

On March 7, 2007 the Office received a notice of recurrence of disability (Form CA-2a) dated January 15, 2007. Appellant reported the date of the recurrence as September 25, 2006, describing an incident in which he got up from a chair, pushed back on some boxes that were falling and fell back into his chair. The Office developed the claim as a new traumatic injury.

In a report dated September 25, 2006, Dr. David Prescott, a family practitioner, stated that “due to [appellant’s] current medical condition as summarized in OWCP File [No. xxxxxx471, the November 28, 2004 claim], it is my medical opinion that he be permitted to remain at home” until a reevaluation on December 1, 2006. He also submitted an October 29, 2006 duty status report (Form CA-17) identifying the date of examination as September 25, 2006 and the date of injury as November 28, 2004. An attending physician’s report (Form CA-20) from Dr. Prescott dated October 29, 2006 also reported the date of injury as November 28, 2004. In a report dated May 15, 2007, Dr. Steven Wooten, a chiropractor, stated that appellant reported a low back injury occurring on September 25, 2006. In a statement dated May 15, 2007, appellant stated, in response to an inquiry from the Office as to the delay in reporting the alleged incident, that he did not know who his supervisor was.

By decision dated May 31, 2007, the Office denied the claim for compensation. It found the evidence was insufficient to establish an incident as alleged.

Appellant requested a hearing before an Office hearing representative, which was held on September 25, 2007. In response to the hearing transcript, an employing establishment security director submitted an October 17, 2007 letter indicating that appellant did not notify the employing establishment of an injury on September 25, 2006. A brief statement from a coworker, Ms. Oliver, reported that she sat in the cubicle next to appellant on September 25, 2006 and he did not report an injury. By report dated October 17, 2007, Dr. Prescott stated that appellant had low back pain which developed from a work-related injury on September 25, 2006 when appellant attempted to balance himself against a pile of boxes.

By decision dated December 11, 2007, the hearing representative affirmed the May 31, 2007 Office decision. The hearing representative found the September 25, 2006 incident had not been established as alleged.

Appellant requested an appeal with the Board. By order dated August 22, 2008, the Board remanded the case to combine the case records regarding appellant’s back injury claims. In a decision dated October 17, 2008, the Office denied the claim on the grounds appellant had not established the September 25, 2006 incident as alleged. Appellant again requested a hearing, which was held on February 24, 2009.

In a report dated March 18, 2009, Dr. Prescott described a September 25, 2006 employment incident. He stated that appellant had low back pain, tenderness, muscle spasm and tightness in a September 25, 2006 examination. Dr. Prescott stated that appellant came in late on the same day the injury occurred and the diagnosis was determined to be work related at that time.

By decision dated May 6, 2009, the hearing representative affirmed the denial of the claim on the grounds that an incident had not been established.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that he or she sustained an injury while in the performance of duty.² 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 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. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.³

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁴ An injury does not have to be confirmed by eyewitnesses 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 subsequent course of action.⁵ It is well established that a claimant cannot establish fact of injury if there are 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.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

ANALYSIS

Appellant alleged that an employment incident occurred on September 25, 2006.⁸ He stated that he stood up from a chair in front of stacked boxes, which began to fall. Appellant pushed back on the boxes and fell backward into his chair. In reviewing the evidence regarding

¹ 5 U.S.C. §§ 8101-8193.

² *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

³ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁴ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁵ *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

⁶ *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

⁷ *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

⁸ Although he initially filed a recurrence of disability claim related to the November 28, 2004 injury, when a new employment incident is alleged, the claim is properly considered a claim for a new injury. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

his course of action following the alleged incident, the Board finds it is not consistent with the occurrence of the alleged incident.

The evidence indicates that appellant did not initially notify anyone at the employing establishment of the alleged incident. While appellant reports some confusion as to the identity of his supervisor, he had filed previous compensation claims and was aware of the proper procedure. Moreover, the only statement from a coworker indicated that appellant did not report an injury on September 25, 2006.

Appellant did receive medical treatment from Dr. Prescott on September 25, 2006, but his contemporaneous reports make no mention of an employment incident that date, nor do his October 29, 2006 form reports. Dr. Prescott did not refer to a September 25, 2006 incident until an October 17, 2007 report. The first mention of the incident is a chiropractor's report dated May 15, 2007. In addition, while Dr. Prescott stated in his March 18, 2009 report that he made a diagnosis of a work-related injury on September 25, 2006, his brief report regarding that examination suggested he was referring to the November 28, 2004 injury. He does not clearly state that appellant reported a new employment incident on September 25, 2006, and if so, why his contemporaneous reports do not mention the incident.

There are additional inconsistencies with the alleged incident on September 25, 2006. Appellant submitted a statement to the Office on November 7, 2006 which referred generally to his light-duty job. He indicated that his physician placed him on disability as of September 25, 2006, without describing an incident on that date.

The Board finds that appellant's subsequent actions were not consistent with the alleged incident. Appellant did not notify the employing establishment, the Office or his physicians of the incident in a timely manner. 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 September 25, 2006 incident occurred at the time, place or in the manner alleged. The Office therefore properly found he did not meet his burden of proof to establish an injury in the performance of duty on September 25, 2006.

CONCLUSION

The Board finds that appellant did not establish an employment incident occurred as alleged on September 25, 2006, and therefore he did not establish an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2009 is affirmed.

Issued: March 3, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board