United States Department of Labor
Employees' Compensation Appeals Board

S.O., Appellant	)	
and	)	**Docket No. 09-2175**
	)	**Issued: May 21, 2010**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, New York, NY, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 27, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated March 27, 2009. Under 20 C.F.R. § 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a lower back injury in the performance of duty.

FACTUAL HISTORY

Appellant, a 32-year-old special agent, filed a Form CA-1 claim for benefits on November 14, 2008, alleging that he strained his lower back on November 5, 2008 while engaged in firearms training, running and entering/exiting vehicles. He indicated on the form that he stopped working on the date of injury and sought treatment from Dr. Kevin Nguyen, a specialist in emergency medicine, on November 5, 2008. Dr. Nguyen stated on the form that he did not witness appellant's alleged injury; he stated, however, that appellant informed him about

the incident. He also indicated on the form that he provided medical treatment to appellant on November 5, 2008.

In a November 6, 2008 treatment note, Dr. Nguyen placed appellant on disability until November 9, 2008.

Appellant underwent a computerized tomography (CT) scan on November 6, 2008, the results of which were received by the Office on February 6, 2009. The CT scan indicated mild degenerative changes in the thoracic and lumbar spine, with mild diffuse disc bulge at L4-5.

In a Form CA-16 dated November 11, 2008, Dr. Neil Roth, a Board-certified orthopedic surgeon, indicated that he placed appellant on total disability from November 5 to 17, 2008. He checked a box indicating that the condition found was caused or aggravated by the employment activity described. An employing establishment official signed the form, approving medical treatment for an injury which occurred on November 5, 2008. Appellant underwent x-rays of the lumbosacral spine on November 11, 2008, which indicated spondylolysis at L5.

In a report dated December 9, 2008, received by the Office on February 6, 2009, Dr. Neil Roth, a specialist in orthopedic surgery, noted continued complaints of low back pain and left-sided buttock pain with no radiation, no numbness or tingling or weakness. He diagnosed low back strain and lumbar spasm and recommended that he continue with physical therapy. Dr. Roth stated that appellant could be released to light duty providing it was available. In a December 9, 2008 form report, he diagnosed lumbar spasm and outlined work restrictions for appellant. In a form report dated December 10, 2008, Dr. Roth diagnosed lumbosacral spasm and radiculitis.

In a treatment note dated January 6, 2009, Dr. Roth essentially reiterated his previously stated findings and conclusions.

By letter dated February 17, 2009, the Office noted that the claim had initially been administratively handled with no time lost from work; it authorized payment for a limited amount of medical expenses. It stated that it was now required to determine whether appellant sustained a work-related injury on November 5, 2008. The Office advised him that the evidence was not sufficient to establish that he actually experienced the incident or employment factor alleged to have caused his injury. In addition, it stated that it was unclear what work factors caused the injury. The Office therefore asked appellant to provide a detailed statement explaining what activities he was performing on November 5, 2008 that caused the injury and to submit statements from any persons who witnessed his injury or had immediate knowledge of it. It asked him to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition and an opinion as to whether his claimed condition was causally related to his federal employment. The Office stated that appellant had 30 days to submit the requested information.

By decision dated March 27, 2009, the Office denied appellant's claim, finding that he failed to establish fact of injury. It stated that he failed to submit a clear statement regarding the basis of his claim; it therefore found that the factual basis of his claim was unclear and insufficient to establish that the incident occurred on the date, at the time and in the manner he alleged. The Office further found that the medical evidence appellant submitted lacked sufficient medical

rationale to establish that the claimed diagnoses were sustained in connection with the reported November 5, 2008 incident.

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 it 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(ee).

[6] *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*, 41 ECAB 206 (1989).

