

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY R. PHILLIPS and U.S. POSTAL SERVICE,
CORONADO STATION, Tucson, AZ

*Docket No. 00-770; Submitted on the Record;
Issued March 8, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on May 27, 1998.

On November 25, 1998 appellant, then a 54-year-old letter carrier, filed a claim alleging that on May 27, 1998 he bent his left wrist back while loading trays of mail, causing injury to the wrist. One of his supervisors, Cathy Neuman, stated on the claim form that she had no knowledge of appellant's injury.

In support of his claim, appellant submitted medical evidence including an undated note in which Dr. Michael J. Maximov, a Board-certified internist, advised that appellant could return to full-duty work on October 1, 1998; a certificate dated October 1, 1998 in which Pandora Williams, a physician's assistant, advised that appellant could return to work for a maximum of eight-hour shifts; a certificate dated October 6, 1998 in which Ms. Williams advised that appellant could return to work without limitation; a form report dated October 26, 1998 in which Dr. Thomas E. Butler, Jr., an orthopedist, diagnosed scapholunate instability and arthritis of the left wrist; a duty status report dated October 26, 1998 in which Dr. Butler advised that appellant could return to work with no lifting greater than 10 pounds with his left hand and no repetitive or powerful gripping or grasping with his left wrist; and a certificate dated November 23, 1998, in which Dr. Butler advised that appellant could return to work with no lifting of greater than 10 pounds.

By letter dated December 3, 1998, the employing establishment challenged the claim and submitted an undated statement in which Mike Atchley, an employing establishment supervisor, stated that the first time he heard about appellant's injury was in late August 1998 when appellant mentioned that he was going to be having surgery on his wrist.

By letter dated January 6, 1999, the Office of Workers' Compensation Programs requested that appellant furnish additional information pertaining to his injury.

In a decision dated January 7, 1999, the Office determined that appellant was not entitled to continuation of pay during his absence from work after May 27, 1998.

In a statement dated January 11, 1999, appellant recounted the events that occurred on May 27, 1998 and stated that he immediately advised Mr. Atchley of the injury to his wrist. He advised that he notified Ms. Neuman at the same time.

Appellant submitted further evidence including a note dated January 6, 1999 in which Dr. Butler summarized the history of appellant's injury as related to him by appellant; a note dated January 15, 1999 from Dr. J. David Gibeault, a Board-certified orthopedic surgeon, who diagnosed carpal instability and advised that appellant would need further surgery.

On February 21, 1999 appellant requested a change of primary physician from Dr. Butler to Dr. Gibeault.

By decision dated March 29, 1999, the Office denied appellant's claim on the grounds that the evidence submitted was insufficient to establish that appellant sustained an employment-related injury on May 27, 1998.

On April 12, 1999 appellant requested a hearing and submitted additional medical evidence including a surgical report from Dr. Butler dated October 26, 1998, notes from Dr. Butler dated August 17, October 29 and November 30, 1998, a duty status report dated June 17, 1999 from Dr. Gibeault and progress notes dated June 17, 1999 from Dr. Gibeault. In a report dated August 30, 1999, Dr. Butler noted that appellant related a history of lifting a heavy item at work, at least 40 pounds, at which time he experienced a tearing sensation in his wrist as it was forcibly turned palm up.

At the hearing, held on August 3, 1999, appellant described the events surrounding the incident of May 27, 1998 and testified that he had notified Mr. Atchley immediately after the incident that he had injured his wrist. He testified that there were no witnesses to the incident and that he saw Ms. Williams two or three days after the injury. Appellant recounted his treatment history and testified that he avoided reporting the incident because he was afraid that the employing establishment would hold it against him as he was trying to get into the employing establishment's management program.

Appellant submitted further medical evidence including a note dated December 4, 1998 from Dr. Maximov; a January 15, 1999 report from Dr. Gibeault; a report dated December 16, 1998 from Dr. Debra A. Walter, a Board-certified internist; a report from Dr. Maximov dated January 7, 1999; and a letter from Dr. Butler dated August 25, 1999.

By decision dated November 10, 1999 and finalized November 16, 1999, the Office hearing representative affirmed the prior decision.

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the course of his employment on May 27, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim² including the fact that the individual is an "employee of the United States" within the meaning of the Act,³ that the claim was timely filed within the applicable time limitation period of the Act,⁴ 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.⁵ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To determine whether an employee has sustained an injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.⁷ An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹ An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹⁰ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹¹ However, an employees' statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.¹²

¹ 5 U.S.C. §§ 8101-8193.

² See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.115.

³ See *James A. Lynch*, 32 ECAB 2116 (1980); see also 5 U.S.C. § 8101(1).

⁴ 5 U.S.C. § 8122.

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *Delores C. Ellyett*, 41 ECAB 922 (1990).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Earl David Seal*, 49 ECAB 152 (1997); *Charles B. Ward*, 38 ECAB 667 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175 (1984).

⁹ *Robert J. Krstyen*, 44 ECAB 227 (1992); *John J. Carlone*, *supra* note 7; for a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

¹⁰ *Joseph Albert Fournier, Jr.*, *supra* note 8.

¹¹ *Dorothy Kelsey*, 32 ECAB 998 (1981).

¹² *Ruth M. Jackson*, 30 ECAB 917 (1979); *Bennie W. Butler*, 13 ECAB 156 (1961) and cases cited therein.

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.¹³

In this case, appellant concedes that there were no witnesses to the alleged incident and that he did not file a notice of traumatic injury claim for nearly six months after the incident. His supervisors, Mr. Atchley and Ms. Neuman, stated that they did not have knowledge of the incident. Appellant did not seek medical treatment for his injury until September 28, 1998, three months after the date of the alleged incident. While he has provided medical evidence establishing that he had a wrist condition, the evidence does not establish the occurrence of the injury at the time, place and in the manner alleged by appellant; therefore, appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on May 27, 1998.

The decision of the Office of Workers' Compensation Programs dated November 10, 1999 and finalized November 16, 1999 is hereby affirmed.

Dated, Washington, DC
March 8, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Elaine Pendleton, supra* note 5.