United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 10-2054**
	)	**Issued: July 8, 2011**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Philadelphia, 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:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 10, 2010 appellant filed a timely appeal from the July 7, 2010 merit decision of the Office of Workers' Compensation Programs that found he did not sustain an injury in the performance of duty. Pursuant to the Federal Employees' Compensation Act[1] and 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 met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on November 1, 2009.

FACTUAL HISTORY

On November 4, 2009 appellant, then a 39-year-old correctional officer, filed a traumatic injury claim alleging that on November 1, 2009 he injured his right hand and arm while transferring an inmate for psychiatric observation. He was maintaining control of the inmate

[1] 5 U.S.C. § 8101 *et seq.*

while transferring him to another unit. Appellant stated that he had pain in the right arm and hand with swelling. He did not stop work. Appellant's supervisor, Lisa Morgan, stated that appellant never notified her of the medical restriction to his right hand due to a previous surgery.

In a November 5, 2009 telephone call memorandum, Phil Nguyen, a safety manager at the employing establishment, controverted the claim. He advised that appellant had a prior claim for a May 23, 2009 injury which was denied. Mr. Nguyen explained that appellant ran out of leave as the continuation of pay utilized in the prior claim had to be converted to leave. Appellant was unable to take a planned two-week vacation, beginning November 2, 2009, after running out of leave. He returned to full duties but received a light-duty restriction from his attending physician advising against using the right arm on October 26, 2009. Appellant did not inform his supervisor of the restriction before he claimed a new injury on November 1, 2009. Mr. Nguyen noted that appellant weighed almost 100 pounds more than the inmate and did not appear to be injured in a videotape of the incident.

On November 28, 2009 appellant stated that on November 1, 2009 he received a telephone call from the control center advising him that the operation lieutenant, Ms. Morgan, requested that he assist four other correctional officers with moving an inmate to the special housing unit. He noted that the inmate was agitated and disoriented, refused to walk, and had to be carried to the elevator. When appellant got to the elevator with the inmate, Duty Officer David Garraway questioned him regarding why he was not helping, and he responded that his hand "was still messed up." Mr. Garraway responded "you'll be ok ... get in there and help out!" Appellant helped to carry the inmate out of the elevator to the special housing and was directed to remain in the cell with the inmate while the other officers put on their riot gear. He was directed to place restraints on the inmate and afterwards noticed pain and swelling in his right hand and arm. Appellant sought treatment in the health services department. He stated that the note for light duty pertaining to his prior claim was on file.

The employer provided additional statements. In a November 1, 2009 statement, J. Opperman, a lieutenant, confirmed that on that date an inmate with erratic behavior was transferred to the health services building. He confirmed that appellant assisted with restraining and moving the inmate without incident. Mr. Opperman noted that appellant did not state he was on light duty because of a prior hand injury.

In a November 2, 2009 statement, Isabel Pena-Silva, a nurse with the employing establishment, noted that on November 1, 2009 she entered the health services building and a few officers were in the waiting room with an inmate. She advised that two of them were standing up and grabbed an inmate that was sitting on a chair. Ms. Pena-Silva described the inmate as restless and disoriented, trying to stand up frequently and the two officers had him under control with arms and shoulders grabbed. She confirmed that one of the officers was appellant.

In a November 2, 2009 statement, Mr. Garraway noted that on November 1, 2009 an inmate was being moved and became combative. Appellant and Lisa Weihe, a correctional officer, were ordered to assist with controlling the inmate. Mr. Garraway noted that Ms. Weihe struggled to hold the inmate and he ordered appellant to switch places in order to gain control over the inmate. Once the elevator doors opened, he instructed the special housing officers to

videotape the incident. Mr. Garraway noted that appellant stayed with the inmate while the other officers left to obtain the camera. Appellant had both hands on the inmate's back to hold him down. Mr. Garraway was unaware that appellant had a light-duty restriction.