ANALYSIS

In the present case, the Office found that the record contained insufficient evidence supporting that the claimed event occurred at the time, place and in the manner alleged. It noted that although appellant stated on his CA-1 form that he injured his lower back while engaged in firearms training, running and exiting and entering a vehicle on November 5, 2008, he failed to provide a clear account of the manner in which the November 5, 2008 work incident resulted in the claimed injury. The Office concluded that appellant did not establish that he sustained the injury in the performance of duty on November 5, 2008. The Board finds, however, that he presented sufficient evidence to establish that he injured his lower back at the time, place and in the manner alleged.[9] 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.[10] Although no one witnessed the incident and although the employing establishment challenged appellant's account of how the injury occurred, his statement that he experienced pain on November 5, 2008 while using firearms and running and getting in and out of a vehicle during a training exercise was not contradicted by any documentary evidence in the record. In addition, Dr. Nguyen indicated on the CA-1 form that appellant sought medical attention on the date he alleged the incident to have occurred. On the November 11, 2008 CA-16 form Dr. Roth stated that he had placed appellant on total disability as of November 5, 2008 for a work incident which took place on November 5, 2008; an employing establishment official signed the form, approving medical treatment for an injury which occurred on November 5, 2008. Appellant sought additional medical treatment and underwent diagnostic tests on November 6, 2008, one day after the occurrence of the alleged work incident.

The Board finds that the totality of this evidence is sufficient to establish that appellant sustained an incident in the performance of duty on November 5, 2008. The Office subsequently controverted the claim and contended that he did not experience the incident as alleged on the date in question. However, the record contains no contemporaneous factual evidence indicating that the claimed November 5, 2008 work incident did not occur as alleged.[11] Under the circumstances of this case therefore the Board finds that appellant's allegations have not been refuted by sufficiently strong or persuasive evidence. The Board finds that the evidence of record is sufficient to establish that the incident in which he claimed to have injured his lower back on November 5, 2008 occurred at the time, place and in the manner alleged.

The Board finds, however, that appellant failed to submit rationalized medical opinion evidence to sufficiently describe or explain the medical process by which the claimed November 5, 2008 work accident would have been competent to cause the claimed injury. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[12]

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[9] *Id.*

[10] *Id*. *Buffington*, 34 ECAB 104 (1982).

[11] *See Thelma Rogers*, 42 ECAB 866 (1991).

[12] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[13] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

Dr. Roth submitted several reports in which he stated findings on examination, noted complaints of lower back pain, outlined work restrictions and diagnosed lumbar spasm and radiculitis. A November 11, 2008 lumbosacral x-ray showed spondylolysis at L5. However, Dr. Roth did not provide an opinion regarding the work relatedness of appellant's alleged conditions. He checked a box indicating that the condition found was caused or aggravated by the employment activity described in a November 11, 2008 CA-16 form and extended appellant's total disability through November 17, 2008. However, reports which support causal relationship with a checkmark are insufficient to establish the claim, as the Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation.[14] There is no indication in the record therefore that appellant's diagnosed lower back conditions were work related.

Dr. Roth's medical reports are of limited probative value in that they did not provide adequate medical rationale in support of his conclusions.[15] These reports did not describe appellant's accident in any detail or how the accident would have been competent to cause the claimed lower back condition. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[16] Appellant failed to provide a rationalized, probative medical opinion relating his current condition to any factors of his employment. Therefore, he failed to provide a medical report from a physician that the work incident of November 5, 2008 caused or contributed to the claimed lower back injury.[17]

The Office advised appellant of the evidence required to establish his claim; however, he failed to submit such evidence. Appellant therefore did not provide a medical opinion to sufficiently describe or explain the medical process through which the November 5, 2008 work

[13] *Id.*

[14] *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

[15] *William C. Thomas*, 45 ECAB 591 (1994).

[16] *See Anna C. Leanza*, 48 ECAB 115 (1996).

[17] In his appeal to the Board, appellant contends that he never received the Office's February 17, 2009 developmental letter requesting additional factual and medical information in support of his claim. Under the mailbox rule, it is presumed, absent evidence to the contrary, that notice mailed to an individual in the ordinary course of business was received by that individual. The presumption arises when the record shows that the notice was properly addressed and mailed. *See Levi Drew, Jr.*, 52 ECAB 442 (2001); *Kimberly A. Raffle*, 56 ECAB 243 (1999). The copy of the Office's February 17, 2009 letter contained in the record clearly indicates that it was sent to appellant's address of record, 672 10th Street, Apt. 2, Brooklyn, N.Y., 11215, which he provided on his CA-1 form. The Board therefore rejects this contention.

incident would have caused the claimed injuries. Accordingly, as he has failed to submit any probative medical evidence establishing that he sustained an injury to his lower back in the performance of duty on November 5, 2008, the Office properly denied his claim for compensation.

CONCLUSION

The Board finds that the Office of Workers' Compensation Programs properly found that appellant failed to meet his burden of proof to establish that he sustained a lower back injury to in the performance of duty on November 5, 2008.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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