United States Department of Labor
Employees' Compensation Appeals Board

R.T., Appellant	)	
and	)	**Docket No. 08-408**
	)	**Issued: December 16, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 29, 2007 appellant filed a timely appeal from the November 15, 2006 decision of the Office of Workers' Compensation Programs, which denied her traumatic injury claim and a July 27, 2007 decision denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained a right knee injury on September 5, 2006 in the performance of duty, as alleged; and (2) whether the Office properly denied her request for an oral hearing as untimely filed.

FACTUAL HISTORY

On September 11, 2006 appellant, then a 53-year-old mail clerk, filed a traumatic injury claim alleging that on September 5, 2006 she injured her right knee when she slipped while walking down a hallway at the employing establishment. She stopped work on September 6, 2006.

Appellant was treated on September 6, 2006 by Dr. Scott Miller, an internist, who obtained a history that she felt acute tenderness in the right knee while walking at work. She did not recall twisting her leg. On examination, Dr. Miller noted swelling of the right knee with tenderness in the medial region. He ordered diagnostic testing. On September 8, 2006 Dr. Gregory Altman, a Board-certified orthopedic surgeon, treated appellant at the request of Dr. Miller. He obtained a history that she fell on water approximately one-month prior and sustained a twisting injury to her right knee. Appellant denied any prior knee problems. Dr. Altman reported that x-rays of the right knee did not reveal any bony abnormality.

A September 12, 2006 magnetic resonance imaging (MRI) scan revealed the anterior cruciate and lateral collateral ligaments to be intact with normal chondral surfaces. A small vertical tear of the medial meniscus was observed with degenerative lobular signals throughout the remainder of the body of the meniscus. Medial and anterior compartment degenerative joint disease was diagnosed with findings consistent with quadriceps tendinopathy and a possible synovial cyst or ganglion. On September 20, 2006 Dr. Altman reviewed the MRI scan and diagnosed a medial meniscus tear. He noted that she would be scheduled for arthroscopic evaluation.

Nancy J. Cheskey and Gail Carr, coworkers, provided statements concerning the incident. Ms. Cheskey stated that on September 5, 2006 she was walking down the hall with appellant, who reached down and commented that her knee hurt. Appellant rubbed her right knee for a minute before they walked back to her office. A nearby coworker commented that appellant was wearing two different shoes. Ms. Cheskey did not observe appellant trip, slip or fall while they were walking together. Ms. Carr noted that, on September 6, 2006, appellant told her that she was experiencing knee pain following an injury in the hallway the previous day. Appellant could not recall how she injured her knee, other than walking with Ms. Cheskey. Ms. Carr asked Ms. Cheskey about the injury, she stated that appellant had winked at her about filling out an accident report.

By letter dated October 2, 2006, the Office requested that appellant submit additional evidence in support of her claim. It subsequently received a statement from Jane Rahenkamp, manager of marketing, who spoke to appellant on September 6, 2006 and related that she was walking down the hall with Ms. Cheskey on the prior day when she twisted her knee and almost fell. Ms. Rahenkamp instructed appellant on filing a claim. Subsequently, Ms. Cheskey and Ms. Carr mentioned their belief that appellant stopped work to be with her husband while he was undergoing medical tests. Ms. Cheskey challenged appellant's description of having twisted her knee while walking down the hall. She informed Ms. Rahenkamp that appellant's knee was swollen when she arrived at work that day.

On October 5, 2006 appellant responded to the statements of her coworkers regarding the September 5, 2006 incident. She related that she experienced terrible pain in her knee as they were walking down the hall. Appellant grabbed onto a nearby U-cart and her knee went out from under her. She contended that Ms. Cheskey did not assist her but walked away laughing at her. Another coworker, James Joyce, assisted appellant back to her office. Appellant denied wearing different styles of shoes on her feet or of complaining of knee pain to Ms. Cheskey prior to the incident. The following day, Ms. Rahenkamp instructed appellant to notify her supervisor and fill out an accident report. Appellant subsequently underwent medical evaluation.

On October 12, 2006 Dr. Altman advised that appellant was totally disabled. He noted a history that she twisted her right knee at work on a wet floor on September 5, 2006.

In a November 15, 2006 decision, the Office denied appellant's claim, finding that the evidence was insufficient to establish that she sustained the September 5, 2006 incident at the time, place and in the manner alleged.

On June 4, 2007 appellant requested an oral hearing before an Office hearing representative. Additional evidence was submitted to the record.

