United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 07-1524**
	)	**Issued: November 1, 2007**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT AGENCY, West Point, NY, 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 May 14, 2007 appellant filed a timely appeal from the April 19, 2007 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 has established that he sustained an injury in the performance of duty on December 18, 2006 as alleged.

FACTUAL HISTORY

On January 30, 2007 appellant, then a 51-year-old plumber, filed a traumatic injury claim, Form CA-1, alleging that he slipped and fell in the back of his truck while loading materials on December 18, 2006. He stated that he injured his back, elbow and head when he hit a tool box. Richard Dotson, appellant's supervisor, indicated that appellant provided notice of the incident on the day it occurred and that he first sought treatment on January 30, 2007 from a

physician at the employing establishment. Dr. Edward J. Hartey, a chiropractor, submitted progress notes, from February 2 to 15, 2007, which were largely illegible.

By notice dated February 22, 2007, the Office informed appellant that his claim, which had been administratively handled until that point because there was minimal time loss from work, would be formally adjudicated because his medical bills exceeded $1,500.00. The Office notified appellant that he needed to submit a detailed medical report from his attending physician to establish his claim. The Office explained that chiropractors were considered "physicians" under the Act only to the extent that they treated spinal subluxations that had been established by x-ray.

In a note dated February 21, 2007, Joan Thompson, an employee of Hartey Chiropractic, stated that appellant had been diagnosed with lumbar subluxation, myalgia/myositis, lumbar intervertebral disc radiculopathy and lumbalgia. Illegible treatment notes from February 19 to 27, 2007 were also submitted.

On March 6, 2007 the employing establishment submitted additional medical information about appellant's claim. On an undated accident report form appellant stated that on December 18, 2006 he stepped into some water on the bed of his work truck and slipped, hitting his left arm, head and back on a tool box. On a patient health questionnaire dated February 2, 2007, he indicated that he had constant, sharp, burning pain in his lower back and that his whole back and head ached. Appellant stated that he had not had similar symptoms in the past. On a February 2, 2007 general examination form, Dr. Hartey noted that appellant had used ice and heat on his back following his fall, but that it never got better. Dr. Hartey indicated that x-rays taken of appellant's lumbosacral spine on February 2, 2007 showed moderate degenerative disc disease and degenerative joint disease at L5-S1, reduced spacing at L5-S1, and an unnamed problem with the posterior aspect of L4-5.

On March 12, 2007 appellant requested compensation for leave without pay taken from February 2 to 17, 2007.

By decision dated April 19, 2007, the Office denied appellant's claim for compensation. It found that the medical evidence of record was insufficient to establish that he had sustained any injury in the manner alleged.

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; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the incident caused a personal injury, and, generally, this can be established only by medical evidence.[3]

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.[4] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant,[5] and must be one of reasonable medical certainty,[6] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

ANALYSIS

The Office has accepted neither that the incident occurred as alleged on December 18, 2006 nor that appellant sustained an injury as a result of the alleged incident. Therefore, the issue to be resolved is whether appellant has met the burden of establishing these elements of his claim.

The Board has held that 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 refused by strong or persuasive evidence.[8] Appellant has consistently alleged that he slipped and fell in the back of his truck, hitting his back, arm and head on a tool box. His supervisor stated that he was notified of the incident the day it occurred and did not indicate that appellant's statement of the facts was incorrect. The employing establishment did not controvert the claim. Therefore, contrary to the Office's decision, the Board finds that the evidence of record establishes that the December 18, 2006 incident occurred as alleged.

In order to establish fact of injury, appellant has the burden of showing by the weigh of the probative medial evidence that he sustained an injury as the result of the December 18, 2006 event. The Board finds that the medical evidence of record is insufficient to establish appellant's claim.

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

[4] *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[5] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *John W. Montoya*, 54 ECAB 306 (2003).

[7] *Judy C. Rogers*, 54 ECAB 693 (2003).

[8] *Caroline Thomas*, *supra* note 2.

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under the Act.[9] Section 8101(2) of the Act states that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[10] Office regulations define subluxation as incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae, which must be demonstrated on x-ray.[11] Based on x-rays, Dr. Hartey, a chiropractor, provided a diagnosis of reduced intervertebral space, among other problems, in appellant's lumbar spine. As this diagnosis comports with the definition of subluxation, Dr. Hartey is considered a physician under the Act for purposes of the spinal subluxation diagnosis. However, he provided no rationalized medical opinion evidence addressing the causal relationship between his diagnosis and the December 18, 2006 employment incident. The record establishes that appellant's x-rays were obtained on February 2, 2007, some six weeks following the incident at work. Dr. Hartley did not address how appellant's condition was caused by or contributed to by the fall at work. The Board has held that when diagnostic testing is delayed, uncertainty mounts regarding the cause of the diagnosed condition.[12] This report is of little probative value.[13] Dr. Hartey also submitted several progress notes, but they are of no probative value because they are illegible.

Joan Thompson, an employee of Hartey Chiropractic, submitted a note listing several diagnoses, including lumbar subluxation, myalgia or myositis, lumbar intervertebral disc radiculopathy and lumbalgia. This note is of no probative value because there is no evidence that Ms. Thompson is a physician under the Act.[14]

The Board finds that appellant has not met his burden of proof to establish that his diagnosed spinal subluxation was causally related to his accepted employment incident.

CONCLUSION

Though appellant has established that the December 18, 2006 incident occurred as alleged, the Board finds that appellant has not established that he sustained an injury in the performance of duty as a result of this accepted incident.

[9] *Kathryn Haggerty*, 45 ECAB 383 (1994).

[10] 5 U.S.C. § 8101(2); *John E. Cannon*, 55 ECAB 585 (2004).

[11] 20 C.F.R. § 10.5(bb); *Mary A. Ceglia*, 55 ECAB 626 (2004).

[12] *See Mary A. Ceglia*, 55 ECAB 626 (2004); *Linda L. Mendenhall*, 41 ECAB 532 (1990).

[13] *Robert Broome*, 55 ECAB 339 (2004).

[14] *See* 5 U.S.C. § 8101(2) (defining "physician").

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 19, 2007 is affirmed.

Issued: November 1, 2007
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