

appellant initially stated that he had twisted his back at home and went from permanent restricted duty to limited duty.

In a May 21, 2008 letter, the Office informed appellant that the evidence of record was insufficient to support his claim and advised him as to the medical and factual evidence required to establish his claim.

In an April 21, 2008 report, Dr. Bryan Yamashiro, a treating physician, diagnosed lumbar radiculopathy. He noted that appellant had a prior history of back problems beginning in 2005 and had injured his back in a slip and fall two years previously. A physical examination revealed full range of motion with tenderness over the lumbar paraspinal muscles.

In an April 28, 2008 report, Dr. Coswin Saito, a Board-certified physiatrist, noted that appellant was seen for complaints of left-sided back pain with parasthesias in the left lower extremity which began in early April 2008. He reviewed a magnetic resonance imaging (MRI) scan which showed a left lateral disc herniation which he opined accounted for appellant's complaints.

In a May 8, 2008 report, Dr. John M. Sandor, Board-certified in occupational medicine, diagnosed L5-S1 disc herniation based on an April 26, 2008 MRI scan. He stated that appellant had injured himself at work five weeks previously when he fell down. Dr. Sandor noted that appellant had back pain on April 21, 2008 when bending down while he escorted an inmate. Appellant's symptoms were consistent with an injury from a prior March 2008 fall. Dr. Sandor noted that appellant was going to file an occupational disease claim for neck fatigue which he attributed to falls in his job during his years of work and the repetitive activities involved in writing charts. On May 8, 2008 he noted an injury date of April 3, 2008. Dr. Sandor diagnosed lumbar intervertebral disc displacement with myelopathy. He advised that appellant was capable of working with restrictions.

In a May 13, 2008 statement, appellant noted that he injured his neck and back when he slipped in a water puddle while escorting prisoners. He stated that he flew up in the air and landed on his back. Appellant did not report the fall as nothing was broken; but he experienced recurrent neck and back pain since the fall.

In a May 29, 2008 attending physician's report, Dr. Yamashiro noted an injury date of April 3, 2008 and checked "yes" as to whether the condition was employment related. No diagnosis was noted on the form other than a notation to see an attachment.

On May 19, 2008 Dr. Sandor diagnosed cervicalgia and provided work restrictions. He noted that appellant attributed his neck and back conditions to the April 3, 2008 employment incident. Dr. Sandor noted that, when appellant was seen on May 8, 2008, he attributed his back pain to a March 2008 fall. Appellant related that he has been performing light-duty work since April 22, 2008 which involved positioning his head down while writing charts. Dr. Sandor noted that objective testing performed on May 7, 2008 revealed mild cervical spine degenerative changes. He opined that it was unlikely that the April 3, 2008 fall caused appellant's neck condition although there might be an aggravation due to appellant's bending his neck down to write charts.

On June 9, 2008 Dr. Sandor diagnosed cervicalgia, neck sprain and lumbar intervertebral disc displacement with myelopathy. He noted appellant's symptoms of lumbago and post L5-S1 lumbar disc herniation were consistent with a fall on April 3, 2008. The neck pain was unlikely to be a result of the April 3, 2008 incident.

On June 30, 2008 the Office received a May 1, 2008 statement from Dr. Leonardo F. Giron, clinical director, regarding a telephone conversation with appellant. Dr. Giron contacted appellant after he failed to show up for work on April 21, 2008. Appellant related to Dr. Giron that he did not report for duty as he had twisted his back at his home. He also informed Dr. Giron that he would be seeing his primary care physician that day and reporting back to work the following day.

In a July 2, 2008 decision, the Office denied appellant's claim on the grounds that he failed to establish fact of injury. It found the evidence insufficient to establish that the April 3, 2008 incident occurred as alleged.

On July 26, 2008 appellant requested an oral hearing before an Office hearing representative and a telephonic hearing was held on February 2, 2009.

