United States Department of Labor
Employees' Compensation Appeals Board

R.H. Appellant	)	
and	)	**Docket No. 06-1702**
	)	**Issued: November 20, 2006**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL TRANSFER CENTER, Oklahoma City, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2006 appellant filed a timely appeal of an August 30, 2005 merit decision of the Office of Workers' Compensation Programs finding that he did not sustain an injury in the performance of duty and a June 13, 2006 nonmerit decision finding that he abandoned his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a back injury in the performance of duty on August 9, 2004, as alleged; and (2) whether the Office properly determined that he abandoned his request for a hearing.

FACTUAL HISTORY

On August 23, 2004 appellant, then a 39-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2004 he hurt his lower back as he bent over to retrieve a restraint box. He stated that, when he grabbed it and pulled it his way, he felt something pull in his lower back. On appellant's claim form, Robert N. Larrt, an employing establishment lieutenant, stated that appellant's injury was sustained in the performance of duty and that his knowledge of the facts of the injury was in agreement with appellant's statement of injury.

In a June 17, 2005 memorandum, appellant further described the August 9, 2004 incident. Upon arrival by bus at the employing establishment's prison in Beaumont, Texas, he pulled out a box of restraints that weighed about 125 pounds and felt something pull in his lower back. He reported the injury to his supervisor and submitted a CA-1 form to the safety office. Walt Correa, an employing establishment safety manager, asked appellant whether he needed medical treatment and appellant declined because he believed he just pulled a muscle. Mr. Correa advised him to file the claim in case he needed medical attention. After his back condition did not improve, he went to see a doctor on February 14, 2005. He noted that he no longer worked at the employing establishment facility in Oklahoma City, Oklahoma and that his new duty station was in Hazelton, West Virginia.

By letter dated July 27, 2005, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the medical evidence he needed to submit to support his claim of injury.

Appellant submitted an April 26, 2005 medical report from Dr. Julian E. Bailes, a Board-certified neurosurgeon. He obtained a history of occasional sharp pain radiating from appellant's lower back to the left lateral leg with paresthesias of the whole left foot. Dr. Bailes diagnosed left-sided L4-5 herniated nucleus pulposus and recommended a microlumbar discectomy upon authorization from the Office. In a June 13, 2005 report, Dr. Bailes noted appellant's complaints of low back and left leg pain. He reported essentially normal findings on physical examination and diagnosed a herniated nucleus pulposus at L4-5 left.

Hospital records indicated that appellant was evaluated on February 14, March 3, 8, 11 and 22, 2005. He was referred to Dr. Bailes for an appointment on April 4, 2005 to evaluate magnetic resonance imaging (MRI) scan results of the lumbar spine. The March 8, 2005 MRI scan of appellant's lumbar spine demonstrated a broad-based left paramedian lateral herniated nucleus pulposus at L4-5. Appellant submitted prescription notes from physical therapy and medication for his back condition.

By decision dated August 30, 2005, the Office denied appellant's claim on the grounds that he did not establish that the claimed employment incident occurred at the time, place and in the manner alleged. The decision was mailed to him at 403 Teakwood Avenue, Yukon, OK 73099.

In an August 23, 2005 memorandum, received by the Office on August 30, 2005 appellant reiterated his prior description of the August 9, 2004 incident.

On October 5, 2005 appellant requested an oral hearing before an Office hearing representative. He contended that he received the Office's August 30, 2005 decision on September 14, 2005 as it was mailed to an incorrect address. Appellant indicated that his address was 14 Kylie Street, Reedsville, WV 26547.

By letter dated November 7, 2005, the Office's Branch of Hearings and Review acknowledged receipt of appellant's hearing request. This letter was addressed to 403 Teakwood Avenue, Yukon, OK 73099. On April 12, 2006 an Office hearing representative wrote appellant to advise him that a hearing was scheduled to take place in Pittsburgh, Pennsylvania at 11:15 a.m. on May 24, 2006. The notice was addressed to 14 Kylie Street, Reedsville, WV 26547-0000. Appellant did not appear at the hearing or contact the Office to explain his failure to appear.

