U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IDA ESTRADA and U.S. POSTAL SERVICE,
HIGHLAND HILLS STATION, San Antonio, TX

Docket No. 02-399; Submitted on the Record;
Issued July 11, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely filed; and (2) whether appellant sustained an injury while in the performance of duty.

On June 27, 2001 appellant, then a 47-year-old casual carrier, filed a traumatic injury claim, alleging that the day before she fell on a bump in the grass while delivering the mail and hurt her right ankle, calf, leg, back, shoulder, hand, wrist and fingers. Her supervisor stated on the claim form that appellant did not report her injury until after the supervisor called her at home on June 27, 2001 to make sure she wanted to resign. The employing establishment controverted the claim.

Appellant's supervisor stated that appellant had come in from her route on June 26, 2001, turned in her badge and stated that she wanted to resign because carrying the mail was too hard for her and she had obtained another job. The supervisor added that appellant first told her that she had stepped in a hole and later that she had fallen over a tree stump. A coworker corroborated that appellant had complained on June 26, 2001 about how hard carrying mail was but that she had called home during lunch that day and learned that she had obtained a job with the school district.

The supervisor related that during her telephone conversation with appellant on Wednesday, June 27, 2001, appellant stated that she had gone to the doctor the day before and he had opined that she could deliver mail to apartments and businesses. Appellant asked if she could be assigned to do this. The supervisor explained that assignments were not made like that.

Appellant later came to work and stated that a supervisor had seen her fall "somewhere on Ryan" outside a back door, but the supervisor denied this. The supervisor then went out with appellant on the route where appellant found a stump in front of 326 Ryan and said she had tripped over the stump. The supervisor added that appellant claimed that she had told her

coworkers about her fall on June 26, 2001 but they denied she said this and stated that she had spoken instead about how hard they worked and how carrying mail was not the job for her.[1]

Appellant told her supervisor that she sought medical treatment the night of June 26, 2001 but then later admitted that she had not seen her doctor but claimed that she said it because she was "in terrible pain." She was sent to the employing establishment's physician on June 27, 2001, who released her for limited duty. Appellant went to her own physician, Dr. Robert A. Borrego III, on June 29, 2001. Dr. Borrego diagnosed cervical and right wrist and elbow sprains and took her off work for 10 days.

Dr. Borrego referred appellant to Dr. Patrick W. Mulroy, Board-certified in physical medicine and rehabilitation, who found that x-rays of the right wrist were within normal limits except for a ganglion cyst. Dr. Mulroy diagnosed myofascial pain and multiple contusions without abrasions and referred her for physical therapy.

The Office requested on July 12, 2001 that appellant submit further information and medical evidence regarding her injury. She explained that she fell down on a tree stump that was in the yard where she was delivering mail on June 26, 2001.

On August 23, 2001 the Office denied appellant's claim on the grounds that she had failed to establish that she sustained an injury in the performance of duty. The Office noted that appellant had not responded to its July 12, 2001 questionnaire.

On October 10, 2001 appellant requested an oral hearing and stated that she took her supervisor to the place where she had fallen, showing her a tree stump and the hole where she caught her foot and fell. She added that she had responded to the Office's July 12, 2001 inquiry by sending a packet of information to her congressional representative.

On November 6, 2001 the Office denied appellant's request for a hearing as untimely filed. The Office noted that the issue in her case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered which establishes that appellant experienced the incident as alleged.

The Board finds that the Office properly denied appellant's request for a hearing as untimely filed.

Section 8124(b)(1) of the Federal Employees' Compensation Act[2] provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is

[1] Appellant accepted a limited-duty position on August 3, 2001. She was involved in an automobile accident on August 14, 2001 and was separated from her position on August 31, 2001.

[2] 5 U.S.C. §§ 8101-8193.

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."[3]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[5]

In this case, appellant's request for a hearing was dated October 10, 2001, well beyond the 30-day limitation of section 8421(b)(1) and its implementing regulation.[6] Because appellant failed to request an oral hearing within 30 days of the Office's August 23, 2001 decision she is not entitled to an oral hearing as a matter of right.

While the Office has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its November 6, 2001 decision, stated that it had reviewed appellant's request and determined that whether appellant actually fell at the time, place and in the manner alleged could be resolved with a request for reconsideration and evidence showing that she sustained an injury while in the performance of duty.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[7] The record does not indicate that the Office acted in any manner in denying appellant's request for a hearing that could be found to be an abuse of discretion. Therefore, the Office properly denied appellant's request for a hearing as untimely.[8]

The Board also finds that appellant failed to meet her burden of proof in establishing that she sustained an injury while in the performance of duty.

