United States Department of Labor
Employees' Compensation Appeals Board

N.M., Appellant	)	
and	)	**Docket No. 08-105**
	)	**Issued: August 4, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Corpus Christie, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 12, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 23, 2007, which found that he did not sustain an injury in the performance of duty. He also timely appealed a July 12, 2007 nonmerit decision, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty on January 4, 2007; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 2, 2007 appellant, then a 66-year-old clerk, filed a traumatic injury claim alleging that on January 4, 2007 he was removing parcels from a dumper with a metal extension

arm and experienced a "jolt" in his right arm in the performance of duty. The employing establishment controverted the claim and alleged that he was not at work on the date of the incident as he had called in sick. It noted that appellant stopped work on December 31, 2006 and returned to work on January 10, 2007. The employing establishment stated that it first had notice of the claimed injury on February 2, 2007.

By letter dated February 7, 2007, the Office advised appellant that additional factual and medical evidence was needed. In particular, it advised him that the employing establishment indicated that he was on sick leave on the date of the injury and requested his comments. The Office allotted appellant 30 days to submit the requested information.

The Office received duty status reports dated February 2 and 19, 2007 from Dr. Guy Racette, Board-certified in family medicine, who noted an injury date of January 4, 2007 and related that appellant had complaints about his arm, which was injured on January 4, 2007. Dr. Guy diagnosed a right shoulder strain, shoulder pain and recommended that appellant return to work with restrictions. The Office also received a February 8, 2007 right shoulder x-ray, read by Dr. Kenneth D. Matejka, a Board-certified diagnostic radiologist, which revealed degenerative changes and no evidence of fracture. A February 12, 2007 magnetic resonance imaging (MRI) scan read by Dr. Ning Huang, a Board-certified diagnostic radiologist, revealed mild impingement of the right acromioclavicular joint spur, a large ganglion cyst adjacent to the coracoid process and anterior to subscapularis tendon/muscle, separate from the subcoracoid recess and a degenerative labrum.

In a February 8, 2007 statement, Robert McGuire, a supervisor, controverted appellant's claim for a January 4, 2007 injury. He noted that appellant did not immediately report the accident when it occurred. Mr. McGuire stated that, when appellant called in, he initially claimed that it was due to an emergency and not an on-the-job injury. He alleged that appellant was "falsifying the accident to cover missed days from work." Mr. McGuire advised that appellant had a history of attendance issues and did not report the accident until he received a return to work letter for his continued and extended absences. He further noted that there were no witnesses. Additionally, Mr. McGuire stated that the only possible injury date could be January 11, 2007 as a manager, Julie Cervantes, recalled speaking with appellant about job placement. He noted that, between January 11, 2007 and the date that the accident was reported, appellant called in to the automated employee resource management system 14 times and requested emergency annual leave for a personal emergency. Mr. McGuire indicated the first question asked, "Is this due to an on[-]the[-]job injury?" He indicated that appellant would have to answer "no" to this question each of the 14 times he called for the system to give him the choice of emergency annual leave. Additionally, Mr. McGuire noted that if appellant answered "yes" he would have been instructed to contact his supervisor. He noted that appellant was questioned as to why he did not report his absences as being due to a job injury and he responded, "he should have and he made a mistake." Mr. McGuire indicated that appellant was questioned as to why he did not seek medical treatment until February 2, 2007 and appellant responded that "he thought he could resolve the issue with heat packs and rest." He stated that appellant was released to restricted duty on February 2, 2007, he called in sick on February 3, 2007 and reported to limited duty on February 4, 2007, but did work thereafter.