In a November 8, 2009 statement, Ms. Weihe confirmed that on November 1, 2009 appellant assisted with moving an unruly inmate. Appellant restrained the inmate by holding the man with his arms. Ms. Weihe indicated that appellant did not inform anyone that he was on light duty.

In a November 13, 2009 memorandum, Mr. Nguyen noted that appellant provided a medical restriction form due to a nonwork injury on October 28, 2009. He could perform light-duty work but could not perform forceful gripping, or repetitive motion, with his right hand. On November 1, 2009 appellant failed to notify others of his limitation and placed himself in a position to aggravate his preexisting condition. The videotape revealed that he used his left hand to hold the inmate's leg without difficulty. Later, appellant was seen holding the inmate on the bed with both hands and checking his leg restraints without difficulty. Mr. Nguyen advised that "at no time was there any evidence of injury or pain expressed on the video." He also noted that there was no evidence of appellant being kicked. Mr. Nguyen stated that the employer was not aware of appellant's condition.

In a November 16, 2009 statement, Daniel Stafford, a correctional officer, noted that on November 1, 2009 an inmate was engaging in bizarre behavior that required he be moved to the health unit. He confirmed that appellant responded to the area and held the inmate by his arm while the inmate sat in a chair. Mr. Stafford did not hear appellant inform his supervisors that he was on light duty.

The Office received discharge instructions, attending physician's reports dated July 9 and November 2, 2009, a hospital record, a right forearm x-ray, and notes dated November 1, 2009 and return to work slips. The treatment record noted appellant's complaint of right arm and hand pain after he grabbed an inmate to maintain control while transporting the inmate. Appellant had limited right hand mobility and tenderness. An ace bandage was applied and he was referred to his personal physician. In a November 1, 2009 emergency room report, Dr. Ronald Hall, Board-certified in emergency medicine, advised that appellant was restraining a prisoner for approximately 40 minutes and subsequently experienced tingling and pain in the forearm. A fourth finger deformity and swelling were noted with decreased sensation. The November 2, 2009 report of Dr. John Taras, a Board-certified orthopedic surgeon, stated that appellant's right hand was kicked and further injured while restraining and transporting an inmate. Dr. Taras diagnosed a right hand contusion.

By decision dated December 21, 2009, the Office denied appellant's claim. It accepted that appellant was involved in restraining an inmate on November 1, 2009; but the medical evidence was not sufficient to establish causal relation.

On December 28, 2009 appellant's representative requested a telephonic hearing, which was held on April 15, 2010. Appellant noted that he was left alone with the inmate while the other officers went to suit up in riot gear. He did not realize until later that he had been injured

and immediately went to the nurse. Appellant informed Ms. Morgan that he needed emergency assistance. He also asserted that Ms. Morgan saw the inmate kick his hand.

Appellant submitted treatment notes from Dr. Taras who recommended continued light duty for the right hand. In a January 4, 2010 treatment note, Dr. Taras advised that appellant forcefully restrained an inmate and was kicked in the right hand. He diagnosed a rotator malalignment of right fifth digit and rotation of the fifth finger. Dr. Taras opined that appellant's condition was a result of the November 1, 2009 incident as it was not noted on prior evaluations. He indicated that surgery was necessary. Dr. Taras stated that, while appellant had a preexisting condition, the additional injury to his hand on November 1, 2009 necessitated surgery.

In an April 28, 2010 statement, Ms. Morgan noted that on November 1, 2009 appellant used his left hand to escort the inmate to the health services building. The inmate did not appear combative or aggressive and she did not see him kick, strike or otherwise touch appellant during the escort or after being placed in the special housing unit. Ms. Morgan denied that appellant asked to be seen by the medical staff or had informed her that the inmate kicked his right hand.

On April 29, 2010 the employing establishment provided additional comments that disputed the claim. Mr. Nguyen referred to the video evidence, stating that it did not support that appellant sustained an injury. The videotapes revealed that appellant had his left hand on the inmate's arm and back and held him down in the cell. Additionally, he placed restraints around the inmate's waist and ankles.

