

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
L.W., Appellant)	
)	
and)	
)	Docket No. 09-2264
)	Issued: June 23, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Mobile, AL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 10, 2009 appellant filed an appeal of a merit decision of the Office of Workers' Compensation Programs dated April 16, 2009 denying his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2 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/arm on January 31, 2009, as alleged.

FACTUAL HISTORY

On February 5, 2009 appellant, then a 47-year-old city mail carrier, filed a Form CA-1 (notice of traumatic injury) alleging that on January 31, 2009 he injured his shoulder and arm while picking up trays with flats and letters to load in a truck. He stopped work on February 4, 2009 and returned to work on February 27, 2009. The employing establishment advised that appellant continued working after the claimed injury without notifying management. Evidence submitted with the claim included a Form CA-16 authorization for examination and/or treatment issued by the employing establishment on February 6, 2009, which noted the date of injury as

January 31, 2009 and an injury and illness incident report, which noted the date of injury as February 2, 2009.

In a February 4, 2009 report, Dr. Thomas C. Vanderheyden, Board-certified in emergency medicine, reported that appellant complained of severe pain to his left shoulder which began two days ago while lifting a heavy object at work. X-rays to the left shoulder were negative. A diagnostic impression of severe left shoulder pain was provided along with patient information on shoulder pain.

In a February 12, 2009 report, Dr. Norman S. Lichtenfeld, a Board-certified orthopedic surgeon, indicated that on February 2, 2009 appellant was picking up some large boxes and he got a small twinge of pain in the upper left back. The pain worsened over the weekend and, when he returned to work on Monday, he started having severe pain in the same area along with tingling down the left arm. An assessment of upper back pain with radicular left arm pain was provided.

The employing establishment controverted the claim on the basis that appellant did not report the injury until February 4, 2009 and he initially told his manager that he hurt his arm on February 2, 2009, not January 31, 2009 as reported on the CA-1 form. In a February 5, 2009 accident report, Leander D. Harris, supervisor, stated that appellant told him that he got hurt at work on Monday, February 2, 2009. He indicated that appellant's supervisor, James Haback, stated that appellant did not report an injury on the job on February 2, 2009.

In a February 13, 2009 e-mail, Mr. Haback indicated that appellant worked on cars and maintained rental houses in his spare time. He indicated that management was not informed of appellant's injury until four days after the alleged date of injury.

By letter dated February 23, 2009, the Office advised appellant that the evidence submitted was not sufficient to establish his claim. It requested that appellant provide additional factual information regarding when the injury occurred and medical information, including a well-rationalized report from a physician explaining why the condition diagnosed is believed to have been caused or aggravated by the claimed injury. In particular, the Office asked appellant to address why he claimed the injury occurred on January 31, 2009 when the medical evidence indicated that his symptoms began on February 2, 2009.

Appellant submitted a February 16, 2009 physical therapy note which indicated that appellant reported having pain in his thoracic region after lifting a mail tray on January 30, 2009. In a February 12, 2009 prescription note, Dr. Lichtenfeld diagnosed upper back pain with radicular left arm pain. In a March 6, 2009 progress note, he indicated that appellant's upper back strain had resolved and physical therapy was no longer necessary. In a March 6, 2009 disability note, Dr. Lichtenfeld's nurse noted that appellant was disabled due to upper back pain from February 12 through 26, 2009.

By decision dated April 16, 2009, the Office denied the claim, finding that appellant failed to establish fact of injury. It found that the evidence appellant submitted was insufficient to establish that the January 31, 2009 incident occurred as alleged as multiple injury dates were

reported and appellant did not provide the requested factual information which would establish his account of the alleged work incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 his 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

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 "traumatic injury," see 20 C.F.R. § 10.5(ee).

⁶ *Elaine Pendleton*, *supra* note 2.

⁷ *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

⁸ *See Constance G. Patterson*, 41 ECAB 206 (1989).

ANALYSIS

Appellant alleged that on January 31, 2009 he injured his shoulder and arm while picking up trays with flats and letters to load in a truck. 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. 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 and upper arm on January 31, 2009 while picking up trays with flats and letters to load his truck, other evidence of record indicates that the claimed incident and symptoms began on other dates.

The medical records from Drs. Vanderheyden and Lichtenfeld as well as evidence from the employing establishment indicated that appellant reported that the injury occurred on February 2, 2009. The February 16, 2009 physical therapy note indicates that the claimed injury occurred on January 30, 2009. The employing establishment reported that appellant continued to work and waited approximately four days to report the alleged injury and indicated that appellant maintained rental homes and did automobile repairs outside of work. This contradictory evidence creates an uncertainty as to the time, place and in the manner in which appellant sustained his alleged left shoulder/left arm injury.

In addition, appellant did not offer any clarifying explanation or evidence in response to the Office's February 23, 2009 information request. This casts additional doubt on his assertion that he injured his left shoulder/arm while lifting trays on January 31, 2009. The Office requested that appellant submit additional factual evidence explaining how he injured his left shoulder/arm on the date in question. Because appellant failed to submit any responsive evidence, he did not clarify the inconsistencies in the evidence regarding when his claimed injury occurred. These inconsistencies cast doubt on the validity of the claim and the Board finds that there is insufficient evidence to establish that the claimed lifting incident occurred as alleged on January 31, 2009. As appellant has not established that the claimed lifting incident occurred as alleged, it is not necessary to consider any medical evidence with regard to causal relationship.¹⁰

On appeal, appellant asserts that he sustained an injury while lifting a heavy tray. The evidence regarding when the claimed injury occurred, as explained above, contains inconsistencies that have not been addressed by appellant. Because of this, appellant has not met his burden of proof to establish that he sustained a work-related injury as alleged on January 31, 2009.

⁹ *Id.*

¹⁰ *S.P.*, 59 ECAB ____ (Docket No. 07-1584, issued November 15, 2007).

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury to his left shoulder/arm in the performance of duty on January 31, 2009, as alleged.¹¹

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated April 16, 2009 is affirmed.

Issued: June 23, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ The record contains additional evidence from appellant after the Office issued its April 16, 2009 decision. 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. § 501.2(c)(1).