United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 09-1425**
	)	**Issued: January 12, 2010**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, COAL DISTRICT 4, Mount Hope, WV, 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 May 18, 2009 appellant filed a timely appeal from a January 8, 2009 merit decision of the Office of Workers' Compensation Programs denying 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 established he sustained an injury in the performance of duty on March 17, 2008.

FACTUAL HISTORY

On November 24, 2008 appellant, a 61-year-old coal mine safety and health electrical inspector, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2008 while driving a truck to a mine he ran over potholes, jarring and injuring his neck. He alleged that he sustained intervertebral damage with discal displacement, nerve damage and headaches. Appellant believes that his condition was caused by this injury because he sustained no other injuries or illnesses.

Appellant submitted a March 18, 2008 progress note from the Beckley Veterans Administration (VA) Hospital which recorded that he was seen on that day for "little black spots" in the vision of the left eye which started yesterday, with no pain or dizziness and no headaches."[1] No history was presented of the alleged March 17, 2008 employment event.

In a May 27, 2008 progress note, Joshua Alexander, a physician's assistant at the VA hospital, noted that appellant was seen for migraine headaches and left visual field disturbance. The note also indicated that appellant had neck pain which had been present for many years.

On June 12, 2008 Dr. Robert E. Vaughan, radiologist, reported that a magnetic resonance imaging (MRI) scan revealed intervertebral osteochondrosis and discal displacement with extrusion. He also diagnosed hypertrophic arthropathy about the uncovertebral and facet joints.

On August 20, 2008 Dr. G.J. Harpold, a Board-certified neurologist, reported findings on examination and diagnosed post-traumatic stress disorder and migraine headaches. Dr. Harpold noted appellant reported having headaches for seven months prior to the appointment. Dr. Harpold also stated that appellant complained of numbness in his arms, more on the right than the left, which began after falling in a mine. On August 22, 2008 Dr. Harpold opined that appellant had been disabled for the past seven months because of headache and had been unable to work or drive. Dr. Harpold also opined that appellant continued to be temporarily disabled due to his migraine headaches.

In a progress note dated September 22, 2008, Mr. Alexander noted a date of "recurrence" as March 17, 2008, but stated that he was unaware of factors that produced a recurrence.

In a December 17, 2008 note, Larry E. Cook, supervisory electrical engineer, stated that the March 17, 2008 incident was not reported until appellant filed his claim on November 24, 2008. When appellant returned to Mount Hope, he reported his vision was impaired by "spots." Mr. Cook noted that appellant has been off work since March 18, 2008, pursuing treatment and diagnostic tests to determine the cause of his eyesight problems and was not able to drive a vehicle.

By decision dated January 8, 2009, the Office denied the claim because the evidence of record did not demonstrate that the incident occurred as alleged.[2]

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his claim including that the individual is an

[1] It is unclear who authored this report.

[2] Appellant submitted additional evidence on appeal. 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). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision). As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal.

[3] 5 U.S.C. §§ 8101-8193.

"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. These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[5]

An employee has not met his 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.[6] 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[7] However, 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.[8]

ANALYSIS

The Office denied appellant's claim on the grounds that he had not established that the incident occurred as alleged. Due to the material factual inconsistencies in the record, the Board finds that appellant has not satisfied his burden of proof to establish he sustained an incident in the performance of duty on March 17, 2008, at the time, place and in the manner alleged.[9]

Appellant alleges his conditions resulted from a March 17, 2008 incident when the vehicle he was driving rolled over potholes. He did not however report this alleged incident to his supervisor or file a claim until November 24, 2008, some eight months later. Initial records from March 2008 indicate that he complained of visual disturbances to his supervisor and to the

[4] *Donna A. Lietz*, 57 ECAB 203 (2005).

[5] *See E.A.*, 58 ECAB 677 (2007); *Arthur C. Hamer*, 1 ECAB 62 (1947).

[6] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

[7] *M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *John D. Shreve*, 6 ECAB 718, 719 (1954).

[8] *S.P., supra* note 6; *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

[9] Appellant submitted reports from a physician's assistant and a nurse practitioner. Because healthcare providers such as nurses, acupuncturists, physicians' assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability, or causal relationship. (5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983). Records from lay personnel can however be evaluated as witness statements to corroborate a history of injury. *Vivian J. Walker*, 51 ECAB 448 (2000).

VA hospital personnel, but he made no mention of any incident or trauma occurring on March 17, 2008.

A May 27, 2008 progress note from the Beckley VA hospital, reported that appellant was seen for migraine headaches and left visual field disturbance. The history of injury indicated that appellant had neck pain which had been present for many years. No mention was made of the alleged incident of March 17, 2008.

While appellant's initial complaints related to his vision, in August 2008 he told his attending physician that he had been experiencing headaches for seven months prior to August 20, 2008. Again there is no record that appellant informed anyone that a traumatic event occurred on March 17, 2008 which could have caused this condition. If appellant's headaches began seven months prior to August 2008, they would have begun in January 2008, not March 17, 2008. Appellant also subsequently sought treatment for numbness in his arms, but he related that this symptom began after he fell in a mine.

The Board also notes that appellant presented no statements from individuals who witnessed or corroborated appellant's allegations regarding the alleged March 17, 2008 employment incident. Such inconsistencies cast serious doubt upon the validity of his claim and for this reason the Board finds that appellant has not satisfied his burden of proof to establish he sustained an injury in the performance of duty on March 17, 2008.

CONCLUSION

The Board finds that appellant has not established he sustained an injury in the performance of duty on March 17, 2008.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 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