was aware of." Mr. Cashel also stated that he had not seen the alleged incident and appellant did not inform him that he had been injured. The only thing he remembered was appellant telling him earlier that his knee hurt from a prior injury. Mr. Wilkins stated that he did not witness appellant falling on the floorboard. He first learned of appellant's fall from his supervisor.

Mr. Chavota noted that the prior Thursday he had been working with appellant moving lockers when appellant related that he injured his knee while playing racquetball. Appellant related that his knee was still hurting.

In a December 23, 2005 investigative report, William M. Lavender noted that Mr. Frank, the supervisor, had investigated appellant's claim of an injury at work on December 5, 2005. Mr. Frank interviewed the three employees who had been working with appellant. Each employee stated that they had neither seen nor heard anything "and all agreed that, if this happened, they would have both heard and seen this incident." The employees also related that appellant had injured his knee playing racquetball two weeks previously.

[1] The physician's signature is illegible.

In a letter dated January 18, 2006, the Office advised appellant that the employing establishment controverted his claim and that the witness statements failed to support his claim that he fell on December 5, 2005. Rather, the evidence indicated that appellant had sustained a knee injury prior to the alleged December 5, 2005 fall. The Office requested that he provide additional factional evidence as well as a detailed narrative medical report. Appellant submitted additional treatment records pertaining to his right knee condition. On January 5 and 26, 2006 a Dr. Melanie Shorter diagnosed right knee medial and lateral meniscus tears with degenerative arthritis.

In a February 12, 2006 statement, appellant noted that on December 5, 2005 he had been assigned to remove the temporary wooden floorboards. While stepping on a board, it flipped up causing him to fall and twist his right knee. Initially, appellant felt no pain but after 30 minutes had passed his knee began to hurt. He noted that he had sustained a minor right knee injury while playing racquetball on November 15, 2005. Appellant listed his coworkers as witnesses as they were working with him at the time but had "mistakenly labeled [his] coworkers as witnesses when [he] should have labeled them as potential witnesses." He alleged that the injury on December 5, 2005 aggravated a preexisting injury and thus was a legitimate claim.

By decision dated April 5, 2006, the Office denied appellant's claim. The Office found that the evidence was insufficient to establish that a diagnosed condition was causally related to the December 5, 2005 employment incident identified by appellant.

On April 11, 2006 appellant requested a review of the written record by an Office hearing representative.

Appellant submitted an undated report by Dr. Todd E. Kinnebrew, a treating physician, diagnosing mild arthritis, lateral and medial meniscus tears. He related that appellant twisted his right knee while on an aircraft. Dr. Kinnebrew noted that appellant had previously sustained a knee injury while playing racquetball. He opined that the racquetball injury had healed by the time appellant sustained the employment injury and that "this is a separate injury or at least an aggravation of previous injury."

By decision dated July 24, 2006, an Office hearing representative found that the December 5, 2005 incident did not occur as alleged. The hearing representative found that the witness statements from appellant's coworkers and the investigative memorandum cast doubt as to whether the incident occurred at the time, place and in the manner alleged.

In a letter dated November 10, 2006, appellant requested reconsideration, contending that due to high noise levels the witnesses would not have heard when appellant was hurt. He reiterated that he had incorrectly identified his coworkers as witnesses as they had not seen the incident.

On February 5, 2007 the Office denied appellant's request for reconsideration as he failed to submit new evidence or relevant new argument.

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 and every 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 must first be determined whether a fact of injury has been established. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[5]

ANALYSIS -- ISSUE 1

Appellant alleged that he injured his right knee in the performance of duty on December 5, 2005. The Office denied his claim after finding that he did not demonstrate that the incident occurred at the time, place and in the manner described.

The initial question presented is whether appellant has established that the December 5, 2005 employment incident occurred as alleged. 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, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[6] An employee has not met his burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of his claim.

Appellant alleged that he stepped on an unstable floorboard in a plane which flipped, causing him to twist his right knee.

