United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 08-899**
	)	**Issued: September 2, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Billings, MT, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 4, 2008 appellant filed a timely appeal from a January 10, 2008 nonmerit decision of the Office of Workers' Compensation Programs that denied her request for reconsideration and a March 13, 2007 decision denying his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a traumatic injury in the performance of duty on January 16, 2007; and (2) whether the Office properly denied her request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On January 17, 2007 appellant, then a 50-year-old transportation security screener, filed a traumatic injury claim alleging that she developed dizziness, nausea, bronchial pain and a burning sensation in her lungs in the performance of duty on January 16, 2007. She attributed

her symptoms to inhalation of fumes due to a possible fuel spill or exhaust buildup in her workplace. Appellant utilized sick leave on the day of her claimed injury and on February 2, 2007. The employing establishment controverted her claim, noting that no fumes were detected. It also noted that appellant claimed to have fume exposure again on January 22, 2007. James Vitale, appellant's supervisor, stated on January 31, 2007 that "after interviewing [appellant] it was difficult to determine what caused her symptoms. She stated that she may have the flu, or allergies, or that it was fumes from the building."

On February 5, 2007 the Office requested additional information concerning appellant's claim. It asked that she provide a detailed description of the claimed incident and statements from any witnesses who had immediate knowledge of the claimed injury.

The employing establishment provided e-mail correspondence concerning appellant's claim. In a January 23, 2007 e-mail, Mike Riddle, an airport police officer, explained that, on the previous evening, he was paged to respond to the area where appellant worked. He stated that appellant had complained of symptoms including a dry throat and headache. Appellant informed Mr. Riddle that she had numerous allergies which could be causing her symptoms. Mr. Riddle also noted that there were carbon monoxide detectors in multiple locations in the employing establishment's building and that the operations staff was unable to find any unexplained fumes. Appellant stated that she felt fine but that she left 10 minutes early. On February 3, 2007 John Kuper, a manager, reported that appellant had complained about the air quality at the exit station and that she left early and used sick leave on February 2, 2007. He did not believe appellant's illness was caused by any environmental problems at the employing establishment. In a February 5, 2007 e-mail, Randy Keck, a manager, stated that appellant informed him that she had sinus problems and allergies which bothered her at home and at work. He spoke to a person responsible for airport maintenance and was informed that the air at the airport was "way under required parts per million in all categories." In a letter received February 13, 2007, Bonnie Erickson, a program assistant, noted talking to appellant on January 23, 2007 about her claim. Appellant indicated that she may have a touch of the flu or that it may be allergies that have been bothering her and that she has not been feeling well lately.

By decision dated March 13, 2007, the Office denied appellant's claim on the grounds that she failed to establish that an incident occurred in the performance of duty as alleged. Moreover, appellant had not submitted medical evidence rendering a diagnosis to which the claimed work-related events could be connected.

On November 19, 2007 appellant requested reconsideration of the Office's March 13, 2007 decision. She stated that she sought medical attention, that her doctor found a carbon monoxide buildup, and that there was a janitor who was a witness. Appellant contended that the carbon monoxide detectors had been tested in the middle of the afternoon on a clear day after all planes had departed. She asserted that fumes only became problematic when there were storms and planes present.

By decision dated January 10, 2008, the Office denied appellant's request for reconsideration without conducting a further merit review. It found that she had not established that the Office misapplied or misinterpreted a point of fact or law, articulated a new and relevant legal argument, or submitted new and relevant medical evidence.

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, that an injury was sustained in the performance of duty as alleged, and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[2] 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.[3]

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. 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 which is alleged to have occurred.[4] The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[5]

Regarding the first component of fact of injury, 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.[6] An employee has not met his or her burden of proof of 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.[7] 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.[8] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.[9]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *See Louise F. Garnett*, 47 ECAB 639 (1996).

[5] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[6] *See Gene A. McCracken*, 46 ECAB 593 (1995).

[7] *See Louise F. Garnett*, *supra* note 4.

[8] *Linda S. Christian*, 46 ECAB 598 (1995).

