

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY B. GIBSON and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Richmond, Va.

*Docket No. 97-2174; Submitted on the Record;
Issued March 23, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on August 7, 1996; and (2) whether the Office of Workers' Compensation Programs, by its March 28, 1997 decision, abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On August 23, 1996 appellant, then a 42-year-old computer programmer/analyst, filed a traumatic injury claim (Form CA-1) alleging that on August 7, 1996, as he was leaving the restroom the door opened. He went on to say that when he stepped back to get out of the way he fell on the floor cutting open his elbow. Appellant further stated that he developed a staph infection in the cut. On the reverse side of the form, the employing establishment indicated that appellant stopped work on August 12, 1996. No evidence was submitted with appellant's claim.

By letter dated October 8, 1996, the Office requested detailed factual and medical information from appellant to support his claim. Appellant was allotted 30 days within which to submit the requested evidence.

Appellant did not respond within the allotted time.

By decision dated November 12, 1996, the Office denied appellant's claim for failure to establish that he sustained an injury in the performance of duty as alleged, and, therefore, fact of injury was not established.¹

¹ The Office stated in its decision dated November 12, 1996 that, previously paid continuation of pay would be charged to appellant's sick and/or annual leave or if he does not have a leave balance, the money already paid as continuation of pay will be deemed an overpayment within the meaning of 5 U.S.C. § 5584.

By letter dated December 11, 1996, appellant requested reconsideration. No evidence was submitted with the request.

By decision dated March 27, 1997, the Office denied appellant's request for reconsideration on the grounds that he neither raised substantive legal questions nor included new and relevant evidence to warrant review of the prior decision.

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on August 7, 1996 as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act² 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, and that the claim was filed within the applicable time limitation of the Act.³ An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,⁴ that the injury was sustained while in the performance of duty,⁵ and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁷

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been 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.⁸ In the instant case, there is no dispute that the claimed incident occurred at the time, place and in the manner alleged.⁹ However, the Office found that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the

² 5 U.S.C. §§ 8101-8193.

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

⁴ *Robert A. Gregory*, 40 ECAB 478 (1989).

⁵ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *Steven R. Piper*, 39 ECAB 312 (1987).

⁷ *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Elaine Pendleton*, *supra* note 3.

⁹ The man who opened the restroom door provided a statement corroborating appellant's version of the incident.

employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.¹⁰

In this case, appellant failed to submit any evidence to establish that he sustained an injury in the performance of duty on August 7, 1996, as alleged. Although the Office advised appellant what type of evidence was needed to establish his claim, such evidence has not been submitted.¹¹ Therefore, the Board finds that appellant has failed to meet his burden of proof.

The Board also finds that in its decision dated March 28, 1997, the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of his claim on the merits under 5 U.S.C. § 8128.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹² When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.¹³

In his request for reconsideration dated December 11, 1996, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. Also, appellant did not submit new and relevant evidence.

As appellant's December 11, 1996 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

¹⁰ *Kathryn Haggerty*, 45 ECAB 383 (1994); *see* 20 C.F.R. § 10.110(a).

¹¹ In a letter dated November 21, 1996, appellant stated that he never received a request for additional information. The record supports that the Office's October 8, 1996 request for additional information was sent to appellant at the address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *A.C. Clyburn*, 47 ECAB 153 (1995).

¹² 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

¹³ 20 C.F.R. § 10.138(b)(2).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 28, 1997 and November 12, 1996 are affirmed.¹⁴

Dated, Washington, D.C.
March 23, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

¹⁴ The Board notes that appellant submitted new evidence with his appeal. However, the Board may not consider such evidence for the first time on appeal. 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 should resubmit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b).