

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHRISTINE S. HEBERT and U.S. POSTAL SERVICE,  
POST OFFICE, Baton Rouge, La.

*Docket No. 96-812; Submitted on the Record;  
Issued August 4, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on October 26, 1992.

The Board has duly reviewed the case record in the present appeal and finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on October 26, 1992.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order<sup>1</sup> on March 24, 1995 in which it set aside the December 8, 1992 and July 19, 1993 decisions of the Office of Workers' Compensation Programs and remanded the case to the Office for further development. Appellant had alleged that she sustained an employment-related injury in that her supervisor, Mr. Charles A. Robertson, sexually assaulted her at work on October 26, 1992; Mr. Robertson claimed that he did not sexually assault appellant in that he and appellant had sexual intercourse on a consensual basis. The Board determined that the Office's December 8, 1992 and July 19, 1993 decisions did not contain adequate findings of fact and did not clearly delineate the basis for the Office's denial of appellant's claim.<sup>2</sup> The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

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<sup>1</sup> Docket No. 93-2292 (issued March 24, 1995).

<sup>2</sup> The Office noted in its July 19, 1993 decision that it had been accepted that a sexual incident occurred at work on October 26, 1992 between appellant and Mr. Robertson, but it did not clearly indicate whether it had made a determination that this incident would be considered an employment factor or arose within the performance of duty. Appellant claimed both physical and emotional injury in connection with the alleged attack.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> 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 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.<sup>4</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup> To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.<sup>6</sup> Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>7</sup> The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.<sup>8</sup>

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 or her subsequent course of action.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> An employee's statement alleging that an injury occurred at a given time and in a

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>5</sup> *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

<sup>6</sup> *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354, 356-57 (1989); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

<sup>8</sup> *Elaine Pendleton*, *supra* note 4; 20 C.F.R. § 10.5(a)(14).

<sup>9</sup> *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

<sup>10</sup> *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>11</sup> *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>12</sup>

On remand the Office engaged in further development of the factual evidence relating to appellant's claim. By decisions dated August 23 and October 13, 1995, the Office found that appellant did not meet her burden of proof to show that she was sexually assaulted on October 26, 1992 and, therefore, did not establish the fact of injury.

The Board notes that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that she sustained an injury in the performance of duty on October 26, 1992. Appellant alleged that she was sexually assaulted by Mr. Robertson at approximately 1:30 p.m. on October 26, 1992. She indicated that after the incident she continued to perform her mail sorting duties until approximately 2:30 p.m. when she punched out. Appellant noted that Mr. Robertson came by her work space on several instances -- she indicated that on the first occasion Mr. Robertson apologized for the attack, on the second he picked up mail she was casing and on the third she asked him when she could punch out. Such activity and interactions would not appear to be consistent with appellant having been sexually assaulted and appellant did not adequately explain how she worked without apparent difficulty for approximately one hour after the alleged attack in the presence of the alleged attacker. Appellant indicated that she feared Mr. Robertson but she did not explain why she did not immediately exit the employing establishment after the alleged attack or otherwise contact appropriate authorities.<sup>13</sup> It does not appear that appellant reported the alleged attack until 2:45 p.m. or 3:00 p.m. when she called a coworker; appellant did not explain why she delayed in this manner.

Although appellant sought medical treatment on October 26, 1992 for the claimed physical affects of the alleged attack, she did not adequately explain why she delayed until November 10, 1992 to seek medical treatment for the claimed emotional effects. A criminal investigation was commenced shortly after the claimed incident on October 26, 1992, but the record reveals that appellant chose not to pursue criminal charges against Mr. Robertson. Appellant did not adequately explain why she did not continue to pursue a criminal action against Mr. Robertson.<sup>14</sup> For these reasons, appellant's claim that she was sexually assaulted at work on October 26, 1992 is refuted by strong and persuasive evidence and the Office properly denied her claim.

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<sup>12</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

<sup>13</sup> It should also be noted that the storage room would appear to be adjacent to the work spaces of other workers and appellant did not adequately explain why she did not call for help during the alleged attack.

<sup>14</sup> The dismissal of Mr. Robertson for having consensual sex with appellant was upheld upon appeal. Appellant also was terminated by the employing establishment for engaging in consensual sex; she was later reinstated to the employing establishment, but the settlement which implemented the reinstatement did not contain a finding regarding the nature of the October 26, 1992 incident.

The decisions of the Office of Workers' Compensation Programs dated October 13 and August 23, 1995 are affirmed.

Dated, Washington, D.C.  
August 4, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member