

tightening pallet nets. In a June 28, 2006 statement, received by the Office on July 20, 2007, appellant asserted:

“On June 27, [2006] I was building pallets ... and pulling the nets tight ... [when] my left shoulder started to hurt and today, June 28, [2006] I was building again, the left arm and shoulder started to burn and I look[ed] at it. It was black and blue, so I showed it to [my coworker] and my work leader.”

Appellant submitted several treatment notes which indicated that he underwent a magnetic resonance imaging [MRI] scan and was examined on July 11, 2007. A July 11, 2006 report from the employing establishment clinic indicated that he was treated for severe muscle pain in the left shoulder and left upper arm due to an injury he sustained on June 27, 2006. The report stated:

“Visit for care of left upper arm and shoulder pain after sustaining an injury [on] June 27, 2006 while working ... in EDC building cargo pallets. Was throwing cargo nets and felt pain when [he] lifted left arm over head. [H]as pain and burning and contusion present at division of deltoid and bicep muscles.”

Appellant was referred for an MRI scan and given restrictions of limited use of the left arm, no lifting over 20 pounds, no pulling, pushing and reaching overhead.

A July 11, 2006 x-ray report noted no fracture or significant bony or joint abnormalities in the left shoulder with no radiolucency at the base of the greater tuberosity of the humeral head and no calcium deposits.

In a July 12, 2006 report, Dr. Paul S. Potok, an osteopath, commented on the results of the MRI scan appellant underwent on that date. He stated:

“There is mild degenerative cystic change in the humeral head. There is a massive rotator cuff tear with complete rupture of both supra and infraspinatus tendons. Free cuff edge is retracted by about 3.5 centimeters. There is tendinopathy, perhaps with partial tearing of the subscapular tendon as well. The tendon for the long head of the biceps is intact. There is no gross labial abnormality.”

The employing establishment submitted a July 17, 2006 notice of proposed suspension on the grounds of failure to follow instructions, negligence and rude and discourteous conduct. The memorandum stated:

“Failure to follow instructions:

“On July 11, 2006 at approximately 7:30 a.m., you went to the [employing establishment] clinic. You returned to the work area with medical documentation from the clinic which clearly stated that you were in a light[-]duty status. Specifically, this documentation stated that you were not to lift anything weighing more than 10 pounds and that you were not to do any pulling, reaching, pushing, or overhead work until further notice. I gave you clear instructions to assist the ...

clerk, in order to make sure that you comply with your medical restrictions. I also instructed everyone during the setup meeting that if you ran out of work then you should contact a work leader for additional assignments. However, you failed to follow my instructions and when you completed your current assignments with the ... clerk you sought out additional work by yourself. Without seeking any approval you tried to assist an Outloading employee load a truck. While loading this truck you exceeded the physical restrictions that the clinic advised you to follow. You used tie down strips which are heavy duty and hard to work with and are certainly beyond what the clinic recommended for you to do.

“Negligence:

“You damaged a specially built box for HUMV truck cap in the above[-]described incident on July 11, 2006. While trying to force this item into the truck, it got caught on something, you then pulled the item back and then pushed it into the truck again. In doing this you damaged the box holding the truck cap and it had to be sent back to the wood working area to be reconstructed.”¹

In a report dated July 18, 2006, Dr. Donald E. Potter, a general practitioner and specialist in occupational medicine, stated that x-rays of appellant’s left shoulder indicated no significant bony deformity and that an MRI scan reflected a massive rotator cuff tear with retraction.

In a report dated August 4, 2006, Dr. Ernest R. Rubbo, Board-certified in orthopedic surgery, stated that he had treated appellant for chronic rotator cuff tendinitis. He related appellant’s history of injury that he experienced burning, increased pain and discomfort in his left shoulder while lifting a heavy air pallet net. Dr. Rubbo noted that an MRI scan indicated a large rotator cuff tear of the left shoulder. On examination, appellant had full range of motion of the left arm with crepitation; he showed weakness of abduction against resistance as well as external rotation against resistance. Dr. Rubbo placed him on a job involving no use of his left upper extremity if possible.

By letter dated August 14, 2006, the Office requested additional information. It requested evidence indicating that appellant sustained his alleged injury on the date in question, along with a physician’s opinion as to how his injury resulted in the diagnosed condition.

By decision dated September 14, 2006, the Office denied appellant’s claim finding that he failed to establish fact of injury. It stated that the factual and medical evidence he submitted did not establish that he sustained a left shoulder injury on June 27, 2006, as he alleged. The Office noted that, after appellant instigated the July 11, 2006 incident, in which he apparently exceeded Dr. Potter’s physical restrictions for light duty -- after appellant’s supervisor warned him not to -- he left the work area and completed a Form CA-1 claiming he sustained a left shoulder injury on June 27, 2006. The Office therefore denied compensation.

¹ As indicated above, the employing establishment also cited appellant for rude and discourteous conduct.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing that 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, 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 or she actually experienced the employment incident at the time, place and in the manner alleged.⁵ 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.⁶

In order to determine whether an employee actually sustained an injury in the performance of her duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered, in conjunction with one another.⁷

The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred. 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. 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 incident. 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 she has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantive evidence.⁸ An employee has not met this

² 5 U.S.C. § 8101 *et seq.*

³ *Joe D. Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(e)(e).

