United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 08-701**
	)	**Issued: July 18, 2008**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, OREGON NATIONAL GUARD, Klamath Falls, OR, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2008 appellant filed a timely appeal from the February 22, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim, and an October 23, 2007 decision finding that he had abandoned his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on August 23, 2006, as alleged; and (2) whether the Office properly determined that appellant abandoned his request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

On September 22, 2006 appellant, then a 26-year-old aircraft engine mechanic, filed a traumatic injury claim alleging that on August 23, 2006 he sustained a ruptured lower disc when he made a "sharp quick turn to the left." His claim included a witness statement by Shane Garlock who noted, "[Appellant] took a sharp quick turn to the left and barely made it through the door. Later going home from the pain." On the claim form, a superintendent for the employing establishment indicated that the filing of the claim was delayed because the first line supervisor was on leave. However, she was immediately notified of the injury.

Appellant submitted physical therapy notes which indicated that he had surgery on September 25, 2006. He also submitted progress notes from Dr. Karl C. Wenner, a Board-certified orthopedic surgeon, dated from October 6, 2006 to January 16, 2007.

By letter dated January 23, 2007, the Office informed appellant that his claim was originally treated as a simple, uncontroverted case with minimal loss from work and that these cases were administratively handled to allow medical payments up to $1,500.00. However, as the medical bills exceeded $1,500.00, the merits of the claim would be considered. Appellant was asked to submit further evidence and answer certain questions with regard to the alleged incident. He was requested to explain, *inter alia*, what work he was performing when the injury occurred, how the injury occurred, the immediate effects of the injury and what he did immediately thereafter, whether he sustained the injury on duty and the reason he delayed seeking medical treatment.

In a September 20, 2006 report, Dr. Wenner indicated that appellant was seen for complaints of pain. Appellant told him that he had a long history of back pain but that it became more significant about six to eight weeks prior with pain radiating down his right leg. He noted that it was associated with some weight lifting and sit-ups and that he had experienced pain when he knocked down a bee's nest. Dr. Wenner listed his impression as very large disc herniation with significant radiculitis. He noted that appellant was unable to work. On September 25, 2006 Dr. Wenner performed a microdiscectomy with laminotomy at L5-S1 on the right and excision of disc material migrating to L4-5. He submitted additional progress. Appellant did not file any timely response with regard to the Office's queries as to how the alleged incident occurred.

By decision dated February 22, 2007, the Office denied appellant's claim for compensation, finding the evidence was insufficient to establish that the August 23, 2006 incident occurred as alleged.

On March 22, 2007 appellant requested an oral hearing. By letter dated August 20, 2007, the Office informed appellant that his hearing was scheduled for September 25, 2007 at the Federal Building in Medford, Oregon.

By decision dated October 23, 2007, the Office found that appellant failed to appear at the scheduled hearing and failed to contact it either prior to or subsequent to the scheduled hearing to explain his failure to appear. Accordingly, it found that appellant abandoned her request for a hearing.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act 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 the applicable time limitation 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.[1] 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.[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.[3] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[4] An alleged work incident 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 statement must be consistent with the surrounding facts and the circumstances and his subsequent course of action.[5] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[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] Although 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,[8] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[9] The second component is whether the employment incident

---

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

[2] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[3] *Elaine Pendleton*, *supra* note 1.

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[6] *Id*. at 255-56.

[7] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[8] *Robert A. Gregory*, 40 ECAB 478 (1989).

[9] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

caused a personal injury and generally this can be established only by medical evidence.[10] The medical opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish the August 23, 2006 incident, as alleged. Appellant alleged injury on August 23, 2006 when he made a "sharp quick turn to the left." This is a vague statement. Appellant did not describe what he was doing when he was injured or how the injury occurred. By letter dated January 23, 2007, the Office asked appellant to provide additional information with regard to how the alleged incident occurred. However he did not respond to the Office's query. The Board notes that appellant did not file a claim until September 22, 2006, one month after the alleged incident. Although an explanation is provided by the superintendent indicating that appellant's first line supervisor was on leave, this does not explain why there is no record of appellant seeking medical attention prior to September 20, 2007. Furthermore, the medical evidence of record does not support the August 23, 2006 incident. The September 20, 2006 report of Dr. Wenner does not mention an August 23, 2006 incident. Rather, Dr. Wenner obtained a history that appellant hurt himself while doing weight lifting and sit-ups six to eight weeks earlier, which preceded the date of the alleged incident. Furthermore, he indicated that appellant experienced back pain when he knocked down a bee's nest. These discrepancies cast serious doubt on appellant's claim that the August 23, 2006 incident occurred as alleged.[12] Appellant has failed to establish that the incident occurred as alleged. The Office properly denied appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

Under the Act and its implementing regulations, the claimant who has received a final adverse decision by the Office is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[13] Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date[14] The Office has the burden of proving that it mailed notice of a scheduled hearing to appellant.[15]

---

[10] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[11] *Louis T. Blair, Jr.*, 54 ECAB 306, 308.

[12] *James A. Fournier*, *supra* note 9.

[13] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[14] 20 C.F.R. § 10.617(b).

[15] *See Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office's procedure manual provides in relevant part:

> "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 schedule date of the hearing.
>
> "Under these circumstances, H&R [the Branch of Hearings and Review] will issue a formal decision finding that claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]…."[16]

ANALYSIS -- ISSUE 2

In finding that appellant abandoned his request for a hearing, the Office noted that a hearing had been scheduled in Medford, Oregon on September 25, 2007. He received written notification of the hearing 30 days in advance but failed to appear for the hearing.

The Board finds that the record contains no evidence that appellant requested postponement of the hearing. He failed to appear at the scheduled hearing and did not provide any notification for such failure within 10 days of the scheduled hearing. As this meets the criteria for abandonment as specified in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant abandoned his request for an oral hearing before an Office hearing representative.[17]

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury on August 23, 2006 as alleged. The Board further finds that the Office properly determined that appellant abandoned his request for a hearing.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). *See also Chris Wells,* 52 ECAB 445 (2001).

[17] Following the issuance of the Office's October 23, 2007 decision, appellant submitted additional evidence in the form of argument. However, the Board may not consider such evidence for the first time on appeal. In as much as this evidence was not considered by the Office, it cannot be considered on review by the Board. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 23 and February 22, 2007 are affirmed.

Issued: July 18, 2008
Washington, DC

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

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

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