United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 11-1405**
	)	**Issued: November 16, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

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

Oral Argument October 6, 2011

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) December 15, 2010 merit decision denying her claim and a May 3, 2011 decision finding that she had abandoned her request for an oral hearing before an OWCP hearing representative. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she sustained an injury in the performance of duty on October 13, 2010 as alleged; and (2) whether OWCP properly found that she had abandoned her request for an oral hearing before an OWCP hearing representative.

On appeal, appellant contends that the injury occurred as alleged and that she did not receive notice of her scheduled oral hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 2, 2010 appellant, then a 44-year-old mail processing clerk, filed a traumatic injury claim alleging that she sustained injury on October 13, 2010 during the course of her employment. On the claim form and in an October 21, 2010 statement, she explained that a forklift, which was coming down the aisle, hit her and knocked her down on the cement floor. Appellant was transported to the hospital, where she was given a prescription and general educational information for ankle sprain and back pain.

On October 25, 2010 the employing establishment issued a Form CA-16 to Dr. Oliver Brand, a Board-certified family practitioner, authorizing treatment of injuries sustained in the October 13, 2010 incident. On the reverse side of the Form CA-16, Dr. Brand indicated that he had examined appellant on October 13, 2010. The history of injury was noted as a forklift hit her mid body and knocked her to the floor. Dr. Brand stated that appellant was disabled October 13 through 19, 2010 and could resume light work with no lifting for two months thereafter. No condition was diagnosed on the form.

The employing establishment challenged the claim. It stated that appellant's supervisor, Ernest Kidd, Jr., spoke to the employees working in the area at the time of the alleged accident and that the facts did not support that appellant was injured by the forklift as alleged. In a November 1, 2000 statement, Mr. Kidd noted that, at approximately 17:00 on October 13, 2010, appellant was allegedly hit by a forklift driven by a Eugene Thomas, who was delivering a pallet of mail across the aisle from where she was working. Mr. Thomas stated that his forklift was at a complete stop and that appellant walked in front of it and laid down on the floor. An employee, Donnie Wilson, stated that he had stopped all traffic to move some equipment out of the way so Mr. Thomas could stage the pallet of mail by the machine. Another employee, John Brantley, stated that he was in front of Mr. Thomas' forklift and that the forklift was not in motion. Mr. Kidd noted that several other employees stated that they neither saw nor heard anything that appellant had been struck by a forklift. The emergency personnel who examined appellant on the scene found no physical signs of bruising.

Additional medical evidence noted on October 20, 2010 that appellant was treated for chest pain in the emergency department. On November 5, 2010 appellant was put on light duty with no lifting until November 8, 2010.

By letter dated November 10, 2010, OWCP advised appellant that she needed to submit additional factual and medical evidence in support of her claim. It provided 30 days to submit the requested information.

In response, OWCP received a claim form and statements regarding an alleged hernia injury of October 8, 2010; an October 19, 2010 report and October 21, 2010 work release from appellant's gynecologist; October 20, 2010 laboratory results and diagnostic testing; an October 13, 2010 work release slip; prescriptions; a hospital report for a December 8, 2009 back injury along with a work release slip for the December 8, 2009 back injury; a November 8, 2010 report from appellant's ophthalmologist indicating that she is legally blind in her left eye; and an August 14, 2008 notification of personnel action.

In an undated statement, appellant stated that she did not understand why Mr. Kidd provided a statement as he was not present when the accident occurred. She claimed that Cedric Norman, a supervisor, stayed with her until the ambulance arrived. Appellant stated that she is legally blind in her left eye and that she had to go across the aisle to get more labels for her machine when the incident occurred. She alleged that it was dangerous and crowded around all the equipment and hard to see around everything.

The October 13, 2010 ambulance report noted as a history of injury that appellant's right foot caught under a pallet and she tripped and fell on a rubber padded floor at the employing establishment.