By decision dated June 13, 2006, the Office found that appellant abandoned his request for a hearing. It noted that a hearing had been scheduled for May 24, 2006, appellant was properly notified of the hearing but failed to appear without explanation. The Office mailed the June 13, 2006 decision to appellant at 14 Kylie Street, Reedsville, WV 26547-0000.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 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 compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3] Establishing that a federal employee has sustained a traumatic injury in the performance of duty involves two components. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit evidence, in the form of medical evidence to establish that the employment incident caused a personal injury.[5] The term injury as defined by the Act, refers to some physical or mental

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[4] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[5] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

condition caused by either trauma or by continued or repeated exposure to or contact with, certain factors, elements or conditions.[6]

An employee who claims benefits under the Act 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.[7] 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] An employee has not met his or her burden of proof of 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.[9] 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.[10] However, 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.[11]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a back injury in the performance of duty on August 9, 2004. The Board finds that he established that the employment incident occurred at the time, place and in the manner alleged.

The Board finds that there are not such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that he experienced an employment incident on August 9, 2004. He consistently claimed that he sustained a back injury on August 9, 2004 when retrieving a box of restraints while working. Appellant promptly reported the incident. Mr. Correa, an employing establishment safety manager, asked him whether he required medical treatment. Appellant refused treatment due to a belief that he only pulled a muscle. Mr. Correa advised him that he could file a claim in case he needed medical attention. Although appellant continued to work and delayed seeking treatment for several months, he explained that he believed that he only pulled a muscle in his back and did not initially feel that medical care was necessary. The employing establishment did not controvert appellant's claim. Mr. Larrt, an

[6] *Elaine Pendleton*, *supra* note 2; 20 C.F.R. § 10.5(a)(14).

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

[8] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[9] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[10] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[11] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

employing establishment supervisor, stated on appellant's CA-1 form that his knowledge of the facts of the injury was in agreement with appellant's statement.

Based on the statements of appellant, Mr. Correa and Mr. Larrt, the Board finds that the employment incident in the form of pulling out a box of restraints on August 9, 2004 did in fact occur.

The Board, however, finds that appellant did not submit sufficient medical evidence to establish that he sustained a back injury due to the August 9, 2004 employment incident.

Dr. Bailes' April 26 and June 13, 2005 reports stated that appellant sustained a left-sided herniated nucleus pulposus at L4-5. His reports, however, failed to address whether appellant's diagnosed back condition was caused by the August 9, 2004 employment incident. The Board finds that this evidence is insufficient to establish his claim. Dr. Bailes failed to address how the herniated disc first diagnosed in 2005 was caused or contributed to by the accepted employment incident.

Hospital records covering intermittent dates from February 14 through March 22, 2005 and prescription notes regarding the treatment of appellant's back condition fail to provide a diagnosis or to relate the diagnosed condition to the accepted employment incident. This evidence is insufficient to establish appellant's claim.

Appellant has not submitted rationalized medical evidence establishing that he sustained a back injury in the performance of duty on August 9, 2004. He has failed to meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

"e. Abandonment of Hearing Requests.

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
>
> "Under these circumstances, Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district Office. In cases involving prerecoupment hearings, the Branch of Hearings Review will also issue a final decision on the

overpayment, based on the available evidence, before returning the case to the [district Office]."[12]

ANALYSIS -- ISSUE 2

On appeal, appellant contends that he did not receive prior notification that a hearing had been scheduled for May 24, 2006. The record shows that the Office mailed appropriate notice to him at his last known address. In an October 5, 2005 hearing request, appellant listed his address as 14 Kylie Street, Reedsville, WV. The record reflects that the Branch and Hearings and Review mailed a November 7, 2005 acknowledgement of appellant's hearing request to 403 Teakwood Avenue, Yukon, OK. However, it mailed the April 12, 2006 notice of hearing to 14 Kylie Street, Reedsville, WV. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office procedure manual, the Board finds that the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.[13]

CONCLUSION

The Board finds that, although appellant has established that the August 9, 2004 employment incident occurred as alleged, he has failed to establish that he sustained a back injury in the performance of duty on August 9, 2004. The Board further finds that the Office properly determined that he abandoned his request for a hearing.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[13] *See Claudia J. Whitten*, 52 ECAB 483, 485 (2001).

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed as modified. The August 30, 2005 decision of the Office is affirmed.

Issued: November 20, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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