By decision dated July 7, 2010, the Office hearing representative affirmed the December 21, 2009 decision. She modified the prior decision to find that the evidence did not establish that a specific incident or exposure occurred at the time, place and in the manner alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 timely filed within the applicable time limitation period of the Act[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyet*, 41 ECAB 992 (1990).

statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[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 cast doubt on an employee's statements in determining whether he or she has established a *prima facie* case.[7] 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.[8]

When an employee claims that he sustained an injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must establish that such event, incident or exposure caused an injury.[9] Once an employee establishes that he sustained an injury in the performance of duty, he has the burden of proof to establish that, any subsequent medical condition or disability for work, for which he claims compensation, is causally related to the accepted injury.[10]

ANALYSIS

The Office denied appellant's claim finding that he did not establish fact of injury and that the November 1, 2009 incident did not happen at the time, place and in the manner alleged. It found that there were inconsistencies in the various statements of record and the medical reports. The Board finds that the evidence of record is sufficient to establish that the November 1, 2009 incident occurred as alleged. Appellant alleged that he sustained an injury to his right hand while assisting with the transfer of a patient inmate. He noted that he did not realize he was injured until later. The Board notes that the record contains various statements. They include that appellant did not notify his supervisor of his medical restriction and that he had run out of leave. However, the employing establishment's statements are contradictory. Mr. Nguyen, the safety manager, confirmed receipt of the light-duty restriction on October 28, 2009. This contradicts statements from Mr. Opperman and Ms. Morgan that they were unaware of the light-duty restrictions for his preexisting injury. The Board notes that appellant's preexisting injury or the fact that he was on light duty does not preclude a finding that the November 1, 2009 incident occurred as alleged.[11] Mr. Nguyen indicated that the videotaped evidence did not reveal that appellant was kicked; the Board notes that appellant alleged that he sustained an injury to his right hand while restraining the inmate. While Ms. Morgan indicated that she did not see the inmate kick or hit appellant; she also noted that

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[6] *See Mary Jo Coppolino,* 43 ECAB 551 (2002); *Early David Seal,* 49 ECAB 152 (1997).

[7] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[8] *Thelma S. Buffington*, 34 ECAB 104 (1982).

[9] *See generally John J. Carlone,* 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5 (q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams,* 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

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

[11] *See Willie J. Clements,* 43 ECAB 244 (1991).

videotaping did not occur until the elevator door opened.[12] Furthermore, she confirmed that appellant was left alone with the inmate, while the other officers obtained riot gear. Additionally, Ms. Morgan confirmed that the inmate was combative. The fact that she did not see the inmate, who was restless and disoriented, does not establish that the inmate did not strike appellant. Furthermore, the nurse confirmed that the inmate was restless and disoriented, trying to stand up frequently and that appellant and another officer were trying to keep him under control. Two officers were needed to restrain him and that this was accomplished by grabbing his arms and shoulders. The record also reflects that appellant promptly went to the employing establishment health unit and then to an emergency room on November 1, 2009. The emergency room records noted that appellant was restraining a prisoner and subsequently experienced pain and tingling in the forearm. The evidence does not contain such inconsistencies as to cast doubt on the validity of appellant's claim.

The Board finds that the evidence of record establishes that the November 1, 2009 incident, restraining the inmate, occurred at the time, place and in the manner alleged. The inconsistencies as noted by the Office are insufficient to deny that the November 1, 2009 incident occurred as alleged.[13] The case will be returned to the Office for further development of the medical evidence and an appropriate decision regarding whether the November 1, 2009 incident caused an injury.

CONCLUSION

The Board finds that the November 1, 2009 incident occurred as alleged. The case is remanded to the Office for further development.

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[12] Although the record contains references to videotapes and the hearing representative apparently viewed these, no such tapes are in the record before the Board.

[13] *See M.H.,* 59 ECAB 461 (2008): *Bill H. Harris,* 41 ECAB 216 (1989).

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded to the Office for further action in conformance with this decision.

Issued: July 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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