In an October 26, 2010 report, Dr. Brand noted that appellant was knocked to the floor by a forklift at work on October 13, 2010 and went to the emergency department where she was examined and told she had low back and right ankle strains. He also noted that appellant previously hurt her back at work a year earlier. Dr. Brand diagnosed right ankle strain and low back strain and opined that appellant should continue light duty with no lifting for two months.

In a November 1, 2010 report, appellant's podiatrist, Dr. John Roberson, noted a history of appellant's right foot being run over by a forklift on October 13, 2010 and that she was diagnosed with a sprain in the emergency room. He provided examination findings and assessed a neuroma, right third interspace; pain and edema and Talon's bunion. Progress notes of November 15 and December 6, 2010 were also provided.

In a December 8, 2010 report, Dr. John Holloway III, a Board-certified gynecologist, reported that appellant was treated for a lumbar strain on November 5, 2010. He indicated that she described the pain as beginning when she was knocked over by a forklift and fell on the concrete floor at work three and a half weeks ago. Dr. Holloway indicated the x-rays were normal and appellant was treated with medication and a referral for physical therapy. He also indicated that she was placed on light duty with no lifting and off work from November 5 through 8, 2010.

By decision dated December 15, 2010, OWCP denied appellant's claim, finding that she failed to establish fact of injury. It noted that the evidence was insufficient to establish that the incident occurred as alleged and the medical evidence was for other medical conditions not related to this alleged injury.

On December 26, 2010 appellant filed a request for an oral hearing before an OWCP hearing representative.

In a March 1, 2011 letter, OWCP notified appellant that a telephonic hearing before an OWCP hearing representative was scheduled for April 21, 2011 at 2:30 p.m. Eastern Time. Appellant was provided a toll-free number to call and a pass code to connect to the hearing representative and court reporter. The notice was sent to her address of record.

By decision dated May 3, 2011, an OWCP hearing representative found that appellant abandoned her request for an oral hearing.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] 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 FECA, that the claim was filed within the applicable time limitation; that an injury was sustained while 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 elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

To determine whether a federal employee has sustained a traumatic 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 or she actually experienced the employment incident at the time, place and in the manner alleged.[5] 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.[6]

OWCP 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.[7] Nor can OWCP find fact of injury if the evidence fails to establish that the employee sustained an injury within the meaning of FECA. 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 her subsequent course of action.[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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.[9]

ANALYSIS -- ISSUE 1

Appellant filed a claim for a traumatic injury occurring on October 13, 2010. She stated that a forklift struck her while moving down an aisle. It knocked appellant down onto the

[2] 5 U.S.C. § 8101 *et seq.*

[3] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id.* For a definition of the term injury, see 20 C.F.R. § 10.5(ee).

[7] *Pendleton, supra* note 3.

[8] *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *see Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[9] *See Constance G. Patterson*, 42 ECAB 206 (1989).

cement floor. At oral argument before the Board, she denied that she tripped over the forklift pallets. OWCP denied appellant's claim on the basis the injury did not occur as alleged.

Appellant attributed her ankle strain and back condition to October 13, 2010 when she was hit by a forklift. She did not recall or report tripping or falling over the forklift pallets. The Board finds that the weight of the evidence establishes that the employment incident of October 13, 2010 did not occur as alleged. An investigation by the employing establishment indicated that at the time of the alleged incident the forklift driver, Mr. Thomas, had the forklift at a complete stop. It was noted that appellant walked in front of it and laid down on the floor. An employee, Mr. Brantley, confirmed the forklift was not in motion. Another employee, Mr. Wilson, stated that he had stopped all traffic so Mr. Thomas could stage the pallet of mail by the machine. The investigation further revealed several other employees stated they neither saw nor heard any indication that appellant had been struck by a forklift. The ambulance report stated a history that appellant's right foot became caught under a pallet and she tripped and fell onto a rubber padded floor. Appellant, who is visually impaired, denied tripping over the forklift pallets and maintained that the forklift struck her and she fell to the cement floor. Due to these divergent statements on how the injury occurred, the Board finds that the weight of the evidence fails to establish that the October 13, 2010 incident occurred as alleged.