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[2] 5 U.S.C. §§ 8101-8193.

[3] *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

[4] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006); *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[5] *Sedi L. Graham*, 57 ECAB ___ (Docket No. 06-135, issued March 15, 2006); *M.W.*, 57 ECAB ___ (Docket No. 06-749, issued August 15, 2006).

[6] *See Betty J. Smith*, 54 ECAB 174 (2002).

The factual evidence of record does not corroborate appellant's account of events. Mr. Frank, appellant's supervisor, investigated the injury and spoke to the three coworkers who were with appellant that day. They all expressed doubt as to the occurrence of the incident. Mr. Cashel, Mr. Chavota and Mr. Wilkins each denied witnessing or hearing appellant fall while they were working. Mr. Chavota stated that appellant told him his knee was hurting while they were working together. Mr. Wilkins and Mr. Cashel both related that appellant had mentioned that he had previously injured his right knee by playing racquetball. Mr. Cashel also stated that appellant informed him at 9:30 a.m. that his knee hurt and he was going to his car to get his medicine. Around 10:00 a.m. Mr. Frank informed Mr. Cashel that appellant had been injured. Mr. Cashel told Mr. Frank that he was unaware of anyone being injured. In a December 23, 2005 investigative memorandum, Mr. Lavender noted that Mr. Frank had investigated appellant's injury claim by talking to appellant and the three coworkers who had been working with him. Mr. Lavender noted that none of the coworkers heard or saw anything and all of them agreed that they would have seen and heard the incident if it had occurred.

The Board finds that the record contains divergent accounts of how and when appellant injured his right knee, none of which sufficiently corroborate his version of falling over an unstable floorboard on December 5, 2005. Due to the conflicting evidence regarding the time, place and the manner in which the alleged incident occurred, appellant has not established his claim.[7]

The Board finds that appellant failed to establish that the December 5, 2005 employment incident occurred as alleged and, therefore, has not established an injury in the performance of duty. As appellant has not established the factual aspect of his claim, it is not necessary for the Board to consider the medical evidence of record.[8]

LEGAL PRECEDENT -- ISSUE 2

The Act[9] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[10] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[11]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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 previously

[7] *See Caroline Thomas*, 51 ECAB 451, 455 (2000).

[8] *Alvin V. Gadd*, 57 ECAB ___ (Docket No. 05-1596, issued October 25, 2005).

[9] 5 U.S.C. § 8101 *et seq.*

[10] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ___ (Docket No. 06-121, issued June 6, 2006).

[11] 20 C.F.R. § 10.605.

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[12]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[13] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[14]

ANALYSIS -- ISSUE 2

The Office denied appellant's traumatic injury claim on the grounds that there was conflicting evidence regarding the time, place and the manner in which the alleged incident occurred, appellant had not established his claim. The Board finds that appellant's request for reconsideration met none of the regulatory requirements for a review of the merits of this decision.

Appellant's November 10, 2006 request for reconsideration did not allege that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office. He is thus, not entitled to further review on the merits of his case under the first two sections of 10.606(b)(2).[15] Appellant also did not submit any evidence with his request. As there was no relevant and pertinent new evidence for the Office to consider, appellant was not entitled to review under the third section of 10.606(b)(2).[16]

Because appellant did not meet any of the statutory requirements for a review of the merits of his claim, the Office properly denied his November 10, 2006 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained a right knee injury in the performance of duty due to inconsistencies in the evidence regarding the occurrence of the alleged incident. The Board also finds that the Office properly denied appellant's reconsideration request without conducting a merit review.

[12] 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

[13] 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB ___ (Docket No. 06-452, issued May 3, 2006).

[14] 20 C.F.R. §10.608(b). *See Candace A. Karkoff*, 56 ECAB ___ (Docket No. 05-677, issued July 13, 2005).

[15] 20 C.F.R. §10.606(b)(2)(i) and (ii).

[16] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 5, 2007 and July 24, 2006 are affirmed.

Issued: October 3, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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