United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 08-186**
	)	**Issued: May 7, 2008**
DEPARTMENT OF THE AIR FORCE, LACKLAND AIR FORCE BASE, Lackland, 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 23, 2007 appellant filed a timely appeal from an April 9, 2007 decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and an October 10, 2007 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's request for a hearing. On appeal, he contended that the Office wrongfully denied the claim as he received emergency treatment on the date of injury, received ongoing treatment from an attending physician, missed work intermittently and incurred significant medical expenses.

FACTUAL HISTORY

On February 22, 2007 appellant, then a 47-year-old aircraft overhaul supervisor, filed a traumatic injury claim (Form CA-1) asserting that, on December 1, 2005, he sustained back, neck, right knee, hand and shoulder injuries when removing an engine cowl door. He did not stop work at the time of the injury. Appellant's supervisor indicated that he was first informed of the claimed injury on February 21, 2007.

In a March 8, 2007 letter, the Office advised appellant of the additional medical and factual evidence needed to establish his claim. The Office explained the importance of submitting a medical report from his attending physician, containing a history of injury, detailed findings, x-ray and test results and diagnosis of injury. The report should also contain "a medical explanation as to how the reported work incident caused or aggravated the claimed injury." The Office afforded appellant 30 days in which to submit such evidence. There is no additional evidence of record prior to issuance of the April 9, 2007 decision.

By decision dated April 9, 2007, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that there was insufficient evidence to establish that the alleged workplace events occurred at the time, place and in the manner alleged. The Office further found that appellant submitted no medical evidence providing a diagnosis connected to the claimed events.

In an August 28, 2007 letter postmarked August 30, 2007, appellant requested an oral hearing.

By decision dated October 10, 2007, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. The Office found that appellant's request for a hearing was postmarked on August 30, 2007, more than 30 days after issuance of the Office's April 9, 2007 decision. The Office additionally denied appellant's request for a hearing on the grounds that the issues involved could be addressed equally well by requesting reconsideration and submitting new evidence establishing that he sustained the claimed injury in the performance of duty.[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 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 filed within the 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

[1] Appellant submitted new evidence accompanying his request for appeal. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

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 on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee sustained a traumatic 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 that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.[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]

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 he 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.[7]

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained neck, back and right upper extremity injuries in the performance of duty on December 1, 2005 when removing an engine cowl door. To meet the first element of his burden of proof, he must establish the claimed incident as factual.[8] Appellant must submit sufficient evidence to establish that he experienced the December 1, 2005 incident at the time, place and in the manner alleged.[9] However, he did not submit factual evidence corroborating his account of events. Appellant did not provide a supervisor's statement, employing establishment incident report, accident report, witness statements or other factual evidence supporting that he removed an engine cowl door on December 1, 2005 and sustained an injury. Also, the claim form indicates that he did not inform his supervisor of the December 1,

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

[4] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[7] *John J. Carlone*, 41 ECAB 354 (1989).

[8] *Gary J. Watling*, *supra* note 5.

[9] *Barbara R. Middleton*, 56 ECAB 634 (2005).

2005 incident until February 21, 2007. This delay casts additional uncertainty on appellant's claim.[10] He did not establish that the claimed December 1, 2005 incident occurred as alleged. Therefore, he has not established a *prima facie* claim for compensation.[11]

The Office advised appellant in a March 8, 2007 letter of the additional evidence needed to establish his claim. However, he did not submit such evidence. The Board finds that appellant has failed to meet his burden to demonstrate he sustained an employment-related injury on December 1, 2005. Therefore, the Office properly denied the claim.[12]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[13] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[14] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[15]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim by decision dated April 9, 2007. Appellant's letter requesting an oral hearing was postmarked on August 30, 2007, more than 30 days after the April 9, 2007 decision. Thus, the Office properly found that appellant's request for a review of the written record was not timely filed under section 8124(b)(1) of the Act and that she was not entitled to an examination of the written record as a matter of right.

The Office then exercised its discretion and determined that appellant's request for a review of the written record could equally well be addressed by requesting reconsideration and submitting additional evidence establishing that he sustained an injury as alleged. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken

[10] *Barbara L. Middleton*, *supra* note 9.

[11] *See Donald W. Wenzel*, 56 ECAB 390 (2005); *Richard A. Weiss*, 47 ECAB 182 (1995).

[12] On appeal, appellant asserts that he received emergency treatment on the date of injury as well as continuing treatment from an attending physician. However, he did not submit any emergency room records, treatment records, medical reports, chart notes, test results, x-ray reports, imaging scan reports or other medical documents.

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. §§ 10.616, 10.617.

[15] *Claudio Vasquez*, 52 ECAB 496 (2002).

which are contrary to both logic and probable deductions from known facts.[16] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for an oral hearing was proper under the law and facts of this case.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty as alleged. The Board further finds that the Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 10 and April 9, 2007 are affirmed.

Issued: May 7, 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

[16] *Daniel J. Perea*, 42 ECAB 214 (1990).