

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA COLLAZO and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

*Docket No. 96-2672; Submitted on the Record;
Issued December 11, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained an injury in the performance of duty on February 8, 1996, as alleged, and (2) whether the Office of Workers' Compensation Programs' Branch of Hearings and Review properly denied appellant's request for a hearing as untimely.

On February 9, 1996 appellant, then a 42-year-old letter carrier, filed a notice of traumatic injury (Form CA-1) alleging that on February 8, 1996 she sustained an injury to her left arm and lower part of her back when a cab rear-ended her postal vehicle.

On February 9, 1996 appellant sought medical treatment from the employing establishment's medical unit where she was diagnosed as having job-related low back strain and a job-related left forearm contusion and recommended for restricted duty until February 15, 1996. No history of the February 8, 1996 incident was reported and it is unclear whether a nurse or physician rendered the diagnosis.

Appellant worked light duty until February 12, 1996, when she brought a medical note diagnosing cervical sprain and left elbow tendinitis and excusing her from work due to total disability from February 12 to 16, 1996. The physician's name is not legible and no history of the February 8, 1996 incident was given.

A February 16, 1996 medical note, from The Neurology Group stated that appellant was totally disabled due to cervical and lumbar radioculopathy. The physician's signature is illegible and there is no history of the February 8, 1996 incident. Moreover, it is noted that this is the first documentation of a cervical injury.

In a March 6, 1996 medical report, Dr. Richard O. Kling, a Board-certified orthopedic surgeon, described appellant's subjective complaints and performed a physical examination. Dr. Kling diagnosed cervical sprain rule out radiculopathy, lumbosacral strain and advised

physical therapy. No opinion was rendered on causal relationship to the February 8, 1996 incident.

In an April 3, 1996 medical note, Dr. Peter C. Kwan, a neurologist, noted that appellant was seen for a neurologic evaluation and was considered to be totally disabled and excused her from work for four weeks. No diagnosis or clinical findings were given.

A note and physical therapy referral from Dr. Rodica Alexandrescu, a Board-certified physiatrist, dated April 13, 1996 released appellant for limited duty as of May 1, 1996. No diagnosis or objective findings are reported.

A statement from the employing establishment notes that appellant indicated she would be visiting her mother in Florida while totally disabled from work.

By letter dated April 30, 1996, the Office requested appellant to provide an accident and police report to confirm the alleged February 8, 1996 motor vehicle accident and to provide a comprehensive medical report explaining the clinical findings that support the diagnosis and the relationship between the medically supported condition and the alleged accident. Appellant was additionally asked to have her physician explain why she was able to work light duty and then became totally disabled. The Office did not receive the requested factual and medical evidence.

In a May 31, 1996 decision, the Office rejected appellant's claim, finding fact of injury was not established.

By letter dated July 2, 1996, appellant requested a hearing. In a July 22, 1996 decision, the Office denied appellant's hearing request.

The Board finds that appellant has failed to establish that she sustained an employment injury on February 8, 1996, as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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.² These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been

¹ 5 U.S.C. § 8101 *et seq.*

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

established. Generally, fact of injury consists of two components which must be considered in conjunction with one another.

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁴ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁵ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁶ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁷ Such circumstances as late notification of injury, confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case.⁸ The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

The second requirement to establish fact of injury is that the employee must submit sufficient evidence, usually in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹ As part of this burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition.¹⁰

In this case, there is insufficient evidence in the file to support that a work-related motor vehicle accident occurred on February 8, 1996, as alleged. Appellant failed to respond to the Office's request for information concerning the accident or submit any reports of the accident to confirm it occurred as alleged. Additionally, the medical evidence submitted to the record note limitations to appellant due to the conditions of cervical strain, left elbow tendinitis and lumbar radiculopathy. These reports do not contain, however, a full history of the alleged incident of February 8, 1996 or medical rationale, which explains how the conditions diagnosed were caused or aggravated by the February 8, 1996 incident. The medical reports of record fail to

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

⁶ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁷ *Id.* at 255-56.

⁸ *Karen E. Humphrey*, 44 ECAB 908 (1993).

⁹ *John J. Carlone*, *supra* note 5.

¹⁰ *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982); *Steven J. Wagner*, 32 ECAB 1446 (1981).

explain the clinical findings or support that the diagnoses made are related to the alleged accident. Moreover, the Office provided appellant with the opportunity to cure the deficiencies in the claim, but she failed to submit the requested medical and factual evidence to substantiate her claim. Appellant, therefore, has failed to meet her burden of proof in establishing that she sustained an employment injury on February 8, 1996 and thus has failed to establish fact of injury.

The Board further finds that the Office's Branch of Hearings and Review properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹¹ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹²

In the present case, the Office issued its decision on May 31, 1996. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was postmarked July 3, 1996 and thus it is outside the 30-day statutory limitation for the decision. Since appellant did not request a hearing within 30 days, she was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.¹³ In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical and factual evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

¹¹ 5 U.S.C. § 8124(b)(1).

¹² *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹³ *Herbert C. Holley*, 33 ECAB 140 (1981).

The decisions of the Office of Workers' Compensation Programs dated July 22 and May 31, 1996 are affirmed.¹⁴

Dated, Washington, D.C.
December 11, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ The Board notes that appellant submitted additional evidence after the Office's May 31, 1996 decision. As this evidence was not previously considered by the Office, it represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office, together with a request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b).