

became aware of her back and left hip conditions. On October 12, 2006 appellant first realized that her conditions were caused by factors of her federal employment. She worked from 8:30 a.m. until 5:30 p.m. Monday through Friday.

In an October 24, 2006 narrative statement, appellant noted that, at approximately 7:00 p.m. on October 12, 2006, she returned home from work. While exiting her car, her left hip gave out and she fell. Appellant noted that she sustained prior hip and back injuries on August 26, 2006, although she did not fall. She also sustained injury on July 20, 2004 when her chair slid out from under her and she fell. Appellant noted that these incidents were on file.

On October 23, 2006 appellant further described the August 26, 2006 incident. At approximately 2:00 p.m., she was standing upright and, as she turned to her left, her low back and hip gave out. Appellant did not fall but she felt an immediate weakening of her back and hip. By 8:00 p.m. that day, she was in pain and experienced difficulty sleeping and walking. Appellant was evaluated by Dr. Kent W. Ward, an attending osteopath, on August 28, 2006. She did not return to work until August 30, 2006 based on his instructions. Appellant continued to work eight hours per day but, by the end of the day she could hardly walk. Subsequently she reduced her work hours to six hours per day and then four hours per day based on Dr. Ward's recommendation. Appellant contended that continuous standing on her feet caused her conditions. She also submitted medical records regarding the July 20, 2004 employment-related injury.

In an October 25, 2006 letter, the employing establishment controverted the claim, contending that the alleged injury did not occur within a reasonable amount of time following appellant's departure from work and her arrival at home on October 12, 2006. An accompanying clock ring report noted that, on October 12, 2006, appellant ended her tour at 5:30 p.m. A map quest query revealed that the drive from work to her home took 36 minutes.¹ The employing establishment also stated that the clock ring report established that August 26, 2006 was appellant's scheduled day off work. Appellant subsequently advised her supervisor that on August 26, 2006 she was at Costco when she experienced pain in her back when she turned. The employing establishment contended that appellant's modified position did not require her to stand continuously or bend and lift repeatedly. An accompanying position description provided the duties of boxing mail and a sales and service associate. The physical requirements involved sitting, standing and walking four to eight hours, lifting 5 to 10 pounds intermittently up to two hours and no climbing, kneeling, bending, stooping, twisting, pushing or pulling.

¹ In the October 25, 2006 letter, the employing establishment also stated that appellant filed a claim assigned number xxxxxx208 for an injury she sustained on July 20, 2004. The Office accepted the claim for back sprain. The employing establishment stated that the claim had been closed since November 2, 2004. It noted that appellant filed claims on March 17, 2005 and September 7, 2006 alleging that she sustained a recurrence of disability. Based on the information she provided on the claim forms, the Office advised her to file a traumatic injury claim (Form CA-1). On October 14, 2006 she filed a CA-1 form but the Office determined that it was a duplicate of the CA-1 form she filed for the July 20, 2004 employment injury. On March 30, 2005 appellant was advised that there was no medical evidence substantiating that her ongoing medical treatment was related to her accepted employment injury. She filed a new claim form for the August 26, 2006 injury. The employing establishment stated that appellant had been performing modified work on partial days with restrictions since the July 20, 2004 employment injury.

By letter dated November 6, 2006, the Office advised appellant that the evidence submitted was insufficient to establish her claims. It requested factual and medical evidence to establish her claim. Regarding the factual evidence, the Office requested a detailed description of the employment-related activities appellant was performing and her location at the time of the August 26, 2006 incident. As to the October 12, 2006 incident, it requested information as to whether she sustained any other injury between August 26, 2006 and the date she first reported it to her supervisor. Regarding the medical evidence, the Office requested a rationalized medical report from an attending physician which described her symptoms, results of examination and tests, diagnosis, treatment provided, the effect of treatment and opinion with medical reasons on whether the incidents in appellant's federal employment contributed to her condition.

In reports covering the period August 28 to October 24, 2006, Dr. Ward stated that appellant had advanced degenerative disease and chronic somatic dysfunction of the lumbar spine. He noted that appellant related her problems to her work duties. In an August 28, 2006 prescription, Dr. Ward directed appellant to refrain from lifting more than 20 pounds. He stated that she could not work until August 30, 2006.

An October 11, 2006 x-ray report by Dr. Michael J. D'Angelo, a Board-certified radiologist, stated that appellant had advanced degenerative disease at L2-3.

In a November 19, 2006 letter, appellant further described the August 26 and October 12, 2006 incidents. Regarding the August 26, 2006 incident, she stated that she hurt her left hip and lower back as she exited a dressing room at Costco, noting that, during the workday, she was required to bend and twist an extreme amount. Appellant was also required to sit and stand repeatedly as she was responsible for assisting approximately 75 carriers and performing other duties. Regarding the October 12, 2006 incident, she stated that, after finishing her four-hour work shift, her left hip and lower back hurt so much that she could hardly walk. Appellant drove directly home after work and fell after exiting her car.

