

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP R. ELLIS and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

*Docket No. 96-2605; Submitted on the Record;
Issued December 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained an injury to his left knee, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On February 16, 1995 appellant, then a 55-year-old tractor trailer driver, filed a notice of occupational injury (Form CA-2) alleging that his condition of water on the knee was a result of utilizing the tractor's clutch and being bumped by mail equipment.

A January 31, 1995 narrative medical report and treatment notes from Dr. Rama E. Chandran, a Board-certified orthopedic surgeon, indicated that appellant was referred for additional testing to determine the exact diagnosis and etiology of his knee condition. A February 23, 1995 duty status report from Dr. Chandran reflects that a firm diagnosis had not been established and authorizes a magnetic resonance imaging (MRI) examination.

A March 28, 1995 fitness-for-duty report, from Dr. Joseph Strazzo did not contain a diagnosis and did not contain an indication of a relationship between appellant's knee condition and his employment.

By letters dated March 21 and July 17, 1995, the Office informed appellant of his responsibility to provide factual and medical evidence to substantiate his claim. Appellant was also advised that medical evidence containing a diagnosis and the physician's reasoned opinion regarding the relationship between the condition and specific employment duties was required. Appellant provided additional factual information, but the requested medical evidence was not received.

By decision dated August 1, 1995, the Office denied appellant's claim as the evidence submitted failed to establish fact of injury. The Office noted that appellant was advised of the deficiencies in the claim and afforded the opportunity to provide supportive evidence.

In a September 18, 1995 letter, appellant requested an "appeal" of his case as he recently found out that his claim was denied for insufficient evidence. Submitted with his letter were previously submitted reports from Dr. Chandran an August 18, 1995 report from Dr. Chandran copies of test results and the results of a May 12, 1995 MRI of his left knee. Additional factual information was also submitted.

In an October 4, 1995 letter, the Office advised appellant that if he wished to exercise his appeal rights he must specify which type of appeal he is requesting.

In an April 13, 1996 letter, appellant requested an oral hearing. Submitted with his request was additional factual evidence and June 21, 1995 medical report from Dr. Chandran in which chondromalacia of the patella in the left knee was diagnosed which he found to be directly related to appellant's employment.

By decision dated May 22, 1996, the Office's Branch of Hearings and Review found appellant was not entitled to an oral hearing as his request was untimely. The Office, however, found that the issue in this case could be equally well addressed by requesting reconsideration from the district office and submitting evidence not previously considered which establishes that the evidence of record supports a determination that an injury was sustained as alleged.

The Board has duly reviewed the case record in the present appeal and finds that appellant failed to meet his burden of proof in establishing that he sustained an injury, as alleged.

An employee seeking benefits under the Act¹ 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 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.² These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of his 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.

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989), *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁴ 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 substantial evidence. 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.

The second requirement to establish fact of injury is that the employee must submit sufficient evidence, usually in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵ As part of this burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition.⁶

In this case, there is insufficient evidence in the file to support that appellant's knee-related condition resulted from his working conditions. From the evidence before the Office at the time of its August 1, 1995 decision, the medical reports of record fail to contain a diagnosis of appellant's knee condition or render an opinion concerning the relationship between appellant's knee condition and his working conditions. Moreover, the Office provided appellant with opportunities to cure the deficiencies in the claim, but he failed to submit the requested medical evidence to substantiate his claim. Appellant, therefore, has failed to meet his burden of proof in establishing that he sustained an employment injury and thus has failed to establish fact of injury.

The Board further finds that the Office's refusal to grant appellant an oral hearing before an Office hearing representative did not constitute an abuse of discretion.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is 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."⁷ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁸

In the present case, the Office issued its decision on August 1, 1995. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was dated April 13, 1996 and received by the Office on April 22, 1996, and thus it

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

⁶ *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982); *Steven J. Wagner*, 32 ECAB 1446 (1981).

⁷ 5 U.S.C. § 8124(b)(1).

⁸ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

is outside the 30-day statutory limitation for the decision. Since appellant did not request a hearing within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.⁹ In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated May 22, 1996 and August 1, 1995 are affirmed.¹⁰

Dated, Washington, D.C.
December 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁹ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁰ The Board notes that appellant submitted additional medical evidence after the Office's August 1, 1996 decision. As this evidence was not previously considered by the Office prior to its decision of August 1, 1996, the evidence represents new evidence which cannot be considered by the Board. 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 may 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).