United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 10-1591**
	)	**Issued: March 9, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Phoenix, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2010 appellant filed a timely appeal from a January 22, 2010 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 3, 2009 in the performance of duty.

FACTUAL HISTORY

On November 4, 2009 appellant, then a 38-year-old nuclear medicine technologist, filed a claim alleging that on November 3, 2009 he sustained an injury to his lower back after lifting a patient to perform abdominal x-rays. He stopped work on November 4, 2009.

In a November 4, 2009 clinic note, Dr. Nanette T. Auriemma, a Board-certified internist, evaluated appellant for low back pain after he rolled a patient weighing over 300 pounds to

reposition plates while performing an abdominal x-ray. She noted his history of chronic pain in the lower back due to an annular disc protrusion and tear at L5-S1. Dr. Auriemma diagnosed an acute lumbar strain and found that he should remain off work.

In a November 9, 2009 note from the employing establishment's clinic, Dr. Auriemma again discussed appellant's history of back pain after lifting a patient. She diagnosed acute lumbar strain and recommended that he remain off work after an epidural injection. On November 16, 2009 Dr. Auriemma diagnosed an unchanged acute lumbar strain. She indicated that appellant's back began hurting on or after November 4, 2009.

On November 16, 2009 Dr. Stephen M. Borowsky, a Board-certified anesthesiologist, noted that appellant's back pain had improved following an epidural steroid injection but that his symptoms returned after he lifted a patient at work. He performed a lumbar epidural injection.

On November 17, 2009 the employing establishment controverted the claim. It noted that appellant had filed for disability with the Department of Veterans Affairs and the Social Security Administration for low back problems.

In a statement dated December 18, 2009, Tess Zeller, a coworker, related that before appellant's absence from work she assisted him in positioning a patient for an abdominal x-ray. She found it to be an uneventful procedure. A few minutes later Ms. Zeller heard appellant say, "That was a big patient. I think I hurt my back."

In a December 28, 2009 telephone call, the employing establishment asserted that appellant did not work on November 3, 2009, the alleged date of injury. Appellant came into work on November 3, 2009 at his start time but immediately informed the timekeeper that he was going home. He worked with a coworker at all times because he was on modified duty. Appellant did not inform the coworker who worked with him on November 2, 2009 that anything was wrong. A leave analysis submitted by the employing establishment indicates that he used compensatory time to cover his work hours.

By letter dated December 28, 2009, Liz Slaughter-Payne related that on December 17, 2009 she asked appellant if he was sure of the date of injury. Appellant responded that he was and that Ms. Zeller had worked with him that date. Ms. Slaughter-Payne stated:

> "I requested a copy of his time card for that pay period, I handed him the copy of the time card for him to review. [Appellant] handed the time card back and asked me if I could check to see if the time card was correct. I told him if he would like to pull up his electronic time and attendance record I would allow him to use the computer, but he said he did not remember his password to get into the computer. [Appellant] said the time card shows that I did [not] work on the November 3, 2009. I looked at the time card and said that [is] correct. He stated, "how will this affect my claim" [and] I told him until we have all the facts I [am not] sure, also the decision will be made by [the Office] not the facility. I also told him that I would speak with [Ms.] Zeller because it is not unusual for someone to get dates mixed up."

In a statement received January 4, 2010, appellant related that on November 3, 2009 he experienced increased pain and stiffness in his back after he rolled a patient to get a cassette under his abdomen. His coworker positioned the plate and he rolled the patient. Appellant denied sustaining any injuries between the time he received an epidural on October 29, 2009 and his injury on November 3, 2009. He alleged that he sustained an exacerbation of his preexisting back condition. Appellant reiterated that his injury occurred on November 3, 2009.

By decision dated January 22, 2010, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury as alleged on November 3, 2009. It noted that he had not shown that the November 3, 2009 incident occurred as alleged due to inconsistencies in the evidence, particularly regarding the date of injury.

On appeal, appellant related that he injured his back on November 3, 2009 positioning a patient for an x-ray. Ms. Zeller assisted him on that date. Appellant indicated that his timesheet erroneously showed that he was not at work on November 3, 2009 but that the mistake had been corrected.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2] 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.[3]

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.[4] 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.[5] An employee may establish that the employment

[1] 5 U.S.C. §§ 8101-8193.

[2] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[3] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

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

incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[6]

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.[7] 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.[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 doubt on an employee's statements.[10] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.[11]

ANALYSIS

Appellant filed a claim for a traumatic injury on November 4, 2009. On the claim form, he listed the date of injury as November 3, 2009. The employing establishment, however, asserted that appellant had not worked on November 3, 2009 and submitted a leave analysis showing that he took eight hours compensatory time that day. Appellant has not explained his absence from work on the date of his alleged injury. In a medical report dated November 4, 2009, Dr. Auriemma noted that he experienced low back pain after moving a large patient to obtain an abdominal x-ray. She did not, however, provide the date that appellant moved the large patient. On November 16, 2008 Dr. Auriemma noted that his back began hurting on or after November 4, 2008 but did not specify a date of injury. On December 18, 2009 Ms. Zeller related that before appellant's absence from employment she helped him position a patient for an x-ray. Appellant told her afterward that he thought he had hurt his back. Ms. Zeller did not, however, identify the date that she assisted appellant moving a patient. Ms. Slaughter-Payne related that she informed him on December 17, 2009 that he was not at work on the date of his alleged injury. Appellant inquired whether this would affect his claim. He was thus on notice

[6] *Id.*

[7] *See Elaine Pendelton*, 40 ECAB 1142 (1989).

[8] *H.G.*, 59 ECAB 552 (2008); *Charles B. Ward*, 38 ECAB 667 (1989).

[9] *S.P.*, 59 ECAB 184 (2007); *Tia L. Love*, 40 ECAB 586 (1989).

[10] *M.H.*, 59 ECAB 461 (2008); *Merton J. Sills*, 39 ECAB 572 (1988).

[11] *B.B.*, 59 ECAB 234 (2007); *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

that his timesheet showed that he was not at work but did not reconcile this contradiction with the Office.[12]

The Board finds that there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of the claim. The record does not contain any evidence supporting that appellant moved a patient on November 3, 2009. While he consistently reported that he sustained increased back pain after moving a patient and submitted a witness statement that he complained of back pain after positioning a large patient, his failure to identify the incident as occurring on a date that he was at work casts serious doubt on the validity of his claim. As appellant did not establish the factual aspect of his claim, it is not necessary to consider the medical evidence.[13]

On appeal, appellant maintains that he sustained a back injury on November 3, 2009 moving a patient. He contends that the timesheet showing that he was not at work was in error and that the error had been corrected. The Board's jurisdiction, however, is limited to reviewing final decisions of the Office.[14] The Board may not consider evidence or argument that was not before the Office at the time of its decision.[15] Appellant can submit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on November 3, 2009 in the performance of duty.

[12] *Barbara R. Middleton*, 56 ECAB 634 (2005).

[13] *Alvin V. Gadd, supra* note 2.

[14] 20 C.F.R. § 501.2(c).

[15] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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