In an October 27, 2006 report, Dr. James H. Maxwell, a Board-certified orthopedic surgeon, stated that appellant had left lumbar radiculopathy. On November 15, 2006 Dr. Maxwell performed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine which demonstrated desiccation at L5-S1 but no significant nerve root effacement.

By decision dated January 19, 2007, the Office denied appellant's claim, finding that she did not sustain an injury while in the performance of duty. It determined that neither the August 26 nor October 12, 2006 incidents occurred at work. The Office also found the medical evidence of record was insufficient to establish that appellant sustained an injury causally related to factors of her employment.

On February 20, 2007 appellant requested an oral hearing before an Office hearing representative. By letter dated March 5, 2007, she changed her request to a review of the written record by an Office hearing representative.

By decision dated June 11, 2007, an Office hearing representative affirmed the January 19, 2007 decision. The hearing representative found that appellant did not establish that she sustained an injury while in the performance of duty on October 12, 2006 as it occurred after

she arrived home from work. The hearing representative also found that she did not establish that she sustained an injury while in the performance of duty on August 26, 2006. The hearing representative also found the medical evidence of record insufficient to establish that appellant sustained an injury causally related to her employment.

By letter dated December 3, 2007, appellant, through counsel, requested reconsideration. In a July 30, 2007 narrative statement, appellant stated that her work duties as a postal clerk were modified on September 27, 2006. She usually worked in a cage in the back of the post office where she distributed items to carriers and, in the afternoon, she checked in their keys. Appellant also sold stamps and performed other busy work during her down time which included sorting mail into piles. She would stand and sit around 200 to 300 times a day. Although appellant tried not to lift, push or pull more than 15 pounds as mandated by her work limitations, she exceeded her limitations slightly on a few occasions. She was required to walk around the post office many times with a push cart containing mail. Appellant also carried magazines that she sorted in a tub which caused her to bend down repeatedly to pick up the tubs. She also held a position as a back-up vending clerk which she performed a few times per month and then consistently from March through July 2006. The position involved restocking the vending machines when they were empty or low on stamps which required bending, twisting and lifting. Appellant also had to replace stock at the bottom of the machine.

In an August 6, 2007 report, Dr. Ward stated that appellant attributed the onset of her acute and chronic low back and hip pain to the July 20, 2004 employment injury. She also attributed an aggravation of her condition to the repetitive movements she was required to perform at work. On physical examination, Dr. Ward reported restricted musculoskeletal motion of the lumbosacral, pelvic and hip areas. He stated that an x-ray demonstrated advanced degenerative disease of the lumbar spine. An MRI scan demonstrated disc protrusion at L5-S1 with bilateral S1 impingement. Dr. Ward opined that appellant's chronic low back and hip problem was causally related to her employment as a postal clerk.

In a January 15, 2008 decision, the Office denied appellant's request for reconsideration. It found that the evidence submitted was cumulative in nature and, thus, insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of 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 timely filed within the applicable time limitation period 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.³ These are the essential

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

An employee who claims benefits under the Act⁵ has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁷ An employee has not met her burden of proof in 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.⁸ 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁹ However, 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 refuted by strong or persuasive evidence.¹⁰

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a back and left hip injury on August 26, 2006 due to bending and twisting for an extreme period of time, and sitting and standing repeatedly at work. The Board finds that she has failed to establish that she sustained an injury on August 26, 2006, as there are significant inconsistencies in the evidence which cast serious doubt upon the validity of her claim.

Appellant's initial description of the onset of her current back and left hip conditions and the factors she identified are not consistent to establish the occurrence of the August 26, 2006 incident. She stated that on August 26, 2006 she stood upright, and as she turned to her left, her low back and hip gave out. Appellant further stated that she did not fall but, she felt an immediate weakening of her back and hip. However, her subsequent statement created an inconsistency as she stated that she hurt her left hip and lower back while exiting a dressing room at Costco on August 26, 2006. The employing establishment noted that, following this

⁴ See *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *V.F.*, 58 ECAB __ (Docket No. 06-1497, January 30, 2007); citing *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁷ *Id.*; citing *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁸ *Id.*; citing *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁹ *Id.*; citing *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

¹⁰ *Id.*; citing *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

incident, she informed her supervisor that she hurt her back at Costco on August 26, 2006 as she turned. The employing establishment's clock ring report establishes that August 26, 2006 was appellant's scheduled day off from work.

Although an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value, there are sufficient inconsistencies regarding the onset of the claimed conditions to cast doubt upon the validity of her claim.¹¹ In view of the inconsistency in the evidence regarding the onset of the claimed conditions, appellant has not established that the August 26, 2006 incident occurred at work, as alleged. As appellant has not met her burden of proof in establishing that the August 26, 2006 incident occurred at work as alleged, it is not necessary to address the medical evidence.¹²

LEGAL PRECEDENT -- ISSUE 2

The Act provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹³ In deciding whether an injury is covered by the Act, the test is whether, under all the circumstances, a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.¹⁴ The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.¹⁵ The phrase course of employment is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. In addressing this issue, the Board has stated the following:

“To occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.”¹⁶

¹¹ See cases cited *supra* note 8.

