United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 10-130**
	)	**Issued: September 22, 2010**
DEPARTMENT OF DEFENSE,	)	
New Cumberland, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant, through counsel, filed a timely appeal from the September 15, 2009 merit decision of the Office of Workers' Compensation Programs' finding that he did not sustain an injury while in the performance of duty. 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 sustained back and neck injuries on November 28, 2008, as alleged.

On appeal, counsel contends that the Office hearing representative's decision was contrary to fact and law.

FACTUAL HISTORY

On December 11, 2008 appellant, then a 39-year-old distribution process worker, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2008 he sustained a mid-back and neck strain when he twisted his back while lifting a box that weighed over 40 pounds

and placed it into a tri-wall container.[1] He stopped work on that date. On the CA-1 form the employing establishment stated that it received notice of the claimed injury on December 16, 2008. A September 12, 2008 hospital record advised that appellant sustained a thoracic myofascial strain.

By letter dated December 29, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the factual and medical evidence that he needed to submit.

The employing establishment controverted appellant's claim. In correspondence dated December 2 and 8, 2008, Ronald L. Smith, a safety specialist, stated that on November 28, 2008 appellant became upset and asked to go home after being assigned to work in a different area. Valarie Dickerson, a supervisor, sent appellant to Rodney Owens, a manager, because appellant did not have any leave. Mr. Owens denied appellant's request for leave and advised him to return to work. Mr. Smith stated that after lunch, appellant claimed that he sustained a recurrence of a June 2008 employment-related injury and a new right shoulder injury while processing a package. Appellant rated his back pain as 12 on a scale of 1 to 10. He requested permission to seek medical treatment at a hospital and assignment of a claim number to his injury. After appellant completed a CA-1 form, he moved around in a chair, leaned forward and stood up once without showing any signs of being in pain. On December 2, 2008 he advised the employing establishment that he could not obtain a medical appointment until December 24, 2008. Mr. Smith did not prepare a mishap report regarding appellant's claimed incident because he did not believe an injury had occurred.

In correspondence dated December 3 and 16, 2008, Ms. Dickerson stated that on November 28, 2008 appellant related that he experienced pain that fell within the range of 7 to 8. She assigned him to the Fed-Ex Air line where he would lift jiffy bags rather than boxes within his 20-pound restriction. Prior to lunch, appellant informed Ms. Dickerson that he experienced further pain after lifting a box. He requested permission to leave work. Ms. Dickerson referred appellant to Mr. Owens because she could not approve leave without pay. She did not witness the claimed lifting incident and was unable to determine the weight of any box. Ms. Dickerson stated that, although appellant's injury could have constituted a recurrence, she gave him a CA-1 form and instructed an employee to take him to a hospital.

In a November 28, 2008 statement, appellant contended that he experienced pain as a result of lifting a 20-pound box into a tri-wall container. He rated his pain as 10 out of 10. Appellant noted that he tried to continue work but, he was unable to do so due to pain.

In a November 28, 2008 work restriction evaluation, Pam Darden, a nurse, advised that appellant could work eight hours a day with restrictions. In a January 5, 2009 medical report, a physician whose signature is illegible, advised that appellant sustained a thoracic herniated nucleus pulposus at T8 and T9. Appellant was found unable to work since December 31, 2008.

[1] Prior to the instant claim, appellant filed a CA-1 form, File No. xxxxxx822, for a back injury he sustained on June 6, 2008. The Office accepted his claim for thoracic strain.

In a decision dated February 2, 2009, the Office denied appellant's claim, finding that the factual evidence failed to establish that the November 28, 2008 incident occurred as alleged. It also found that the medical evidence failed to establish that he sustained a back injury causally related to the claimed incident.

In a February 18, 2009 letter, appellant, through counsel, requested a telephonic hearing with an Office hearing representative. In hospital reports dated November 28, 2008, Ms. Darden and other registered nurses addressed his back pain and medications. The history reflects that after appellant moved a box at work on November 28, 2008 he had trouble moving his back. Ms. Darden listed her findings on physical examination and diagnosed acute thoracic myofascial strain and chronic low back pain.

By decision dated September 15, 2009, an Office hearing representative affirmed the February 2, 2009 decision. She found that the factual evidence was insufficient to establish that the November 28, 2008 incident occurred as alleged. The hearing representative reviewed the medical evidence in File Nos. xxxxxx390 and xxxxxx822 and found Ms. Darden's November 28, 2008 report in File No. xxxxxx390 and a December 24, 2008 report from Dr. Allen Kao, an attending physiatrist, and Dr. William J. Rolle, Jr., an attending Board-certified physiatrist in File No. xxxxxx822 addressed appellant's cervical condition.[2] This evidence was insufficient to establish that he sustained a back or neck injury causally related to the November 28, 2008 incident.[3]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing 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 filed within 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.[5] These are the essential elements of each

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[2] In the December 24, 2008 report, Dr. Kao and Dr. Rolle noted that they were performing a follow-up evaluation of appellant regarding his June 6, 2008 employment injury. During his last visit in November 2008, appellant related to the physicians that his pain had improved which enabled him to return to light-duty work. Dr. Kao and Dr. Rolle obtained a history that on November 28, 2008 appellant reinjured himself while trying to lift an object weighing approximately 40 pounds with a twisting motion of his thoracic area while performing his light-duty work duties. The physicians listed essentially normal findings on physical examination with tenderness to palpation over the cervical paraspinal muscles bilaterally and thoracic paraspinal muscles on the right side at the middle and lower thoracic levels. Dr. Kao and Dr. Rolle opined that appellant likely sustained a thoracic and cervical sprain/strain following a work-related injury.