⁷ *Caroline Thomas*, 51 ECAB 451 (2000).

⁸ *Carlone*, *supra* note 5.

burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁹ 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.¹⁰

ANALYSIS

In the present case, the Office found that the record contained conflicting and inconsistent evidence regarding whether the claimed event occurred at the time, place and in the manner alleged. The Office noted that, although appellant stated on his Form CA-1 that he injured himself on June 27, 2006 while lifting pallets, he did not file this claim until after he ignored his supervisor's orders and exceeded Dr. Potter's work restrictions on July 11, 2006. It concluded that he did not establish that he sustained the injury in the performance of duty on June 27, 2006. The Board, however, finds that appellant presented sufficient evidence to establish that the incident to his left shoulder occurred at the time, place and in the manner alleged.¹¹ He submitted a July 11, 2006 Form CA-1 on which he stated that he injured his left shoulder on June 27, 2006 while loading pallets and pulling the nets tight. Although no one witnessed the accident, appellant sought medical attention two weeks after the incident from the employing establishment clinic on July 11, 2006. The clinic report indicated that he sustained an injury on June 27, 2006 while working at the employing establishment building cargo pallets. It stated that appellant felt pain when he lifted his left arm while throwing cargo nets. Dr. Rubbo stated in his August 4, 2006 report that appellant experienced burning, increased pain and discomfort in his left shoulder while lifting a heavy air pallet at work.

The Board finds that the totality of this evidence which includes two reports indicating that appellant was examined and treated for a June 27, 2006 left shoulder injury approximately one month after the alleged employment incident, beginning with the employing establishment's July 11, 2006 report, is sufficient to establish that he sustained the incident as alleged in the performance of duty on June 27, 2006. The Office noted that appellant did not file a Form CA-1 indicating that he sustained a left shoulder injury on June 27, 2006 until after the July 11, 2006 episode in which he allegedly exceeded his work restrictions and behaved in an insubordinate manner. However, the record contains no contemporaneous factual evidence indicating that the claimed June 27, 2006 work incident did not occur, as alleged.¹² Under the circumstances of this case, therefore, the Board finds that appellant's allegations have not been refuted by sufficiently strong or persuasive evidence. The Board finds that the evidence of record is sufficient to establish that the incident in which appellant injured his left shoulder on June 27, 2006 occurred at the time, place and in the manner alleged.

The Board finds, however, that appellant failed to submit rationalized medical opinion evidence to sufficiently describe or explain the medical process by which the June 27, 2006 work

⁹ *Louise F. Garrett*, 47 ECAB 639, 643-644 (1996).

¹⁰ *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

¹¹ *Id.*

¹² *See Thelma Rogers*, 42 ECAB 866 (1991).

incident would have been competent to cause the claimed injury. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹³

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.¹⁴ Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence. He submitted reports from Dr. Potok, Dr. Potter and Dr. Rubbo. Dr. Potok noted MRI scan results which indicated a mild degenerative cystic change in the humeral head and a massive rotator cuff tear, with complete rupture of both supra and infraspinatus tendons. He also stated that appellant had tendinopathy, with partial tearing of the subscapular tendon. In his July 18, 2006 report, Dr. Potter stated that x-rays of appellant's left shoulder indicated no significant bony deformity and that an MRI scan reflected a massive rotator cuff tear with retraction. Dr. Rubbo opined on August 4, 2006 that appellant had chronic rotator cuff tendinitis and noted appellant's assertion that he experienced burning, increased pain and discomfort in his left shoulder while lifting a heavy air pallet net. He stated that on examination appellant had full range of motion of the left arm, with crepitation and that he showed weakness of abduction against resistance as well as external rotation against resistance. Dr. Rubbo also noted that an MRI scan indicated a large rotator cuff tear of the left shoulder and placed appellant on a job which did require using his left upper extremity.

The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.¹⁵ Although the physicians of record did present diagnoses of appellant's condition, torn rotator cuff and chronic tendinitis of the left shoulder, they did not indicate whether these conditions were causally related to the June 27, 2006 employment injury. There is no indication in the record, therefore, that the diagnosed conditions were work related. Appellant failed to provide a rationalized, probative medical opinion relating his current condition to any factors of his employment. Therefore, he failed to provide a medical report from a physician that the work incident of June 27, 2006 caused or contributed to the claimed left shoulder injury.

The Office advised appellant of the evidence required to establish his claim; however, appellant failed to submit such evidence. Appellant, therefore, did not provide a medical opinion to sufficiently describe or explain the medical process through which the June 27, 2006 work accident would have caused the claimed injury. Accordingly, as appellant has failed to submit any probative medical evidence establishing that he sustained a left shoulder injury in the performance of duty, the Office properly denied appellant's claim for compensation.

¹³ See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

¹⁴ *Id.*

¹⁵ See *Anna C. Leanza*, 48 ECAB 115 (1996).

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained a left shoulder injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2006 decision of the Office of Workers' Compensation Programs be affirmed, as modified.

Issued: February 4, 2008
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