In a March 4, 2007 statement, appellant indicated that the date of injury was actually January 11, 2007. He stated that he was out of work the first week of January 2007 due to a "personal emergency" and was not out sick. Appellant noted that the injury occurred in the priority section of the employing establishment. He explained that parcels were dumped on a conveyor belt and placed in a dumper. Appellant alleged that sometimes parcels were positioned such that they would not fall properly and an 8 to 10 foot poker was utilized to position the parcel to fall freely. He alleged that he was using the metal poker to reach into the container when he felt a jolt in his right arm and shoulder. Appellant also alleged that he did not have pain until the evening of January 11, 2007. He explained that he did not immediately advise anyone because he did not initially feel any pain. Regarding his delay in getting medical treatment, appellant explained that he had a military physician but that, after reaching age 65, he could only use the military physician on a space available basis until he enrolled in Medicare. He noted that he was in "limbo" because his insurance would not accept him since he had an on-the-job injury.

The Office received additional treatment notes. It included reports dated March 5, 2007 from Dr. Bill Cullen, Board-certified in family medicine, who advised that the date of injury was January 4, 2007 and diagnosed right shoulder strain and pain. The Office also included a March 5, 2007 report from Dr. Racette, who advised that appellant could return to work on March 5, 2007 with restrictions.

By decision dated March 23, 2007, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. It found that the evidence did not demonstrate that a specific event, incident or exposure occurred at the time, place and in the manner alleged.

In March 19, 2007 report, Dr. Racette advised that the date of injury was January 4, 2007 and released appellant to work on March 19, 2007 with restrictions. A March 27, 2007 report from a physician's assistant noted a January 4, 2007 injury and a May 3, 2007 letter from appellant to the employing establishment which requested permission to photograph the area where he was injured. The Office also received copies of previously submitted reports.

In reports dated May 21 and June 21, 2007, Dr. Richard Carlson, a Board-certified anesthesiologist, noted seeing appellant for injuries sustained at work on January 11, 2007. He advised that appellant had pain complaints in the right shoulder and arm. Dr. Carlson indicated that appellant was injured while handling parcels in the employing establishment. He related that appellant was removing parcels from a container inside an electric conveyor belt, when he began having pain in the right shoulder and arm. Dr. Carlson indicated that appellant related that "A very large and heavy parcel was positioned in such a way that it would not clear the safety bar and was blocking the other parcels from falling freely so I had to use the metal poker to reach into the container and manipulate parcels so that they would fall. As I extended the poker into the container I felt a jolt in my right arm and shoulder." Dr. Carlson examined the right shoulder, noting decreased grip strength and abduction to 90 degrees. He reviewed the diagnostic reports and diagnosed right shoulder and arm pain. Dr. Carlson opined that appellant should undergo acromioplasty and Mumford procedure of the right shoulder.

By letter dated June 19, 2007, appellant requested reconsideration. He alleged that he requested permission to obtain photographs of the area where he working, but had not received a

response. Appellant also alleged that he had explained to the best of his ability how his injury had occurred.

By decision dated July 12, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence. It determined that, because his letter neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant review of its 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 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[2] and that an injury was sustained in the performance of duty.[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] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[6] 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.[7]

An alleged work incident 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.[8] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyett*, 41 ECAB 992 (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 (1989).

[7] *Id*. For a definition of the term "injury," *see* 20 C.F.R. § 10.5(ee).

[8] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

incident.[9] 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.[10] Although 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,[11] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established fact of injury due to inconsistencies in the evidence that cast serious doubt as to whether the specific traumatic incident occurred at the time, place and in the manner alleged.

Appellant alleged on his February 2, 2007 claim form that, on January 4, 2007, he sustained an injury to his right arm in the performance of duty. However, the employing establishment controverted the claim due to factual inconsistencies. Appellant was not at work from December 21, 2006 until January 10, 2007. Additionally, Mr. McGuire contended that appellant was "falsifying the accident to cover missed days from work." Appellant had a history of attendance issues and did not report the accident until he received a return to work letter for his continued and extended absences. Mr. McGuire explained that, between January 11, 2007 and the date that the accident was reported, February 2, 2007, appellant called into the automated system 14 times and requested emergency annual leave for a personal emergency and would have been prompted on the automated system to answer the question. "Is this due to an on[-]the[-]job injury?" Mr. McGuire noted that appellant would have had to answer "no" to this question each of the 14 times that he called in order for the system to give him the choice of emergency annual leave. Appellant had many opportunities to have notified his supervisor of the injury. He contended in response that "he should have [reported it] and he made a mistake." Appellant also indicated that the date of injury was actually January 11, 2007. He stated that he was unsure of the exact date of injury but his February 2, 2007 claim form clearly indicated January 4, 2007 as the date of injury. Appellant only changed the date of the claimed injury after Mr. McGuire controverted the claim.