¹² *Alvin V. Gadd*, 57 ECAB 172 (2005).

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Julian C. Tucker*, 38 ECAB 271, 272 (1986).

¹⁵ *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

¹⁶ *Mary Keszler*, 38 ECAB 735, 739 (1987). This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury arising out of the employment must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury. See *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.¹⁷ When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions.¹⁸ Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto¹⁹ or which are in the nature of necessary personal comfort or ministrations.²⁰

ANALYSIS -- ISSUE 2

Appellant alleged that her back and left hip conditions were aggravated at approximately 7:00 p.m. on October 12, 2006 when she fell in the driveway at her home while exiting her motor vehicle. She had fixed hours of work from 8:30 a.m. to 5:30 p.m. The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on that date.

Appellant's claimed injury on October 12, 2006 occurred off the premises of the employing establishment following her return home from work. There is no evidence that she was engaged in any employment duties or any task incidental to her employment when she was injured. Rather, appellant was off-premises following the end of her work shift and at her home. Although she stated that two coworkers witnessed her experiencing left hip and lower back pain at work following the completion of her work shift on October 12, 2006, there are no witness statements, contemporaneous with the onset of the claimed conditions, which corroborate her allegation. Moreover, the employing establishment's clock ring report establishes that appellant left work on October 12, 2006 at 5:30 p.m. and that her injuries occurred at 7:00 p.m., after her work shift had ended.

Based on the facts of this case, it cannot be said that appellant's injury would fall within any of the exceptions to the general rule regarding off-premises injuries. There is no evidence that she was injured while on an emergency call, while she was traveling on the road as part of

¹⁷ *Mary Keszler supra* note 16 at 739, 740.

¹⁸ *Cheryl Bowman*, 51 ECAB 519 (2000); *Donna K. Schuler*, 38 ECAB 273, 274 (1986); A. Larson, *The Law of Workers' Compensation* § 13.05 (2004).

¹⁹ The Board has stated that these exceptions are dependent upon the particular facts and related situations: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. *Betty R. Rutherford*, 40 ECAB 496, 498-99; *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

²⁰ *See, e.g., Harris Cohen*, 8 ECAB 457 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

her employment, or subjected to a special inconvenience, hazard or urgency of travel that would bring it within coverage of the Act.²¹ Appellant's claimed injuries occurred away from her place of employment while she was engaged in nonemployment activities and represents a nonemployment hazard, which was shared by the general public. The Board finds that she was not in the performance of duty when injured on October 12, 2006 as she failed to establish that the injuries arose out of and in the course of her employment.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Act,²² the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.²³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 3

In a December 3, 2007 letter, appellant, through counsel, disagreed with the Office hearing representative's June 11, 2007 decision, finding that she did not establish her claimed injuries of August 26 or October 12, 2006. The relevant issues are the factual questions of whether appellant sustained an injury while at the employing establishment on August 26 or October 12, 2006.

Appellant submitted a July 30, 2007 narrative statement in which she addressed the modification of her postal clerk work duties on September 27, 2006 which she attributed as the cause of her back and left hip conditions. She also attributed her back and left hip conditions to her work duties as a back-up vending clerk, which she performed a few times per month and then consistently from March through July 2006. While this evidence is new, it is not relevant to the issue of whether appellant sustained traumatic injuries on August 26 or October 12, 2006. Appellant's claims were denied based on the determination that neither the incident at Costco or at her driveway at home occurred while she was on the employing establishment premises in the performance of duty. Her allegations raised on reconsideration are not relevant to the issue of whether the August 26 or October 12, 2006 incidents occurred in the performance of duty. The Board has held that evidence that is not relevant to a claim does not constitute a basis for

²¹ See *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

²² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

²³ 20 C.F.R. § 10.606(b)(1)-(2).

²⁴ *Id.* at § 10.607(a).

reopening a claim for merit review.²⁵ The Board finds that appellant's narrative statement does not require reopening her claim for further review on the merits.

Dr. Ward's August 6, 2007 report stated that appellant's chronic low back and hip problems were causally related to her employment as a postal clerk does not require reopening her claim for further review on the merits. He noted that she attributed the onset of her acute and chronic low back and hip pain to the July 20, 2004 employment injury and the aggravation of this injury to her repetitive movements at work. Dr. Ward's report is not relevant to the underlying issue in this case, which is the factual question of whether appellant has established that the August 26 or October 12, 2006 incidents occurred as alleged. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁶ Dr. Ward did not address whether appellant was working at the employing establishment on August 26 or October 12, 2006 when she injured her back and hip. The Board finds that Dr. Ward's report does not require reopening her claim for further review on the merits.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office. As she did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.²⁷

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an injury while in the performance of duty on August 26, 2006. The Board further finds that appellant has established that she sustained an injury while in the performance of duty on October 12, 2006. Lastly, the Board finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

²⁵ See *L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

²⁶ *Patricia G. Aiken*, 57 ECAB 441 (2006).

²⁷ See 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2008 and June 11, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 17, 2008
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