United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 08-48**
	)	**Issued: March 26, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 2, 2007, which denied her request for a hearing, and a merit decision dated May 2, 2007, which denied her claim for compensation. Under 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 has established that she sustained a left knee injury in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

Appellant, a 53-year-old automation clerk, filed a Form CA-1 claim for benefits on September 14, 2006, alleging that she injured her knee on September 12, 2006. In response to the question requiring the claimant to describe how the injury had occurred appellant stated: "unknown-knee hurt."

The employing establishment controverted the claim. On the form, appellant's supervisor noted that appellant had reported on September 14, 2006 that she felt a twinge in her knee on September 12, 2006. The supervisor also stated:

> "Based on the fact that [appellant] claims she had a twinge two days prior to actually report[ing] her injury with her statement that she ... fell down the stairs at home [on September 8, 2006] it is reasonable to presume that this injury did not occur at work."[1]

A September 14, 2006 report from the employing establishment health clinic indicated that appellant sustained an injury on September 12, 2006. In response to the question, "Describe how the injury occurred, it is stated:

> "Pulling mail trays at work. Turned and twisted left knee ... felt stabbing pain which immediately subsided. On September 8, 2006 while at home ... left knee twisted while walking down stairs ... fell down three steps. Four hours later was again going down stairs [when] suddenly knee gave out."

Appellant was diagnosed with left knee strain and internal derangement. A follow-up clinic report dated September 21, 2006 reiterated that her injury occurred on September 12, 2006 and that the diagnosis was left knee strain.

By letter dated October 2, 2006, the Office advised appellant that she needed to submit additional factual and medical evidence in support of her claim. The Office specifically advised appellant that the employing establishment had controverted her claim because she had not timely reported the claim and she had stated other reasons for her injury to her coworkers. Appellant was requested to provide a detailed description of where she was and what she was doing at the time of the alleged injury. The Office stated that she had 30 days to submit the requested information. Appellant submitted a September 15, 2006 x-ray report, which recorded normal findings. She did not respond to the Office's request for a detailed description of the alleged incident.

By decision dated May 2, 2007, the Office denied appellant's claim, finding that she failed to submit a factual statement which established the basis of her claim. The Office stated that the statements on her claim form were lacking in detail in regard to the circumstances of her alleged injury. The Office noted that it had requested additional factual information to support appellant's claim, but she failed to submit such evidence. The Office therefore denied compensation.

On June 2, 2006 appellant requested an oral hearing.

By decision dated July 2, 2007, the Office denied appellant's request for an oral hearing. The Office stated that her request was postmarked June 2, 2007, which was more than 30 days after the issuance of the Office's May 2, 2007 decision, and that she was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the

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[1] The record contains a copy of a September 14, 2006 form report from the employing establishment health clinic, but this report is not legible.

issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing that 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon 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]

In order to determine whether an employee actually sustained an injury in the performance of her 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.[7]

The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred. 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. 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. 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

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[2] 5 U.S.C. § 8101 *et seq*.

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

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

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

[7] *Caroline Thomas*, 51 ECAB 451 (2000).

determining whether she has established a *prima facie* case. 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 substantive evidence.[8] 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.[9] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[10]

ANALYSIS -- ISSUE 1

In the present case, the Office found that the factual evidence appellant submitted did not establish that she sustained a left knee injury on September 12, 2006 because she failed to describe any specific incident as the basis of her claim. Appellant therefore did not establish that the alleged injury occurred in the time, place and manner alleged.

The Board finds that appellant has presented insufficient evidence to establish that any alleged incident occurred.[11] Appellant submitted a September 14, 2006 Form CA-1 indicating that she injured her knee on September 12, 2006. But on this claim form in response to the request to describe the incident causing injury appellant stated that she did not know how she hurt her knee. Although the Office subsequently requested on October 2, 2006 that appellant provide a detailed description of the alleged incident, she never responded to the Office's request. Appellant has not established the time, place or manner of any specific employment incident. Therefore she has not met her burden of proof to establish fact of injury.

The Board notes that the record contains a September 14, 2006 clinic report indicating that appellant turned and twisted her left knee on September 12, 2006 while pulling mail trays at work, and felt a stabbing pain in her left knee. The Board is unable to reconcile this description of the injury with appellant's claim form which was also completed on September 14, 2006 and which stated that she could not describe how the injury occurred, in light of her continued refusal to describe the injury to the Office in response to the October 2, 2006 request.

The Office advised appellant of the evidence required to establish her claim; however, she failed to submit such evidence, the Office properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office final decision.[12] A claimant is not entitled to a hearing if the request is not made within 30 days of the

[8] *John J. Carlone*, *supra* note 5.

[9] *Louise F. Garrett*, 47 ECAB 639, 643-644 (1996).

[10] *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[11] *Id.*

[12] 5 U.S.C § 8124(b)(1).

date of issuance of the decision as determined by the postmark of the request.[13] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[14] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[15]

ANALYSIS -- ISSUE 2

In the present case, because appellant's June 2, 2007 request for a hearing was postmarked more than 30 days after the Office's May 2, 2007 decision denying compensation for a claimed knee injury, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing. The Board therefore affirms the Office's July 2, 2007 decision denying appellant an oral hearing by an Office hearing representative.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained a left knee injury in the performance of duty. The Board finds the Office properly denied appellant's request for an oral hearing before an Office hearing representative.[16]

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[13] 20 C.F.R. § 10.131(a)(b).

[14] *William E. Seare*, 47 ECAB 663 (1996).

[15] *Id.*

[16] On appeal, appellant has submitted new evidence. However, the Board cannot consider new evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy,* 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 501(c).

ORDER

IT IS HEREBY ORDERED THAT the July 2 and May 2, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: March 26, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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