

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

R.H., Appellant)
and) Docket No. 07-2353
DEPARTMENT OF TRANSPORTATION,) Issued: February 27, 2008
FEDERAL AVIATION ADMINISTRATION,)
Mather, CA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated December 7, 2006 and June 27, 2007, finding that he did not sustain an injury in the performance of duty on October 13, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction of the merits of this appeal.

ISSUE

The issue is whether appellant has established that he sustained an injury on October 13, 2006, as alleged.

FACTUAL HISTORY

On October 13, 2006 appellant, then a 45-year-old air traffic controller, filed a traumatic injury claim alleging that on that date he experienced watery eyes and burning nostrils due to a strong chemical odor. He stopped work on October 13, 2006.¹ Irene Ramariez, appellant's

¹ The record reveals that appellant returned to full-duty work on October 18, 2006.

coworker, stated that she noticed him blowing his nose and his watery eyes. The employing establishment controverted the claim, stating that no medical evidence had been submitted.

On October 24, 2006 appellant submitted an October 13, 2006 medical report of Dr. Byong J. Pak, an emergency medicine specialist, who indicated that appellant was evaluated in a hospital emergency room for a headache that developed around 12:30 p.m. on that date after possible exposure to chemical fumes at work. Dr. Pak reported his normal findings on physical examination. He stated that appellant sustained a headache caused by suspected chemical fume exposure. Dr. Pak advised him not to work for three days and prescribed medication. A partially illegible authorization for medical attention form dated October 13, 2006 and signed by William A. Rodda, an operations manager, described the injury sustained by appellant on October 13, 2006 as a reaction to an odor.

By letter dated November 2, 2006, the Office requested that the employing establishment provide comments regarding appellant's allegation and his exposure to harmful substances at work. It also requested a description of only air sample test results, the tasks appellant performed which resulted in the exposure, the precautions it took to minimize exposure and a copy of appellant's position description. On November 2, 2006 the Office also advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the additional factual and medical evidence he needed to submit.

In an undated statement, appellant further described the October 13, 2006 incident and his symptoms, stating that the odor dissipated after October 13, 2006. An odor was initially reported on the previous Tuesday by an unknown person. Appellant's burning nostrils and watery eyes caused a residual migraine headache, which grew worse until he located a physician who would handle a workers' compensation claim. He did not know how the employing establishment removed the odor from his work area. Appellant noted that an air quality monitoring device had been placed in the area by the time he returned to work. He did not know what substance he had been exposed to but believed he inhaled it directly. Appellant stated that he was performing his normal work duties, talking to an aircraft through a headset in front of a radar scope at the time of the exposure. He was not aware of any precautions to take or any known hazards. Appellant did not have any known allergies, asthma or bronchitis and only took Claritin occasionally.

By decision dated December 7, 2006, the Office denied appellant's claim, finding that the medical evidence of record failed to establish that he sustained a medical condition causally related to the October 13, 2006 employment incident.

In a November 28, 2006 letter, the employing establishment stated that the only odor present on October 13, 2006 was from a black marker used on a white board in appellant's work area by a supervisor. It stated that the marker was considered safe and nontoxic. The employing establishment further stated that an air sample test report indicated that no harmful or hazardous fumes or materials were found. Fans were brought into appellant's work area for air circulation and use of the marking pens was terminated. The employing establishment stated that its facility was equipped with forced mechanical ventilation systems that were the appropriate size and capacity for its facility. It noted that the main function of the building was to serve as an air

traffic control center. No day-to-day processes were carried out in the facility which required the use of or exposure to hazardous materials and/or fumes.

An undated form report of Dr. Pak reiterated his prior finding that appellant's headache was due to suspected chemical fume exposure.

By letter dated December 14, 2006, appellant requested an oral hearing before an Office hearing representative regarding the Office's December 7, 2006 decision.