[3] The remaining medical evidence reviewed by the Office in File No. xxxxxx822 is relevant to appellant's accepted thoracic condition.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.[6]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether fact of injury is established. An employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[7] The employee must also submit medical evidence to establish that the employment incident caused a personal injury.[8] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[9]

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.[10] 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.[11] An employee has not met his or 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.[12] 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.[13] 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.[14]

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[6] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 5.

[7] *Delphyne L. Glover*, 51 ECAB 146 (1999).

[8] *Donna A. Lietz*, 57 ECAB 203 (2005); *Alvin V. Gadd*, 57 ECAB 172 (2005); *David Apgar*, 57 ECAB 137 (2005).

[9] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[10] *See Louise F. Garnett*, 47 ECAB 639 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[11] *See Betty J. Smith*, 54 ECAB 174 (2002).

[12] *Id.*

[13] *Linda S. Christian*, 46 ECAB 598 (1995).

[14] *Gregory J. Reser*, 57 ECAB 277 (2005).

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[15] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[16] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[17]

ANALYSIS

Appellant alleged that he sustained back injuries in the performance of duty on November 28, 2008. The Board finds that he established that the employment incident occurred on November 28, 2008, as alleged.

The Board finds that there are no such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that he experienced the lifting incident on November 28, 2008. Appellant consistently claimed that he sustained injury on November 28, 2008 while lifting a box at work. He received medical treatment contemporaneous to the November 28, 2008 incident and related a history of injury to health care providers consistent with his claim. On November 28, 2008 Ms. Darden, a nurse, recorded that appellant experienced trouble with moving his back after moving a box at work on that date. She diagnosed an acute thoracic myofascial strain and chronic low back pain. The December 24, 2008 report from Dr. Kao and Dr. Rolle recorded a history that on November 28, 2008 appellant reinjured himself while lifting a 40-pound object. The physicians opined that he likely sustained a work-related thoracic and cervical sprain/strain. Although Ms. Dickerson contended that appellant did not sustain the November 28, 2008 lifting incident, she acknowledged that he reported the incident to her on the date of injury. Mr. Smith contended that the lifting incident did not occur as appellant wished to go home after being assigned to work in a different area and did not exhibit any signs of pain. This evidence is not sufficient to establish that the incident did not occur as alleged.

The Board finds that the reports from Ms. Darden, Dr. Kao and Dr. Rolle provide a consistent history of incident and appellant received medical treatment for his back contemporaneous with the November 28, 2008 incident. Accordingly, the Board finds that the evidence supports that the November 28, 2008 incident occurred as alleged.[18]

The Board finds, however, that appellant did not submit sufficient medical evidence to establish that he sustained a back injury due to the accepted November 28, 2008 employment incident. Ms. Darden is a nurse practitioner. A nurse practitioner is not a physician as defined

[15] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

[16] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[17] *Charles E. Evans*, 48 ECAB 692 (1997).

[18] *Louise F. Garnett*, 47 ECAB 639, 643-44 (1996); *Constance G. Patterson*, 41 ECAB 206 (1989); *Julie B. Hawkins*, 38 ECAB 393 (1987).

under the Act.[19] Registered nurses, licensed practical nurses, physician's assistants and physical therapists are not "physicians" as defined under the Act and their opinions are of no probative medical value. The nurse reports of record are not sufficient to establish appellant's claim.[20]

The December 24, 2008 report from Dr. Kao and Dr. Rolle described the November 28, 2008 employment incident and found that appellant "likely" sustained a work-related thoracic and cervical sprain/strain. The physicians did not provide a firm diagnosis regarding his thoracic and cervical conditions. Moreover, Dr. Kao and Dr. Rolle did not provide medical rationale explaining how these conditions were caused by the November 28, 2008 employment incident.[21] The opinion expressed is speculative, at best. The Board finds that this evidence is of diminished probative value.

A September 12, 2008 hospital record found that appellant sustained a thoracic myofascial strain; however, it is not relevant in establishing causal relation as it predates the November 28, 2008 employment incident.

The Board finds that there is insufficient rationalized medical evidence to establish that appellant sustained a back injury causally related to the accepted November 28, 2008 employment incident. Appellant did not meet his burden of proof. For this reason, the Board finds no error of fact or law as argued on appeal. The decisions below will be modified to reflect that appellant established the November 28, 2008 lifting incident.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a back injury on November 28, 2008, as alleged.

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[19] *See* 5 U.S.C. § 8101(2) which provides: "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law;" *see also Roy L. Humphrey*, 57 ECAB 238 (2005); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

[20] *Id.*

[21] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 22, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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