Under the Act, an employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged by the preponderance of the reliable, probative and

[3] 5 U.S.C. § 8124(b)(1).

[4] *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

[5] *Martha A. McConnell*, 50 ECAB 129, 130 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

[6] 5 U.S.C. § 8421(b)(1); 20 C.F.R. § 10.616(a).

[7] *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

[8] The record contains a September 11, 2001 typewritten note from appellant asking why her claim was denied and stating that she had not received "any information of my appeal rights," which she was requesting at this time. The Office received this document on December 13, 2001.

substantial evidence.[9] To determine whether an injury was sustained in the performance of duty, the Office begins with an analysis of whether fact of injury has been established.[10]

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 that is alleged to have occurred.[11] The second component, whether the employment incident caused a personal injury, can generally be established only by medical evidence.[12]

While an injury does not have to be confirmed by witnesses to establish the fact that an employee sustained an injury while in the performance of duty, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[13] An employee has not met her burden of proof in establishing the occurrence of an injury when inconsistencies in the evidence cast serious doubt on the validity of the claim.[14]

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.[15] An employee's statement alleging that an injury occurred at a given time and place and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[16]

In this case, the record establishes a sequence of events that is sufficiently inconsistent to cast doubt on whether appellant sustained an employment injury as alleged. The record shows that appellant handed in her badge on June 26, 2001 and informed coworkers that she was quitting and had another job. Appellant admitted in her October 10, 2001 letter that the statement given by her supervisor that she said she wanted to resign on June 26, 2001 "was true." Yet in her July 20, 2001 statement appellant related that she did not report her injury on June 26, 2001 when she returned from delivering mail because she feared she would be fired or considered incapable of doing her job correctly, so she "blocked out her pain at the time."

[9] *Michael W. Hicks*, 50 ECAB 325, 328 (1999); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[10] *Earl David Seal*, 49 ECAB 152, 153 (1997); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

[11] *Linda S. Jackson*, 49 ECAB 486, 487 (1998).

[12] *Michael E. Smith*, 50 ECAB 313, 316 (1999).

[13] *Michael W. Hicks*, *supra* note 9.

[14] *Irene St. John*, 50 ECAB 521, 522 (1999).

[15] *Christine S. Hebert*, 49 ECAB 616, 617 (1998).

[16] *Margarita Bell*, 48 ECAB 172, 176 (1996); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

The record is also clear that appellant told no one on June 26, 2001 that she had injured herself in a fall that day. The next day appellant's supervisor called her to make sure that she was resigning and that is when appellant reported her injury. At first appellant said she had been to see her physician because of the pain from her fall. Then she admitted she had not sought medical treatment on June 26, 2001 but said she had because she was in so much pain. She also related that a physician told her she was capable of delivering mail to apartments and businesses.

On her claim form, appellant said that she "fell on grass where there is a bump." Then she explained that her fall occurred when she caught her foot in a hole. She told her supervisor that it was a hole with a tree stump in it and that she tripped over the stump. At one point she stated that she fell by the back door and that Linda Green was a witness, which she denied. Ms. Green went with appellant to Ryan Street, where she claimed to have fallen and stated that when appellant could not find a hole on Ryan Street she found a stump at 326 Ryan Street and stated that she had tripped over the stump.

While an employee's statement of injury is generally accepted as proof that the incident occurred, the Board finds that in this case there are too many inconsistencies in this record for appellant to establish that the fall or other incident occurred at the time, place and in the manner alleged.[17] The record contains strong and persuasive evidence that undermines the validity of appellant's claim that she injured herself in the performance of duty.

Inasmuch as the Office informed appellant of the need to submit medical evidence in support of her claim and appellant did not provide the requisite evidence, the Board finds that appellant has failed to meet her burden of proof to establish that she sustained an injury while in the performance of duty.[18]

[17] *See Mary Joan Coppolino*, 43 ECAB 988, 991 (1992) (finding that appellant's explanation for the inconsistencies in her account of how she injured her back cast doubt on the validity of her claim for compensation).

[18] Appellant contended that she sent evidence in response to the Office's July 12, 2001 inquiry but that it was never received. In its August 23, 2001 decision, the Office reviewed appellant's request for an oral hearing and determined that the issue in the case could be equally well resolved if she submitted a request for reconsideration.

The November 6 and August 23, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 11, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member