At an April 23, 2007 hearing, appellant and Tim Samsel, a coworker, further described the October 13, 2006 employment incident. Appellant testified that his coworkers, including Ms. Ramariez, filed claims for injuries related to the incident. Upon smelling the odor, appellant and his coworkers requested relief from their supervisor. Appellant and Mr. Samsel testified that the odor grew worse as they neared a scope. Mr. Samsel testified that the odor smelled like burning plastic. He further testified that an investigation discovered a pair of sunglasses that were partially burnt. Mr. Samsel did not know if the sunglasses caused the odor. Appellant described the medical treatment he received.

In a May 3, 2007 memorandum, Mr. Rodda stated that he smelled an unusual odor on October 13, 2006. He further stated that the odor had no ill effect on him on that date or thereafter. Based on his knowledge, none of the personnel investigating the odor experienced any ill effects. Mr. Rodda stated that on October 18 and 19, 2006 an air sample test was performed which found that any detectable chemicals were many times less than that allowed by the Occupational Safety and Health Administration and were unlikely to reach human sensory threshold. The odor was most likely transitory in nature and would not be indicative of a normal building operation.

In an April 20, 2007 narrative statement, Jaime Taylor, an administrative officer at the employing establishment, recounted a discussion he had with a medical provider about who should be billed for appellant's medical treatment.

By decision dated June 26, 2006, an Office hearing representative affirmed the December 7, 2006 decision. The hearing representative found that appellant failed to submit sufficient rationalized medical evidence to establish that he sustained an injury causally related to the accepted October 13, 2006 employment incident.²

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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

² The Board notes that on appeal appellant has submitted new 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.

³ 5 U.S.C. §§ 8101-8193.

filed within applicable time limitation; that an injury was sustained while 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.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To determine whether an employee actually sustained an injury in the performance of duty, the Office must determine whether fact of injury has been established. An employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ The employee must also submit to establish that the employment incident caused a personal injury.⁷ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁸

In order to determine whether an employee actually sustained an injury in the performance of 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. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.⁹ 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 statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹⁰ An employee has not met his or her burden of proof in 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.¹¹ 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.¹² However, an employee's

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 4.

⁶ *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁷ *Donna A. Lietz*, 57 ECAB __ (Docket No. 05-1758, issued October 27, 2005); *Alvin V. Gadd*, 57 ECAB __ (Docket No. 05-1596, issued October 25, 2005); *David Apgar*, 57 ECAB __ (Docket No. 05-1249, issued October 13, 2005).

⁸ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

¹⁰ See *Betty J. Smith*, 54 ECAB 174 (2002).

¹¹ *Id.*

¹² *Linda S. Christian*, 46 ECAB 598 (1995).

statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹³

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.¹⁴ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.¹⁵ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.¹⁶

ANALYSIS

The record supports that on October 13, 2006 appellant was exposed to an odor. The Board finds, however, that the medical evidence of record is insufficient to establish that the accepted employment incident caused an injury.

The medical evidence of record consists solely of reports from Dr. Pak who opined that appellant's headache was caused by suspected chemical fume exposure. Dr. Pak, however, did not provide any medical rationale explaining how or why the accepted employment incident caused appellant's headache. The nature of the material or product causing the aroma was not identified nor did Dr. Pak address how such exposure resulted in the condition for which appellant was treated. As his opinion is not rationalized, his reports are insufficient to support appellant's claim. The medical evidence of record is not sufficient to establish a causal relationship between appellant's condition and the accepted October 13, 2006 employment incident.

CONCLUSION

As appellant did not provide the necessary medical evidence to establish that he sustained an injury caused by the October 13, 2006 employment incident, he has failed to meet his burden of proof.

¹³ *Gregory J. Reser*, 57 ECAB ____ (Docket No. 05-1674, issued December 15, 2005).

¹⁴ *John J. Carbone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

¹⁵ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

¹⁶ *Charles E. Evans*, 48 ECAB 692 (1997).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2007 and December 7, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 27, 2008
Washington, DC

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

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

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