United States Department of Labor
Employees' Compensation Appeals Board

V.M., Appellant	)	
	)	
and	)	**Docket No. 08-2304**
	)	**Issued: May 21, 2009**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Mather, CA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2008 appellant filed a timely appeal from an August 23, 2007 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim. 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 an injury on November 19, 2006 in the performance of duty.

FACTUAL HISTORY

On November 19, 2006 appellant, then a 48-year-old air traffic control specialist, filed a claim alleging that at 3:40 p.m. on that date he sustained a traumatic injury to the left side of his

neck, the lower left back and to an upper molar when the left arm rest of his chair dropped about six to eight inches.[1] He stopped work on November 19, 2006.

On December 15, 2006 the Office requested that appellant submit additional factual and medical information in support of his claim. In a statement dated December 20, 2006, he maintained that the Office was questioning his integrity.

In an authorization for examination and/or treatment (Form CA-16) dated November 20, 2006, a physician's assistant, John Littleton, diagnosed low back and cervical strain. He listed the history of injury as the left arm rest of a chair collapsing. In an undated form report received December 18, 2006, Mr. Littleton listed a history of injury as a chair collapsing under appellant and diagnosed low back pain with radiculopathy. He checked "yes" that the condition was due to an employment activity and found him disabled from November 20, 2006 to January 1, 2007.

In a November 22, 2006 form report, Dr. Richard Nakabayaski, a dentist, noted that a "chair gave way with a jolt" and resulted in a break of appellant's left upper molar. He diagnosed a broken cusp of the tooth and checked "yes" that the condition was caused or aggravated by the described employment activity.

On December 22, 2006 the Office noted that appellant's December 4, 2006 claim form contained a portion of a witness' statement. It requested that the employing establishment forward the complete statement. On December 29, 2006 the employing establishment provided a November 20, 2006 statement from Michael J. Lemon, who stated:

> "I was working as the [o]perations [s]upervisor, sitting approximately [four] feet from [appellant], facing the same direction. I heard the sound of the armrest on the chair he was using as it slid down to the bottom position. I looked in his direction. I noticed his hand on the armrest, his fingers at the control that allows the armrest to move. [Appellant] had a normal expression on his face. I raised my eyebrows as if surprised. [Appellant] looked at me, smiled and said 'I'm okay, I'm okay.' I picked up a [tele]phone, pushed a button (that would indicate that I [am] recording the statement) and said 'say that again.' [Appellant] again smiled and waved his hand and shook his head 'no.' I set down the [tele]phone, releasing the button and I said are you sure you [are] okay? [Appellant] assured me he was. He exhibited absolutely no symptoms of any pain, nor did he for the remainder of the time he was at the flight data position, (approximately [15] more minutes). [Appellant] said nothing to indicate that any injury had occurred whatsoever."

In a record of conversation dated November 19, 2006, Kelley Althouse, appellant's supervisor, related that appellant called her at 5:50 p.m. on that date and stated that the arm of his chair had "malfunctioned and dropped six to eight inches jarring his arm and his face breaking a molar." She noted that she had previously encountered him in the break room and he did not indicate that he was injured. Ms. Althouse provided him with a claim form (Form CA-1).

[1] The claim form listed the date of injury as November 18, 2006. Appellant subsequently clarified at the hearing that the date of his injury was November 19, 2006 rather than November 18, 2006.

In a statement dated December 14, 2006, Mr. Lemon again described the events of November 19, 2006. He noted that after he heard the armrest of the chair going to the bottom position he immediately turned to appellant, who was erect and smiling. Mr. Lemon sated, "The thought ran through my mind that he was, incredulously, going to say that what had just happened would result in a repeat of the chair incident a few weeks earlier." Instead, appellant said that he was "okay." Mr. Lemon related that, at 4:50 p.m. on November 19, 2006, he met appellant and he did not indicate that he was uncomfortable. At around 5:44 p.m. on that date appellant told Mr. Lemon that he thought that he chipped a tooth when the arm of the chair went down. He did not mention that his back or neck hurt.