As appellant did not establish the employment incident alleged to have caused her injury, it is not necessary to consider the medical evidence with regard to causal relationship.[10]

The Board notes that, while appellant has not met the factual component of fact of injury, OWCP failed to address the issue of her possible entitlement to medical expenses. It has broad discretionary authority in the administration of FECA to achieve the objective of section 8103.[11] It has discretionary authority to approve unauthorized medical care which it finds necessary and reasonable and is required to exercise that discretion.[12] Ordinarily, when an employee sustains a job-related injury which may require medical treatment, the designated agency official shall promptly authorize such treatment by giving the employee a properly executed Form CA-16 authorizing medical treatment and expenses within four hours.[13] The agency official is not required to issue a Form CA-16 more than one week after the occurrence of the claimed injury.[14] OWCP regulations provide that in unusual or emergency circumstances, OWCP may approve payment for medical expenses incurred otherwise than as authorized in provision regarding medical care.[15] The employing establishment provided appellant with a Form CA-16 13 days after the claimed injury. In denying appellant's claim for a traumatic injury, OWCP did not consider whether emergency circumstances or unusual circumstances were present or whether

[10] *S.P.*, 59 ECAB 184 (2007).

[11] 5 U.S.C. § 8103.

[12] *Michael L. Malone*, 49 ECAB 194 (1997); *Thomas W. Keene*, 42 ECAB 623 (1991); *Val D Wynn*, 40 ECAB 666 (1989).

[13] 20 C.F.R. § 10.300(b).

[14] *Id.*

[15] *Id*. at § 10.304.

this was a situation in which reimbursement of medical expenses was appropriate.[16] Upon return of the record, the circumstances of the case warrant additional development of this issue.

LEGAL PRECEDENT -- ISSUE 2

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[17] Unless otherwise directed in writing by the claim, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[18] OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.[19]

The authority governing the abandonment of hearings rests with OWCP's procedure manual, which provides that a hearing can be abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned her request for a hearing and return the case to the district OWCP.[20]

ANALYSIS -- ISSUE 2

By decision dated December 15, 2010, OWCP denied appellant's traumatic injury claim. Appellant timely requested an oral hearing before an OWCP hearing representative. In a March 1, 2011 letter, it notified her that a telephonic oral hearing was scheduled for April 21, 2011 at 2:30 p.m. The notice was addressed to her home of record.[21] The record shows that appellant did not appear for the scheduled hearing. Further, appellant did not request a postponement of the hearing or explain her failure to appear at the hearing within 10 days of the scheduled hearing date of April 21, 2011. Therefore, the Board finds that she abandoned her request for a hearing.[22]

---

[16] *K.G.*, Docket No. 10-1806 (issued April 5, 2011); *L.B.*, Docket No. 10-469 (issued June 2, 2010).

[17] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[18] 20 C.F.R. § 10.617(b).

[19] *See Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). *See also G.J.*, 58 ECAB 651 (2007).

[21] In the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received. *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

[22] *See id.*

On appeal, appellant contends that she did not receive notice of the scheduled hearing. The record reflects that a copy of the March 1, 2011 hearing notice was mailed to appellant's last known address of record and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.[23] As OWCP properly mailed a hearing notice to appellant's address of record, it is presumed to have arrived at her mailing address.

CONCLUSION

The Board finds that appellant has not established that the claimed work injury of October 13, 2010 occurred as alleged. However, OWCP should adjudicate the issue of whether appellant should be reimbursed for incurred medical expenses. The Board also finds that OWCP properly found that appellant abandoned her request for an oral hearing before an OWCP hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2011 and December 15, 2010 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Issued: November 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[23] *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).