Medical reports from Dr. Racette dated February 2 and 19, 2007 and the reports dated March 5, 2007 from Dr. Cullen, do not clarify these inconsistencies as they list the date of injury as January 4, 2007. After the Office asked that appellant provide additional factual evidence, he did not fully explain these inconsistencies. Although appellant explained that he did not have access to prompt medical care, he did acknowledge having considerable pain on January 11, 2007, after the claimed employment incident, yet he did not provide a reasonable explanation as

[9] *Id*. at 255, 256.

[10] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[11] *Id.*

[12] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

to why he did not give any notice of a possible employment injury from January 11 until February 2, 2007, even though he was asked each day, when he called to request leave, whether he had sustained an employment injury.

For these reasons, the Board finds that there are such inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim. Given the inconsistencies in the evidence regarding the date of injury and the delay in reporting the incident, finds that there is insufficient evidence to establish that he sustained a traumatic incident in the performance of duty as alleged.[13] As he has not established an employment incident alleged to have caused an injury, it is not necessary to consider whether the medical evidence establishes that an employment incident caused an injury.[14]

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[15] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that: "(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by [the Office]."[16]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[17]

ANALYSIS -- ISSUE 2

In his June 19, 2007 request for reconsideration, appellant stated that he had requested permission from the employing establishment to photograph the area where he alleged that he was injured. He also submitted a copy of the May 3, 2007 letter requesting permission. The Board notes that this would not be relevant in this case as the request for permission to photograph the site of the alleged employment incident does not address the factual inconsistencies that were the basis of the denial of the claim; the failure of appellant to explain the inconsistencies regarding why he changed the date of the claimed injury and why he did not sooner provide notice of the claimed injury to the employing establishment.

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[13] *See Mary Joan Coppolino*, 43 ECAB 988 (1992); *also see Matthew B. Copeland*, 6 ECAB 398, 399 (1953) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

[14] *See Bonnie A. Contreras*, 57 ECAB 364 (2006).

[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b).

[17] *Id*. at § 10.608(b).

The Office received copies of previously submitted reports. The submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[18]

Appellant submitted new medical evidence from Dr. Carlson dated May 21 and June 21, 2007 in which he related that appellant reported having an injury at work on January 11, 2007. Dr. Carlson also noted that appellant reported removing parcels from a container when he began having pain in the right shoulder and arm. He noted a diagnosis and recommended treatment. However, Dr. Carlson appears to relate the history as provided by appellant, which has already been noted in the record. He did not offer any new opinion to explain the inconsistencies in the record related to fact of injury. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[19] Likewise, in a March 19, 2007 report, Dr. Racette recommended a return to work with restrictions. However, he did not address the factual inconsistencies related to the fact of injury in this case and this report does not constitute a basis for reopening the case. Likewise, the March 27, 2007 report from a physician's assistant is not relevant as a physician's assistant does not meet the definition of a physician under the statute.[20]

Appellant, therefore, 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. Further, he failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, he was not entitled to a merit review.[21]

As appellant is not entitled to a review of the merits of his claim pursuant to section 10.606(b)(2), the Board finds that the Office properly refused to reopen his case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty. It further finds that the Office properly refused to reopen his claim for merit review under 5 U.S.C. § 8128(a).

[18] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[19] *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[20] 5 U.S.C. 8101(2). *See e.g., Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

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

ORDER

IT IS HEREBY ORDERED THAT the July 12 and March 23, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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