In a report dated December 27, 2006, Dr. Herbert Getman, a general practitioner, discussed his treatment of appellant on November 20, 2006. He stated, "[Appellant] apparently went to sit in a chair and work and the armrest collapsed. This twisted his body with him falling to the side approximately 8 [to] 10 inches before he caught himself. He never fell completely to the floor. The wrenching action of the fall caused him to injure his back." Dr. Getman diagnosed an annular defect at L5-S1 probably due to his fall and the twisting action.

By letter dated January 8, 2007, the employing establishment controverted the claim, noting that appellant informed Mr. Lemon immediately after the incident that he was uninjured and that he did not report a broken tooth to Ms. Althouse when he initially spoke with her on November 19, 2006. The employing establishment asserted that a broken tooth "would be an immediately noticeable condition…."

By decision dated January 16, 2007, the Office denied appellant's claim on the grounds that he did not establish that the incident occurred at the time, place and in the manner alleged. It noted that appellant had filed a previous claim, assigned file number xxxxxx579 alleging that he sustained an injury on September 26, 2006 when the seat bottom of his chair malfunctioned when he was adjusting it and threw him forward. The Office found that he had not sufficiently responded to its initial development letter.

On January 23, 2007 appellant requested an oral hearing.[2] In a statement received January 31, 2007, he stated:

> "I was working the Flight Data position. Both of my elbows and forearm were resting on the arm rests of my chair facing forward. As I was turning to my left to answer someone's question I was evidently applying more pressure to the left arm rest while at the same time I picked up my right hand and placed it on the right arm rest to complete my turn. As I was turning to the left the left arm rest broke and dropped approximately 8-12 inches with what felt like my entire weight falling over and suddenly snapping to an abrupt stop. The left armrest would not go back up after it broke."

[2] In a report dated December 27, 2006, received by the Office on January 31, 2007, Dr. Getman, again listed the history of injury as an armrest collapsing, causing appellant to fall to the left side about 8 to 10 inches. He diagnosed a tear at L5-S1 probably due to the sudden fall.

At the telephonic hearing, held on June 11, 2007, appellant's attorney clarified that the date of injury was actually November 19, 2006, as shown by the statements of both appellant and the employing establishment. Appellant related that he had one prior injury at work when a chair that he was sitting on malfunctioned on September 26, 2006. He returned to work on November 11, 2006. On November 19, 2006 appellant experienced a second injury when the left armrest of his chair suddenly collapsed about 8 to 10 inches. He felt an immediate burning pain in his lower back. Appellant related that he could not believe that it had happened and felt embarrassed by the incident. Mr. Lemon asked him to state that he was uninjured into a recording device. Appellant told a coworker, Craig Zaias, that he had back pain and that it was "just unbelievable that this was happening again…." He did not have pain in his mouth at the time of the incident but did feel "jaggedness" in his mouth. During a break appellant asked Tom Gallagher to check his tooth and Mr. Gallagher stated that it looked like he had a chipped tooth. He told Mr. Lemon that he believed that he had broken a tooth about 40 minutes after the event. Appellant sought medical treatment the following day. He did not recall telling Mr. Lemon that he was okay after the incident. Appellant stated, "I don't recall saying anything to that effect at all. I just couldn't believe it had happened. I mean, I had just gotten back to work, it seemed like a week, maybe a week and a half. I was in my second week back to work when this happened. And the fact that they knew the chair was in that area just -- it was a lot of emotional things to think about." He denied that his hand was on the controls of the left chair. Appellant stated that he was hanging on to the armrest on the left trying to stabilize himself. He did not immediately tell Mr. Lemon about the pain in his back because he was hoping that it would subside and because he could not believe that it had happened again after he just got back to work. Appellant denied speaking with Ms. Althouse in the break room.

In a report dated May 28, 2007, received by the Office on June 14, 2007, Dr. Nakabayaski provided a history of injury as the arm of a chair giving way and bringing appellant's teeth together such that he broke a tooth.

On July 2, 2007 Mr. Lemon again related that appellant did not mention that he was in pain after the injury and continued working for another hour and a half. Appellant also did not mention any pain or injury to a body part other than his tooth on the date of the alleged incident.

On July 6, 2007 appellant provided an affidavit stating that on November 23, 2006 John E. Bronzo informed him that he had inspected the chair he used on November 19, 2006 and that "the left armrest was indeed broken and locked in the down position." Michael Witte, a coworker, noted that there were numerous broken chairs in the control room.

