

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVE SKROSKI and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, NY

*Docket No. 98-1495; Submitted on the Record;
Issued December 16, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124; and (2) whether appellant has established that he sustained an injury in the performance of duty.

On November 28, 1996 appellant, then a 31-year-old mail carrier, filed an occupational disease claim alleging that on that date he became aware that he had a tear of the anterior horn of the lateral meniscus of his knee, which he attributed to factors of his federal employment. Appellant related: "One of the many missteps that happen over the course of a day's work had caused a pull to my left knee, which caused a swelling [and] congestion that became worse as I continued to walk on it." On the reverse side of the claim form, appellant's supervisor indicated that appellant initially reported the condition on October 25, 1996 and stopped work on October 26, 1996.

In a medical report dated November 14, 1996, Dr. A. Thompson, a Board-certified orthopedic surgeon, stated:

"[Appellant] reports that on October 21, 1996, he was ascending some stairs while walking across some surface that resulted in pain in his knee. The pain continued, became worse and by October 25[, 1996] he could no longer walk his route. He has been out of work from November 1[, 1996] to today."

In a statement dated November 22, 1996, appellant stated that as he was delivering his route on October 28, 1996 "a fairly common misstep occurred, where my foot was not properly seated on the ground. It is where your foot is bent at the ankle [and] you catch it in time before you break your ankle." Appellant stated that he continued to work but his knee condition worsened. He related that he informed his supervisor of his condition on November 1, 1996. Appellant described the medical treatment he received and indicated that he underwent a

magnetic resonance imaging (MRI) study on November 19, 1996 which revealed a tear in the lateral meniscus.

In a statement dated December 12, 1996, an official with the employing establishment related that on October 24, 1996 appellant informed his supervisor, Mr. John Coyle, that he had injured his knee. The official indicated that appellant did not state that his knee condition was employment related until November 21, 1996 when he received the results of an MRI.

By decision dated April 30, 1997, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury. The Office found that appellant did not establish that he sustained an injury at the time, place and in the manner alleged due to inconsistencies in the factual evidence. The Office further noted that appellant had not submitted rationalized medical evidence establishing that his knee condition was causally related to his federal employment.

In a statement dated May 8, 1997, appellant related that he put an incorrect date of injury on the forms that he completed. Appellant indicated that his injury occurred on October 28, 1996. He further related that, "John Coyle claimed on October 24, 1996 that I told him my knee hurt, but did not claim the condition was job related. This was four days before the injury occurred. This is impossible."

By letter dated June 30, 1997, appellant requested a hearing before an Office hearing representative. In a decision dated September 11, 1997, the Office denied appellant's request for a hearing as untimely.

By letter dated October 1, 1997, appellant requested reconsideration of his claim. Appellant stated after reviewing his paperwork he had determined that his date of injury was October 21, 1996.

In support of his request for reconsideration, appellant submitted a medical report dated October 24, 1997, which indicated that he received treatment on that date for left knee pain. The physician noted that appellant had left knee pain which had been getting worse for one week.

Appellant further submitted a statement, received by the Office on October 24, 1997 from a coworker, Ms. Denise McCarthy. Ms. McCarthy stated that she remembered appellant "telling me about an incident on Monday, October 21, 1996, where he had hurt himself while on his route. I also remember him on Tuesday, October 22, 1996, complaining to me that he had something wrong with his knee."

By decision dated January 12, 1998, the Office denied modification of the prior decision.

The Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing as untimely.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within

30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”¹ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,³ when the request is made after the 30-day period established for requesting a hearing,⁴ or when the request is for a second hearing on the same issue.⁵ The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

The Office, in its September 11, 1997 decision, properly determined that appellant was not entitled to a hearing as a matter of right since appellant’s request for a hearing was made by letter dated June 30, 1997, which was more than 30 days after the Office’s April 30, 1997 decision. The Office also exercised its discretion and further considered the hearing request but concluded that appellant could equally well pursue his claim by requesting reconsideration along with the submission of factual and medical evidence. For these reasons, the Office acted properly in denying appellant’s June 30, 1997 request for a hearing.

The Board finds that appellant has not established that he sustained an injury in the performance of duty.

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

¹ 5 U.S.C. § 8124(b)(1).

² *Frederick D. Richardson*, 45 ECAB 454 (1994).

³ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994).

⁷ *See Elaine Pendleton*, 40 ECAB 1142 (1989).

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 in determining whether a *prima facie* case has been established.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

The Board finds that the evidence contains inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. Appellant indicated on his claim form that he first realized that he had a knee condition on November 28, 1996. In describing the factors of employment to which he attributed his condition, appellant specified that a misstep at work on an unspecified date caused his knee problems. In a medical report dated November 14, 1996, Dr. Thompson stated that appellant described his injury as occurring on October 21, 1996 while ascending stairs. In a statement dated November 22, 1996, appellant attributed his condition to a misstep on October 28, 1996 while walking his route. An official with the employing establishment related that appellant informed his supervisor on October 24, 1996 that he had injured his knee but did not attribute it to his employment at that time. In a statement dated May 8, 1997, appellant related that he injured his knee on October 28, 1996 and that he could not have told his supervisor about the injury on October 24, 1996 as that was four days before his injury. However, in a statement dated October 1, 1997, appellant related that the correct date of his injury was October 21, 1996. Appellant submitted chart notes dated October 24, 1996, which indicated that he had been having knee pain for one week, which would place the onset of pain around October 17, 1996. Appellant has failed to present a consistent date of injury or description of his injury based both on the medical reports and on his statements. Appellant related in a statement dated May 8, 1997, that he did not inform Dr. Thompson of the details of his injury because he thought it was unimportant. However, appellant's statement does not constitute an adequate explanation for the discrepancies given for the date of injury found throughout his statements. In an undated statement, received by the Office on October 24, 1997 a coworker related that appellant told her that he injured himself on his route on October 21, 1996; however, this statement is of little probative value in view of the time elapsed since the alleged incident. Appellant, therefore, has failed to meet his burden of proof to establish that the employment incident occurred as alleged and thus has failed to establish fact of injury.

⁸ *Charles B. Ward*, 38 ECAB 667 (1989).

⁹ *Tia L. Love*, 40 ECAB 586 (1989).

¹⁰ *Merton J. Sills*, 39 ECAB 572 (1988).

¹¹ *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

The decisions of the Office of Workers' Compensation Programs dated January 12, 1998 and September 11, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 16, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member