

**United States Department of Labor
Employees' Compensation Appeals Board**

F.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 09-1149
Issued: December 10, 2009**

Appearances:
Carlos M. Morcate, for the appellant
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 March 25, 2009 appellant filed a timely appeal from a March 6, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established she sustained an injury in the performance of duty on November 21, 2008.

FACTUAL HISTORY

On January 20, 2009 appellant, a 65-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained paraspinal muscular strain which she attributed to a November 11, 2008 incident when her supervisor allegedly accused her of "being tardy from [her] lunch [break]." She alleged that this incident caused her to become "really emotional and upset" such that she experienced cramping in her neck, "loss of breath and very hot."

On February 3, 2009 the Office notified appellant that the evidence of record was insufficient to establish her claim. It advised that she needed to submit additional evidence and provided guidance concerning the type of evidence required to establish her claim.

Appellant submitted medical notes and an unsigned hospital discharge report concerning treatment for cervical paraspinal muscular strain. She also submitted a grievance appeal form dated December 20, 2008 concerning a union grievance with the employing establishment.

Appellant submitted statements from two coworkers who observed her condition on the day in question as well as a statement, dated January 15, 2008, in which appellant related several incidents illustrating the complaints she has concerning her supervisor. She also described the events of November 21, 2008. The Office received this evidence on March 6, 2009.

By decision dated March 6, 2009, the Office denied appellant's claim because the evidence of record was insufficient to establish that the incident occurred as alleged.¹ It noted that she never responded to its February 3, 2009 letter, which advised her of the deficiencies in her claim and gave her an opportunity to provide the necessary evidence.

LEGAL PRECEDENT

The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.² As the Board's decisions are final with regard to the subject matter appealed, it is crucial that the Office consider all relevant evidence that was properly submitted prior to the issuance of its final decision.³

ANALYSIS

The Board finds that this case is not in posture for decision.

The Office's March 6, 2009 decision denied appellant's claim because the evidence of record was insufficient to establish that the alleged employment incident occurred as alleged. It stated that appellant never responded to its February 3, 2009 letter, which advised her of the type of factual and medical evidence needed to establish her claim.

¹ On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As this evidence was not part of the record when the Office issued either of its prior decisions, the Board may not consider it for the first time as part of appellant's appeal.

² 20 C.F.R. § 501.2(c).

³ *See Kenneth R. Love*, 50 ECAB 193 (1998). *See also William A. Couch*, 41 ECAB 548 (1990) and *Linda Johnson*, 45 ECAB 439 (1994).

In *William A. Couch*, the Board stated:

“The Federal Employees’ Compensation Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim. Since the Board’s jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board’s decisions are final as to the subject matter appealed, it is critical that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.”⁴

On March 6, 2009 the same day that it issued its decision rejecting appellant’s claim the Office received statements from two coworkers who witnessed appellant’s condition on the date in question and appellant’s January 15, 2008 statement, further describing the circumstances of her November 21, 2008 incident and complaints concerning her supervisor. By stating that no evidence was received in response to its February 3, 2006 inquiry, the Office’s March 6, 2009 decision makes clear that this evidence was not reviewed. Because this evidence was received but not reviewed by the Office in rejecting appellant’s claim, the case must be remanded for a proper review of the evidence and an appropriate final decision on appellant’s entitlement to compensation.⁵

CONCLUSION

The Board finds that this case is not in posture for decision.

⁴ 41 ECAB 548 (1990).

⁵ *Linda Johnson, supra* note 3 (evidence received the same day as the date the Office issues its final decision must be considered).

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: December 10, 2009
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