On August 1, 2008 the Office received an undated letter from appellant who reported his injury on April 29, 2008 to his supervisor, who refused to help him file a traumatic injury claim. Appellant noted that it was not until April 28, 2008 that he found out that he had a herniated disc. He stated that his neck and back problems began on April 3, 2008 and subsequently became worse.

In an April 8, 2009 decision, an Office hearing representative affirmed the denial of appellant's claim on the grounds that the alleged incident was not established.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his 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 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 on a traumatic injury or an occupational disease.³

In order to determine whether an employee actually 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

¹ 5 U.S.C. §§ 8101-8193.

² C.S., 60 ECAB ___ (Docket No. 08-1585, issued March 3, 2009).

³ S.P., 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 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.⁵ An employee has not met her burden of proof in 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.⁷ However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.⁸

ANALYSIS

Appellant alleged that he sustained a traumatic injury to his back and neck on April 3, 2008 when he fell while escorting inmates from the infirmary. The Office denied his claim after finding that he did not establish that the employment incident occurred at the time, place and in the manner described. It also noted that the medical evidence was insufficient to establish a diagnosed medical condition.

The initial question presented is whether appellant has established that the April 3, 2008 employment incident occurred as alleged. 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 statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁹ An employee has not met his burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of his claim.¹⁰

The factual evidence of record does not establish appellant's account of events. Appellant did not file his claim until May 13, 2008. He acknowledged that he did not notify anyone about the incident at the time it occurred. Dr. Giron contacted appellant to determine why he failed to show up for work on April 21, 2008. During his conversation, appellant stated

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

⁵ See *Betty J. Smith*, 54 ECAB 174 (2002).

⁶ *Paul Foster*, 56 ECAB 208 (2004).

⁷ *Barbara R. Middleton*, 56 ECAB 634 (2005); *Linda S. Christian*, 46 ECAB 598 (1995).

⁸ *Gregory J. Reser*, 57 ECAB 277 (2005).

⁹ See *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁰ *Linda S. Christian*, 46 ECAB 598 (1995).

that he had twisted his back at home and would seek treatment from his primary care physician that day before returning to work the following day.

The initial medical evidence submitted by appellant does not establish the April 3, 2008 employment incident. In an April 21, 2008 report, Dr. Yamashiro noted a history of back problems beginning in 2005 and that appellant had injured his back in a slip and fall two years previously. He did not list a history of the April 3, 2008 incident. In a May 8, 2008 report, Dr. Sandor initially listed an employment injury occurring five weeks previously and that appellant recently experienced back pain while bending down at work on April 21, 2008. The first mention of the April 3, 2008 incident was on May 8, 2008 when Dr. Sandor listed the date; however, he provided no description as to what happened. Dr. Yamashiro first noted the injury date of April 3, 2008 in a May 29, 2008 attending physician's report. He checked "yes" that the condition was employment related. No description of the incident was provided on the form other than a notation to see an attachment. The medical evidence of record is not consistent with the history of injury provided by appellant on May 13, 2008.

The Board finds that appellant's subsequent actions were not consistent with the alleged incident. Appellant did not notify the employing establishment or his physicians of the April 3, 2008 incident at the time it occurred. He did not seek medical treatment until the end of April and the initial reports made no mention of an April 3, 2008 employment incident. Based on the evidence of record, the Board finds he has not established the first component of fact of injury. Appellant did not establish that the April 3, 2008 incident occurred at the time, place or in the manner alleged. The Office properly found that he did not meet his burden of proof to establish an incident on that date.

The Board finds that appellant failed to establish that the April 3, 2008 employment incident occurred as alleged. Therefore, appellant has not established an injury in the performance of duty. As appellant has not established the factual aspect of his claim, it is not necessary for the Board to consider the medical evidence of record.¹¹

CONCLUSION

The Board finds that appellant did not establish that he sustained an injury on April 3, 2008 while in the performance of duty.

¹¹ *Alvin V. Gadd*, 57 ECAB 172 (2005).

ORDER

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

Issued: June 24, 2010
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