United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 08-287**
	)	**Issued: May 6, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Fort Lauderdale, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 6, 2007 appellant filed a timely appeal of a June 12, 2007 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an injury in the performance of duty and an August 8, 2007 nonmerit decision, denying his request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury on April 25, 2007 in the performance of duty, as alleged; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On April 25, 2007 appellant, then a 53-year-old carrier technician, filed a traumatic injury claim alleging that on that date he experienced pain in his groin while on his route with a defective satchel.

On appellant's claim form, D.M. Saunders, a supervisor, received notification of the alleged injury on April 28, 2007. Appellant advised an evening supervisor that his injury was caused by walking on April 25, 2007. He informed a manager that his injury was caused by his satchel on April 26, 2007.

Appellant submitted an April 25, 2007 form report of a physician whose signature is illegible which stated that April 25, 2007 was the date of injury. The physician provided clinical findings of a left groin muscle pull and stated that a diagnosis due to the injury was unclear. The physician listed appellant's physical restrictions. In an April 25, 2007 authorization for an examination and/or treatment, the same physician diagnosed a left groin muscle pull. The physician stated that a causal relationship between the diagnosed condition and the April 25, 2007 employment activity was unclear without additional diagnostics.

By letter dated May 9, 2007, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It advised him to state "where you were and what you were doing at the time your injury occurred. Provide a detailed description as to how your injury occurred. (For example, if you fell, state how far you fell, how you landed, etc. If lifting was the cause of the injury, describe the object handled, its weight, what you did with it, etc.)." The Office also addressed the additional medical evidence appellant needed to submit to support his claim of injury.

Records from a medical center emergency room were submitted. They indicated that appellant was treated on April 25, 2007 for a left muscle groin pull.

The May 21, 2007 form reports of Dr. Laurie Kardon, Board-certified in preventive occupational medicine, provided April 25, 2007 as the date of injury. Dr. Kardon opined that appellant sustained a work-related right inguinal hernia. Also on May 21, 2007 she provided his physical restrictions.

On April 25, 2007 Dr. Richard T. Baker, a Board-certified radiologist, performed a computerized tomography (CT) scan of appellant's abdomen and pelvis. He found no kidney stones or obstruction. There were several tiny to small stones within a nondilated gall bladder. There was also mild left and sigmoid colon diverticulosis.

By decision dated June 12, 2007, the Office denied appellant's claim on the grounds that he did not establish that the claimed employment incident occurred at the time, place and in the manner alleged. On July 19, 2007 the Office received appellant's request for an oral hearing before an Office hearing representative which was dated July 10, 2007 and sent in an envelope postmarked July 13, 2007.

In a decision dated August 8, 2007, the Office denied appellant's request for a hearing on the grounds that it was untimely under section 8124. It stated that his request was postmarked July 13, 2007, which was more than 30 days after the issuance of its June 12, 2007 decision, and therefore, he was not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and determined that it could be addressed equally well on reconsideration, by submitting evidence establishing that the claimed event,

incident or exposure occurred at the time, place and in the manner alleged and a diagnosed medical condition was causally related to the accepted incident.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 filed within the applicable time limitation; that an injury was sustained while 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 the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[4] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5] 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.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[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] An injury 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 statements must be consistent with the

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Anthony P. Silva*, 55 ECAB 179 (2003).

[3] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Delphyne L. Glover*, 51 ECAB 146 (1999).

[5] *Donna A. Lietz*, 57 ECAB ___ (Docket No. 05-1758, issued October 27, 2005); *Alvin V. Gadd*, 57 ECAB ___ (Docket No. 05-1596, issued October 25, 2005); *David Apgar*, 57 ECAB ___ (Docket No. 05-1249, issued October 13, 2005).

[6] *Alvin V. Gadd*, *supra* note 5; *Elaine Pendleton*, 40 ECAB 1143 (1989); 20 C.F.R. § 10.5(a)(14).

[7] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[8] *See Louise F. Garnett*, 47 ECAB 639 (1996).

surrounding facts and circumstances and his or her subsequent course of action.[9] An employee has not met his or her burden of proof in 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.[10] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[11] However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[12]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a left groin injury in the performance of duty on April 25, 2007. The Office denied his claim after finding that he did not demonstrate that the specific event occurred at the time, place and in the manner described.

The Board finds that appellant has not established that the employment incident occurred on April 25, 2007, as alleged because he did not sufficiently describe the place and manner in which the alleged incident occurred. On his claim form, appellant stated that on April 25, 2007 he experienced pain in his groin while on his route with a defective satchel. This statement is not sufficiently detailed to allow the Office to determine whether an injury occurred in the manner described. Appellant did not describe how the satchel was defective or explain what he was doing with the satchel. Therefore the nature of the external stress has not been identified. Pursuant to the applicable regulation:

> "Traumatic injury means a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shifts. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected."[13]

On May 9, 2007 the Office advised appellant that it required additional information as to what happened on April 25, 2007 while he was on his route. Appellant offered no further explanation.

The emergency room records and the reports of the physician whose signature is illegible and Dr. Baker stated that appellant was treated for a groin injury on April 25, 2007. However, this evidence did not provide a history of the alleged injury. Similarly, Dr. Kardon's reports

[9] *See Betty J. Smith*, 54 ECAB 174 (2002).

[10] *Id.*

[11] *Linda S. Christian*, 46 ECAB 598 (1995).

[12] *Gregory J. Reser*, 57 ECAB ___ (Docket No. 05-1674, issued December 15, 2005).

[13] 20 C.F.R. § 10.5(ee).

stated that April 25, 2007 was the date of appellant's alleged injury but failed to provide a history of the injury.

D.M. Saunders, a supervisor, received notification of the alleged injury on April 28, 2007. On April 25, 2007 appellant informed an evening supervisor that his injury was caused by walking on his route on that date. He advised a manager that his injury was caused by his satchel on April 26, 2007.

Under the circumstances in this case, the Board finds there are inconsistencies in the evidence that cast serious doubt as to whether an incident occurred as alleged. Appellant was provided an opportunity to perfect the factual aspect of a traumatic injury claim but he failed to do so. Accordingly, the Board finds that he failed to substantiate that the April 25, 2007 employment incident occurred as alleged and, therefore, has not established an injury in the performance of duty. As appellant has not established the factual aspect of his claim, it is not necessary for the Board to consider the medical evidence of record.[14]

LEGAL PRECEDENT -- ISSUE 2

Section 8124 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 a final decision by the Office.[15] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[16] The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[17]

Section 10.616(a) of Title 20 of the regulations further provides:

> "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[18]

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, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in

[14] *Alvin V. Gadd, supra* note 5.

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. § 10.615; *Gerard F. Workinger*, 56 ECAB 259 (2005).

[17] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[18] 20 C.F.R. § 10.616(a). *See also Gerard F. Workinger*, *supra* note 16.

deciding whether to grant a hearing.[19] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[20]

ANALYSIS -- ISSUE 2

Appellant's request for a hearing before an Office hearing representative was dated July 10, 2007 and sent in an envelope postmarked July 13, 2007. The date of filing for appellant's hearing request was fixed by the date of the postmark, *i.e.*, July 13, 2007.[21] Appellant's July 13, 2007 hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated June 12, 2007 and, thus, he was not entitled to a hearing as a matter of right.

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence establishing that he sustained an injury in the performance of duty on April 25, 2007.[22] The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.[23] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on April 25, 2007 in the performance of duty. The Board further finds that the Office properly denied appellant's request for an oral hearing.

[19] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[20] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[21] *See supra* note 18 and accompanying text.

[22] *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

[23] *See André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the August 8 and June 12, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 6, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board