United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 09-1580**
	)	**Issued: February 17, 2010**
U.S. POSTAL SERVICE, DISTRICT HEALTH & RESOURCE MANAGEMENT OFFICE, Middle Florida, FL, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 3, 2009 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated February 9 and April 30, 2009. Under 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 has established that he sustained an injury to his left shoulder/left upper back in the performance of duty.

FACTUAL HISTORY

Appellant, a 60-year-old mail handler, filed a Form CA-1 claim for benefits on December 29, 2008, alleging that he strained his left upper back, just beneath the left shoulder blade, while throwing a heavy bundle of mail on December 17, 2008. The employing establishment controverted the claim on the grounds that he did not file his claim until 12 days after the alleged incident occurred and because the employee's clock ring did not indicate where the alleged incident occurred.

By letter dated January 5, 2009, the Office advised appellant that he needed to submit additional factual and medical evidence in support of his claim. It stated that he had 30 days to submit the requested information.

In a January 29, 2009 response letter to the Office, appellant asserted that he had been unable to provide the requested medical evidence because he had yet to receive the requisite reports from his treating physician. He stated that he consulted his physician on December 29, 2008; the physician diagnosed a shoulder strain and prescribed anti-inflammatory medicine and muscle relaxers. Appellant stated that he was subsequently referred to an orthopedic surgeon, who administered an x-ray test. He related that his shoulder had improved since then and he was not experiencing pain or having any problems moving his shoulder. Appellant advised that he was awaiting the results of his x-ray test but had declined having a magnetic resonance imaging (MRI) scan for his left shoulder.

By decision dated February 9, 2009, the Office denied appellant's claim, finding that he failed to establish fact of injury. It found that the evidence appellant submitted was insufficient to establish that the December 17, 2009 incident occurred as alleged; it noted that he failed to submit a statement disproving the employing establishment's assertion that he was not engaged in the claimed activity of throwing a mail bundle at the time of the alleged incident.

In a report dated December 29, 2008, received by the Office on February 17, 2009, Dr. Christopher Caggiano, an osteopath, related that appellant had been experiencing pain in his left upper back due to a work incident in which he was throwing some heavy material and felt discomfort in his upper back. He related that appellant had no numbness or tingling in his extremity; he only felt pain when his arm was hanging. Dr. Caggiano stated that appellant had no pain with full range of motion of the shoulder and no pain in the shoulder joint. He noted that appellant had some pain in the rhomboid region and diagnosed a likely rhomboid strain.

In a January 29, 2009 report, received by the Office on February 17, 2009, Dr. Ronald Hudanich, a specialist in orthopedic surgery, noted appellant's complaints of left shoulder pain. He advised that his left shoulder pain and symptoms had been triggered by a pulling incident which had occurred two weeks previously, the symptoms were localized in the lateral aspect of the left shoulder. Dr. Hudanich stated that the left shoulder pain had resolved since the work injury. On examination, he noted that appellant had full, painless range of motion of the cervical, thoracic and lumbar spine, with normal stability, strength and tone and not erythema, ecchymosis or edema.

By letter dated February 25, 2009, appellant requested reconsideration. In his request letter, he acknowledged that he was not working on the proper operation on the date of the injury. Appellant stated, however, that he intended to submit a witness statement from a coworker who was working alongside him while he was pitching heavy bundles of mail on December 17, 2009. The Office did not receive any additional factual evidence.

By decision dated April 30, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[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. 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.[4] 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.[5]

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.[6] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.[8]

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[1] 5 U.S.C. § 8101 *et seq.*

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

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

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

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

[6] *Elaine Pendleton*, *supra* note 2.

[7] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[8] *See Constance G. Patterson*, 12 ECAB 206 (1989).

ANALYSIS

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. As stated above, the Board has held that 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.[9] In this case, however, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Although he alleged on his CA-1 form that he injured his left shoulder/left upper back on December 17, 2008 while throwing a bundle of mail, this statement was contradicted by the employing establishment's assertion that he was assigned to a different work site at that time.[10] Appellant did not indicate that the alleged injury occurred while he was working in an unauthorized, unassigned work area until February 25, 2009, two weeks after the Office's February 9, 2009 decision denying the claim.[11] This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained his alleged left shoulder/left upper back injury.

In addition, appellant failed to submit to the Office a corroborating witness statement in response to the Office's request. This casts additional doubt on his assertion that he strained his left shoulder/left upper back while throwing a bundle of mail on December 17, 2008. The Office requested that appellant submit additional factual evidence explaining how he injured his left shoulder/left upper back on the date in question. Appellant failed to submit such evidence. Therefore, given the inconsistencies in the evidence regarding how he sustained his injury the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.[12]

[9] *Patterson, supra* note 8; *Buffington*, 34 ECAB 104 (1982).

[10] The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

[11] The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, *supra* note 10; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

[12] *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a left shoulder/left upper back injury in the performance of duty.[13]

ORDER

IT IS HEREBY ORDERED THAT the April 30 and February 9, 2009 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: February 17, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[13] On appeal, appellant has submitted a witness statement from a coworker. However, the Board cannot consider new evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 501(c).