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

ANALYSIS -- ISSUE 1

The Office denied appellant's traumatic injury claim on the grounds that she did not establish that an incident occurred on January 16, 2007 as alleged. Appellant stated that she developed symptoms including dizziness, nausea, bronchial pain and a burning sensation in her lungs, which she attributed to a possible fuel spill or exhaust buildup. She stated that she sought medical attention and her physician found elevated levels of carbon monoxide. However, appellant did not submit any evidence from witnesses or medical records substantiating that such exposure occurred on January 16, 2007.

Although appellant promptly reported her claimed injury and sought medical treatment shortly after the alleged exposure, her claim cannot be accepted where if her statements are not consistent with the surrounding facts and circumstances and her subsequent course of action. The Office, on February 5, 2007, advised appellant of the factual information needed to establish her claim but she provided no response prior to the denial of her claim on March 13, 2007. The statements from several employing establishment personnel and others with immediate knowledge of the situation appear inconsistent with appellant's statement implicating workplace fume exposure as causing her claimed conditions. Mr. Vitale, appellant's supervisor, noted interviewing appellant about the matter and advised that she reported that her condition could be due to allergies, the flu or fumes. Mr. Riddle, a police officer, noted responding to a call involving appellant on January 22, 2007. Appellant informed him that she had numerous allergies which could be causing her symptoms. Mr. Riddle also noted that there were carbon monoxide detectors in multiple locations in the employing establishment's building and that the operations staff was unable to locate any unexplained fumes. Mr. Keck, a manager, stated that appellant informed him that she had sinus problems and allergies which bothered her at home and at work. He advised that airport maintenance personnel informed him that the air in appellant's work environment was well within air quality standards. Ms. Erickson, a program assistant, stated that, in discussing the claim, appellant noted that her symptoms may have been caused by the flu or allergies. Appellant did not provide any statement to clarify these discrepancies. Her belief that her condition was caused by an exposure to fumes in her workplace is not sufficient to establish causal relation.[10]

Due to the unexplained inconsistencies between appellant's statement on her January 17, 2007 claim and the evidence provided by the employing establishment, the Board finds that appellant has not established that an exposure to fumes occurred as alleged.[11]

[10] *See Luis M. Villanueva*, 54 ECAB 666 (2003).

[11] To the extent that appellant's asserts exposure to potential environmental irritants over a period of time, the Board notes that the matter may be more properly pursued by the filing of an occupational disease claim. An occupational disease refers to an illness or condition "produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q). By contrast, a traumatic injury refers to a condition "caused by a specific event or incident, within a single workday or shift." 20 C.F.R. § 10.5(ee). A traumatic injury must be attributable to an "external force, including stress or strain, which is identifiable as to time and place of occurrence of member or function of the body affected." *Id.*

Moreover, the Board notes that appellant has not submitted any medical evidence. In this regard, she has failed to establish a *prima facie* claim for compensation.[12]

For these reasons, the Board finds that the Office properly denied appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.[13] The regulation provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[14]

Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[16]

ANALYSIS -- ISSUE 2

In support of her reconsideration request, appellant asserted that she sought medical attention and attributed her condition to carbon monoxide exposure. However, she did not argue that the Office misapplied or misinterpreted a specific point of fact, nor did she advance any new and relevant legal arguments. Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office.

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[12] *See Donald W. Wenzel*, 56 ECAB 390 (2005).

[13] 20 C.F.R. § 10.606(b)(2) (1999).

[14] *Id.*

[15] 20 C.F.R. § 10.608(b) (1999).

[16] *Annette Louise*, 54 ECAB 783 (2003).

In her statement, appellant asserted that "medical evidence" had confirmed the presence of elevated levels of carbon monoxide in her system. However, she did not submit the medical evidence to which she referred. Appellant did not provide any new and relevant factual evidence addressing the deficiencies in the evidence that was the basis of the Office's denial of her claim, her failure to establish that the employment exposure occurred as alleged. Accordingly, the Office properly denied appellant's request for reconsideration without conducting a merit review because she did not meet any of the three regulatory criteria warranting a merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she sustained a traumatic injury in the performance of duty. The Office properly denied her request for reconsideration without conducting a merit review.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2008 and March 13, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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