

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY NIELSEN and DEPARTMENT OF THE AIR FORCE,
AIR NATIONAL GUARD, Minot, ND

*Docket No. 99-2373; Submitted on the Record;
Issued November 13, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on September 10, 1997 as alleged.

Appellant, then a 45-year-old aircraft technician, filed a traumatic injury claim on October 6, 1998 alleging that he injured his right shoulder during the installation of an aircraft arresting system at one of three duty stations: Albuquerque, New Mexico; Des Moines, Iowa; or Springfield, Illinois. He alleged that he sustained the right shoulder injury on September 10, 1997. Appellant further alleged that his shoulder injury had been aggravated by performing repetitive work duties at different locations in 1998 and that he had not before realized the cause of the pain. On the reverse side of his claim form, his supervisor noted that he had no actual knowledge of the alleged incident and that appellant had indicated that he was unaware of when and where the injury occurred. Appellant's supervisor further indicated that the employing establishment had no report of an injury or accident filed prior to this claim and that appellant's supervisor at the time of the alleged incident had since left the employing establishment. He did not stop work.

Appellant submitted a narrative statement in support of his claim dated November 3, 1998 and medical notes from Drs. David Uthus, a Board-certified orthopedist and Alexandre Kindy, attending physician dated from August 13 to October 7, 1998, which evidenced evaluation and treatment of right shoulder pain. In a narrative statement dated November 3, 1998 appellant stated:

“[A]t the time of the injury it was not noted probably because the after effects of what happened did not surface until later during that year and the following year while doing the same type of work at other locations....”

* * *

“Not knowing what was causing my pain I sought out the services of [c]hiropractic.... I delayed seeking treatment from an orthopedic surgeon because of the chiropractic treatments....”

In a medical report dated August 13, 1998, Dr. Uthus reported that appellant was seen that day for complaints of aching right shoulder pain, which appellant related to him had persisted for a year, however, appellant did not recall having been injured. Dr. Kindy in a medical report dated September 21, 1998 reported appellant’s complaints of shoulder and neck pain, and indicated that, although appellant’s pain had persisted for approximately two years, there was no history of trauma for either pain.

By decision dated November 23, 1998, the Office of Workers’ Compensation Programs denied appellant’s claim for compensation on the grounds that the evidence was insufficient to establish the relationship between the employment incident and the medical condition. The Office found that the medical evidence did not indicate a history of injury, or how the alleged injury of September 10, 1997 was caused by factors of appellant’s employment.

By letter received December 13, 1998, appellant requested a review of the written record. In his request letter, appellant stated, “[A]s far as I can recall my shoulder injury did occur during employment with the federal government.” On January 12, 1999 he submitted a narrative statement dated December 20, 1998 in which he alleged that his right shoulder injury occurred during the October through November timeframe while working at either the Des Moines, Iowa or Springfield, Illinois airport. Appellant indicated that installing arresting gear for fighter air crafts involves lifting and setting items ranging in weights of 20 to 150 pounds, which sometimes requires working in awkward physical positions in cramped spaces and on ladders. He alleged that his injury had been aggravated in the months following his injury by performing the “same duties” and that he had not realized the origin of his pain and lack of strength. Appellant indicated that, by September 1998, he could no longer tolerate the pain and loss of strength associated with his right shoulder. He submitted progress notes and a letter dated December 30, 1998 from Dr. Kindy in which he diagnosed appellant with chronic impingement syndrome of the shoulder with associated medium sized rotator cuff tear and stated, “[T]he patient states that this started at work from the use of his shoulder at work and this is very possible.” Appellant also submitted a letter dated January 8, 1999 from Dr. Uthus who indicated that he failed to mention in previous reports that appellant believed his symptoms resulted from repetitive strains and trauma to his shoulder at work. Dr. Uthus further stated, “[I]t is certainly felt that his work certainly could have aggravated his rotator cuff.”

By decision dated April 14, 1999, finalized May 14, 1999, the Office hearing representative affirmed the November 23, 1998 decision after a review of the written record. The hearing representative noted that appellant was unable to provide specific details regarding his injury and that the medical evidence made no reference to a traumatic event which allegedly occurred September 10, 1997 and only inferred a relationship between appellant’s employment and his shoulder condition. The hearing representative therefore found that appellant failed to establish that he sustained an injury at the time, place and in the manner alleged.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on September 10, 1997.

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 occupational disease.²

The Office, in determining whether an employee actually sustained an injury in performance of duty, first analyzes 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 The second component is whether the employment incident caused a personal injury and this generally can only be established by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. 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 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 In this case, appellant has not established that on September 10, 1997 he was on the premises of the employing establishment during working hours and was performing the duties of his position when he sustained a right shoulder injury and therefore has not established fact of injury.

Appellant alleged on his CA-1 form filed October 13, 1998 that on September 10, 1997 he sustained a right shoulder injury at one of three duty stations: Albuquerque, New Mexico; Des Moines, Iowa; or Springfield, Illinois. He later submitted a letter dated December 20, 1998 which stated, "[A]s far as I can recall my shoulder injury did occur during employment with the

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 M. Tornello*, 35 ECAB 234 (1983).

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

⁶ *Id.* at 255-56.

federal government.” Appellant then stated that his right shoulder injury occurred during the October through November timeframe while installing arresting gear for fighter air crafts at either the Des Moines, Iowa or Springfield, Illinois airport. He further alleged that his shoulder condition had been aggravated in the months following his injury and in 1998 while performing the “same duties,” however, he delayed in reporting his injury because he did not know of its origin. Appellant’s supervisor challenged his claim asserting that appellant was unaware of when and where the alleged injury occurred and that there had been no previous reports of injury to the employing establishment. Medical evidence of record has established that appellant was not treated for shoulder pain for almost a year after the alleged injury occurred and did not recall an injury employment or otherwise which could have caused his shoulder pain.

Drs. Uthus and Kindy stated in medical reports of record that, although appellant had been seen for complaints of right shoulder and neck pain that had persisted for at least a year, appellant did not recall having been injured or relate a history of trauma for either pain. None of the medical reports contain any mention of the September 10, 1997 employment incident or any opinion that appellant sustained an injury due to a specific employment factor. In a December 30, 1998 report, Dr. Kindy diagnosed appellant with impingement syndrome right shoulder with associated medium-sized rotator cuff tear and stated, “[T]he patient states that this started at work from the use of his shoulder at work and this is very possible.” In a January 8, 1999 report, Dr. Uthus indicated that appellant believed his symptoms resulted from repetitive strains and trauma to his shoulder at work and stated, “[I]t is certainly felt that his work certainly could have aggravated his rotator cuff.” Although Drs. Uthus and Kindy speculated that appellant’s shoulder condition could be work related, such conjecture is not supportive of whether an employment incident actually occurred on September 10, 1997 as alleged.

Appellant has not provided a consistent history of the alleged injury and has in fact established that he does not recall a traumatic injury having ever occurred. Such inconsistencies cause serious doubt upon the validity of appellant’s claim. Medical reports of record indicate treatment for appellant’s shoulder condition several months after the alleged injury and are also void of a history of injury and do not outline specific employment factors, which allegedly caused appellant’s injury on September 10, 1997. For these reasons, the evidence of record is not sufficient to meet appellant’s burden of proof.

The decisions of the Office of Workers' Compensation Programs dated April 14, 1999 and November 23, 1998 are affirmed.

Dated, Washington, DC
November 13, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member