United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	
DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION & MANAGEMENT, New York, NY, Employer	)	**Docket No. 08-1835** **Issued: February 9, 2009**

Appearances:
Paul Kalker, Esq., for the appellant
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 June 18, 2008 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 10, 2008 that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an employment-related back injury on May 19, 2006.

FACTUAL HISTORY

On May 23, 2006 appellant, then a 44-year-old management analyst, filed a Form CA-1, alleging injury on May 19, 2006. He identified lifting files, bending back and attempting to push objects caused a headache, pain in the back, neck and groin and weakness in his legs. Appellant stopped work on May 22, 2006. The employing establishment controverted the claim. Gary

Cowan, director of administration and finance, advised that he received an e-mail from appellant who reported that his back began to ache when packing. He questioned appellant about the alleged injury, who stated that he did not injure himself and could not identify files packed or moved and could not identify where his back ached or his whereabouts after the alleged injury. Appellant stated that he went to the health unit but provided no documentary evidence that he did. Mr. Cowan stated that an examination of appellant's cubicle revealed no boxes or evidence that any of his belongings were moved and voiced concerns whether the injury occurred at all.

On June 13, 2006 the Office informed appellant of the evidence needed to support his claim. In a June 30, 2006 statement, appellant reported that, because he had to change cubicles, on Friday, May 19, 2006, he began getting rid of unnecessary paper by throwing it into large trash bins and removed some files from a cabinet. He stated that he was multitasking, *i.e.* writing, copying, bending, stretching, pushing, kneeling, lifting, leaning, pulling, using his mouse and talking on the telephone, when his neck and back began to hurt. Appellant had done scant actual moving but was determining "what force would be needed to move files and equipment," noting that he lifted files and pushed a filing cabinet to determine their weight. He related that Mr. Cowan was in Boston on May 19, 2006. Appellant advised that over the following weekend, the pain worsened and that he also noticed groin pain. He noted that he had a previous back claim involving having to jump out of a falling elevator at work.

In a May 18, 2006 e-mail, Mr. Cowan notified appellant that on May 23, 2006 new office cubicles were being installed which required reconfiguration. Appellant was to be relocated to a new cubicle and, based on seniority, he was given first choice. In a May 19, 2006 e-mail, he responded that he "started to move stuff around" and his back started to ache. Mr. Cowan responded that appellant indicated in an 11:41 a.m. telephone conversation that he did not injure himself, only that he was experiencing pain. In a May 25, 2006 memorandum addressed to Mr. Cowan, appellant stated that the injury occurred on May 18, 2006. He advised that the nurse in the health unit would not provide documentation because it was privacy act protected. In a June 7, 2006 e-mail, Mr. Cowan noted that appellant had attended a training class in Washington, DC from May 15 through 18, 2006. Upon his return to work on May 19, 2006, appellant sent the e-mail stating that his back was hurting. Mr. Cowan stated that he immediately called appellant, instructing him to cease packing his belongings. Appellant told him that he was moving files from a drawer into a box but could not describe the box or the particular files he was packing, relating that his back was aching. Mr. Cowan reported that appellant called in sick on Monday, May 22, 2006 stating that he did not feel well. On June 19, 2006 he requested that appellant submit medical documentation supporting his alleged injury.

An unidentified and unsigned clinic note dated May 19, 2006 advised that appellant complained of low back pain after moving some boxes in his office. Appellant requested aspirin and complained of discomfort upon palpation of the lower left side of the back. He was given medication. By reports dated June 22, 2006, Dr. Howard V. Katz, a Board-certified orthopedic surgeon, advised that appellant's cervical and lumbar sprain, radiculopathy, headaches and varicocele were caused by a May 19, 2006 work incident and that he could not return to work until August 15, 2006. In a June 28, 2006 letter, Dr. Zafar Khan, a Board-certified urologist, provided appellant information regarding surgery scheduled for September 8, 2006. By report dated July 3, 2006, Dr. Suraj K. Tikko, a Board-certified internist, advised that appellant was seen on June 14, 2006 suffering from a varicocele caused by lifting office equipment.

On July 13, 2006 Mr. Cowan responded to appellant's statement. He advised that at no time on May 19, 2006 did appellant indicate that he was disposing of materials into a trash bin. Mr. Cowan stated that there were no bins and no evidence of any material disposed of in appellant's cubicle, and no boxes visible when he inspected appellant's cubicle on May 22, 2006. He stated that the employing establishment nurse would not provide any information regarding appellant, and that any nurse's report should not be considered valid as it did not indicate a location and was unsigned. Mr. Cowan concluded that appellant had failed to provide proper medical documentation to support his claim.

By decision dated July 20, 2006, the Office denied the claim on the grounds that appellant failed to establish that the May 19, 2006 incident occurred at the time, place and in the manner alleged.

On August 15, 2006 appellant requested a review of the written record, stating that on May 19, 2006 he moved bundles of files and a large file cabinet. He submitted a July 20, 2006 reasonable accommodation request, addressed to Mr. Cowan, asking to work full time at home and be provided a computer with appropriate ergonomic attachments, appropriate software and business supplies, telephone and cellular telephone services, and a reclinable chair, chaise or bed.

Appellant also submitted treatment notes from Dr. Leo W. Tress, a chiropractor. In an August 10, 2006 report, Dr. David Dynof, an orthopedic surgeon, noted appellant's report that he sustained an injury on May 19, 2006 and complained of low back pain and bilateral leg weakness. He reported tenderness on examination of the cervical, thoracic, and lumbar spine, and diagnosed cervical sprain and myalgia, right lumbar trigger points and myalgia and bilateral lumbar radiculitis. On August 15, 2006 Dr. Dynof recommended that appellant not work for four weeks. In an August 15, 2006 report, Dr. Tikko explained that lifting office equipment meant lifting file cabinets and files and that this worsened appellant's varicocele, explaining that the exertion caused venous pooling around the scrotal and testicular area. On September 8, 2006 Dr. Khan performed a bilateral varicocelectomy.