On July 9, 2007 Donald H. Kirby, a manager, related that appellant's chair was not broken but that if the "armrest is not properly engaged the armrest will release to the bottom position when very little pressure is applied. If the armrest was at the highest height setting and released completely, the armrest would drop [three] to [four] inches." On July 10, 2007 Dale Durbin, a program consultant, related that Mr. Lemon's version of the events on November 19, 2006 was the more plausible and maintained that the medical evidence provided a varied history of injury.

In a statement dated July 24, 2007, Mr. Gallagher related that on November 19, 2007 appellant asked him to look at his tooth. He stated, "I looked at his mouth and it looked as if the tooth was wrong."

On July 25, 2007 appellant's attorney pointed out discrepancies in Mr. Lemon's versions of events and maintained that he provided a consistent history of injury to his physicians.

By decision dated August 23, 2007, the hearing representative affirmed the January 16, 2007 decision after finding that appellant did not establish that the event occurred at the time, place and in the manner alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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; 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, 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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[7] 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.[8]

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

[3] 5 U.S.C. §§ 8101-8193.

[4] *Anthony P. Silva*, 55 ECAB 179 (2003).

[5] *See Ellen L. Noble*, 55 ECAB 530 (2004).

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

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

[8] *Id.*

actually experienced the employment incident which is alleged to have occurred.[9] 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.[10] 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.[11] 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.[12] 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.[13]

ANALYSIS

The Office denied appellant's claim based on its finding that he did not establish the occurrence of the November 19, 2006 work incident. The employing establishment controverted the claim based on Mr. Lemon's assertion that appellant told him that he was uninjured after the incident and because he did not immediately report his broken tooth to his supervisor. The employing establishment also noted that the medical evidence contained discrepancies in the history of injury. The Board finds, however, that the evidence is sufficient to establish that appellant experienced the incident at the time, place and in the manner alleged. Appellant related that he injured his left neck, upper back and an upper molar when the left armrest of his chair suddenly dropped. He provided a statement from a witness, Mr. Lemon, who confirmed that he heard appellant's arm rest drop to the bottom position. Mr. Lemon related that appellant told him that he was "okay" after the armrest dropped. Appellant maintained at the hearing that he did not recall telling Mr. Lemon that he was "okay" and explained that he was embarrassed and stunned by the incident. The mere fact that there is some question about what he said immediately after the armrest dropped would not create such an inconsistency as to cast doubt on the validity of the claim.[14] Appellant informed Mr. Lemon later that day that he believed that he had broken his tooth from the sudden drop of the armrest. He also related the incident to his supervisor on that date and filed a claim for a traumatic injury indicating that he had injured his neck, the left lower back and an upper tooth. While appellant did not immediately notify his supervisor of the incident, this does not render the claim factually deficient. He sought medical treatment for his back the following day and for his tooth on November 22, 2006. The medical

[9] *See Louise F. Garnett*, 47 ECAB 639 (1996).

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

[11] *Id*.

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

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

[14] *See generally Betty J. Smith*, *supra* note 10.

evidence contemporaneous to the event contains a generally consistent history of injury as the left armrest of his chair collapsing or his chair giving way "with a jolt."

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 and persuasive evidence.[15] Not only is there no strong evidence contradicting appellant's statement as to how the incident occurred but there is considerable evidence supporting the statement. Thus, under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence and there are no inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. Consequently, appellant has established the occurrence of the November 19, 2006 employment incident.[16]

As the Office denied appellant's claim on the grounds that he did not establish the occurrence of an employment incident on November 19, 2006, it did not consider the medical evidence. The case will be remanded to the Office for evaluation of the medical evidence to determine whether appellant sustained a medical condition or disability due to the accepted November 19, 2006 work incident. After such development as it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of whether appellant sustained an injury on November 19, 2006 in the performance of duty.

[15] *Allen C. Hundley*, 53 ECAB 551 (2002).

[16] Mr. Kirby, a manager with the employing establishment, indicated that it took little pressure to release the armrest to the bottom if not correctly engaged. He further indicated that the armrest would fall three to four inches. Mr. Kirby's statement does not establish that appellant's armrest did not suddenly fall as he alleged but instead supports that it did not fall as far as he described.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2007 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 21, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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