In a July 27, 2007 decision, the Office denied appellant's request for an oral hearing. It found that her request was untimely made more than 30 days after the November 15, 2006 decision. The Office also denied the hearing on the grounds that she could submit additional evidence with a request for reconsideration.[1]

LEGAL PRECEDENT -- ISSUE 1

An employee has the burden of establishing the essential elements of her claim, including the fact that she is an "employee of the United States" within the meaning of the Federal Employees' Compensation Act, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty, as alleged and that any disability or specific conditions for which compensation is claimed are causally related to the employment injury.[2] These are the essential elements of every claim for compensation regardless of whether the claim is based on a traumatic injury or an occupational disease.[3]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[4] 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 cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[5] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, an employee's statement alleging that an injury occurred at a

[1] The Board notes that the Office issued a December 6, 2007 decision denying appellant's November 5, 2007 request for reconsideration. As this decision was issued after appellant filed her appeal with the Board on August 29, 2007, it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *Oren E. Beck*, 33 ECAB 1551 (1982).

[2] *See James P. Bailey*, 53 ECAB 494 (2002).

[3] *See Christine S. Hebert*, 49 ECAB 616 (1998).

[4] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[5] *S.B.*, 58 ECAB ___ (Docket No. 06-978, issued March 5, 2007).

given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[6]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained injury to her right knee on September 5, 2006 while walking down a hall at work. The Office denied her claim, finding that there were inconsistencies in the evidence concerning how she injured her knee.

On her claim form, appellant noted that she slipped while walking in a hallway at the employing establishment on September 5, 2006. She was accompanied by Ms. Cheskey, a coworker, who stated that appellant reached down and commented that her knee hurt. Appellant rubbed her knee for a moment before they walked back to her office. Ms. Cheskey advised that she did not see appellant slip while they were walking together.[7]

When treated by Dr. Miller on September 6, 2006, appellant related that she felt tenderness in her right knee while walking at work. He noted that she did not recall having twisted her leg. However, on September 8, 2006, Dr. Altman obtained a history that appellant had fallen on water approximately a month prior and sustained a twisting injury to the right knee.

Ms. Rahenkamp, a manager, spoke with appellant on September 6, 2005. Appellant reported that she twisted her knee while walking with Ms. Cheskey and almost fell. When requested to explain the discrepancies in the depiction of the September 5, 2006 incident, appellant stated that she felt terrible pain in her right knee while walking with Ms. Cheskey and grabbed onto a nearby cart for support when her knee went out from under her. Appellant contended that Ms. Cheskey did not assist her and walked away.

The Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim that she sustained a right knee injury while walking at work on September 5, 2006. Appellant's account of having slipped or that her knee came out from under her while walking that day was not supported by her coworker. Ms. Cheskey did not observe appellant slip or grab onto a nearby cart for support. This evidence casts doubt on the validity of the claim. Moreover, the histories related to appellant's physicians are not consistent. Dr. Miller noted that appellant did not recall twisting her right leg on September 5, 2006 when treated the next day. This is inconsistent with appellant's statements of how the injury occurred. Dr. Altman obtained a history of a right knee injury approximately a month prior to September 5, 2006 after appellant slipped on water and twisted her right leg. This history is not consistent as to the date the incident occurred. For these reasons, the Board finds that the evidence of records does not establish that appellant sustained injury on September 5, 2006 at the time or in the manner alleged.

[6] *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[7] The mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relationship between the two. Neither the fact that a condition becomes apparent during a period of employment nor the belief of the employee that the condition was caused or aggravated by employment factors is sufficient to establish a causal relation. *See Roy L. Humphrey*, 57 ECAB 238 (2005).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.[8] A claimant is not entitled to a hearing as a matter of right if the request is not made within 30 days of the Office's decision.[9] The Office has the discretion to grant or deny any request that is made after the 30-day period.[10] The Office's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[11]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for compensation in a November 15, 2006 decision. On June 4, 2007 appellant requested an oral hearing before an Office hearing representative. As her request was not filed within 30 days of the November 15, 2006 decision it was untimely and appellant was not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings…."[12]

The Office exercised its discretionary authority under section 8124 by considering whether to grant a hearing. It found that appellant's claim could equally well be addressed by requesting reconsideration under section 8128 and submitting additional evidence. The only limitation on the Office's authority is reasonableness. The Board has held that it is an appropriate exercise of such discretion to apprise an appellant of the right to further proceedings under the reconsideration provisions of section 8128.[13] There is no evidence to establish that the Office abused its discretion in denying appellant's request for a hearing.

CONCLUSION

The Board finds that appellant did not establish that she sustained a right knee injury on September 5, 2006 in the manner alleged. The Board also finds that the Office properly denied her request for a hearing under section 8124(b)(1).

[8] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[9] 20 C.F.R. § 10.616(b).

[10] *Id*. *See Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Andre' Thyratron*, 54 ECAB 257 (2002).

[11] *See Teresa M. Valle*, 57 ECAB 542 (2006); *Henry Moreno*, 39 ECAB 475 (1988).

[12] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[13] *See Andre' Thyratron*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2007 and November 15, 2006 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: December 16, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board