By letter dated September 7, 2006, Mr. Cowan informed appellant that, based on his failure to provide medical support, his absence was being charged as absence without leave (AWOL) as of August 31, 2006. On September 29, 2006 appellant was suspended for 30 days, effective October 15, 2006, for failure to follow established leave procedures and for unauthorized leave. In a November 22, 2006 letter to appellant, Mr. Cowan discussed appellant's continuing absence and advised that, since he had not provided proper medical documentation, his failure to report to work would result in further disciplinary action. On November 30, 2006 he again described the sequence of events surrounding appellant's claim, noting that several employees confirmed that there were no large trash bins in the office on May 19, 2006. Mr. Cowan stated that, on May 22, 2006, he and three coworkers packed appellant's materials and there was no evidence of any previous packing or moving. He repeatedly requested that appellant provide medical certification of his alleged injury. Appellant submitted four prescription notes, an August 16, 2006 report from Dr. Dynof and a September 18, 2006 report from Dr. Khan, none of which contained detailed medical information. Mr. Cowan noted that appellant had been charged with 44 days of AWOL and had served a 30-day suspension, and pursued an unemployment claim with the State of New York that was denied. He submitted a May 19, 2006 e-mail addressed to appellant, advising him that

he should not pack his belongings to prevent possible injury and that he would arrange to have appellant's belongings packed for him. The State Unemployment Board's decision noted that appellant had been cleared to return to work on October 8, 2006 following surgery on September 8, 2006 and had thereafter demanded an accommodation to be allowed to work full time from his home. The board denied the claim because appellant voluntarily separated from employment without good cause.

By decision dated January 11, 2007, an Office hearing representative affirmed the July 20, 2006 decision on the grounds that the evidence was insufficient to establish that appellant experienced the May 19, 2006 incident at the time, place and in the manner alleged. The hearing representative found that inconsistencies in the record cast significant doubt on the validity of the claim. Moreover, the medical evidence of record was insufficient to establish that appellant's medical condition arose from work duties on May 19, 2006.

On January 3, 2008 appellant, through his attorney, requested reconsideration.[1] In a December 20, 2007 report, Dr. Tikko noted that appellant was seen on June 14, 2006 complaining of right groin pain. He referred appellant to a urologist who diagnosed varicocele and performed surgical repair. In a February 11, 2008 memorandum, Mr. Cowan informed the Office that appellant did not work from May 20 through December 25, 2006, when he returned to work unannounced, left at 12:28 p.m. and filed another CA-1 claim on December 27, 2006.

In a September 18, 2006 report, Dr. Khan noted that appellant was under his care, had surgery on September 8, 2006, and could return to work on October 2, 2006. In an October 26, 2006 report, Dr. Dynof reiterated his findings and conclusions and provided procedure notes for lumbar injections. On December 20, 2007 he described appellant's treatment, noting that he underwent chiropractic care, physical therapy and right lumbar trigger point injections. Dr. Dynof advised that appellant could not perform heavy work such as periodic bending, prolonged standing or heavy lifting and continued to have residual inflammatory pathology of the muscular and supportive structure of the cervical and lumbar spine. He concluded that appellant's condition was caused by the injury he sustained on May 19, 2006.

By decision dated April 10, 2008, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

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 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. Regardless of whether

[1] Appellant also requested reconsideration of a February 16, 2007 decision, concerning a December 26, 2006 injury, adjudicated by the Office under file number xxxxxx229. He has an additional appeal before the Board under that Office number, Docket No. 08-1834, that will be adjudicated separately.

[2] 5 U.S.C. §§ 8101-8193.

the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

Office regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[4] In order to determine whether an employee 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 is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[5]

When an employee claims a traumatic injury in the performance of duty, he or she must establish the "fact of injury," namely, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.[6]

ANALYSIS

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment-related back injury on May 19, 2006 because his vague and inconsistent recitation of facts does not support his allegation that a specific incident occurred as alleged.[7] On his claim form, appellant alleged that he was injured lifting files, bending back and attempting to push objects. He later alleged that he had been throwing paper into large bins and had taken files in and out of drawers and pushed against a filing cabinet to test its weight. Appellant's back began to ache when he started to move stuff around. At the time he requested a review of the written record, he reported that he injured his back while moving large files and a filing cabinet. Mr. Cowan reported that there was no evidence that appellant had begun to pack his cubicle on May 19, 2006 and that there were no trash bins in the area. A nurse's report described a history of injury that appellant hurt his back while moving boxes. Dr. Tikko reported a history that appellant was injured while lifting office equipment, files and filing cabinets.

Appellant's allegations are vague and do not relate with specificity the mechanics of how he sustained the claimed injury. Mr. Cowan reported inconsistencies found in the workplace, and the medical record reflects that appellant did not report a consistent history of injury to his physicians. The Board finds that appellant has not established that he sustained an injury in the

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

[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

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

[6] *Paul Foster*, 56 ECAB 208 (2004).

[7] *Id*.

performance of duty on May 19, 2006 as alleged because he did not submit sufficient evidence to establish that he actually experienced the incident at the time, place and in the manner alleged.[8]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment injury on May 19, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 10, 2008 be affirmed.

Issued: February 9, 2009
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

[8] *Id*.