

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERIA DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

*Docket No. 96-632; Submitted on the Record;
Issued January 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant has established that she sustained an employment injury on July 21, 1994, as alleged.

On July 21, 1994 appellant, a 53-year-old mail handler, filed a claim alleging that on July 21, 1994 "the [g]ondola pushed by employee Vessey contain[ing] parcel mail stacked improperly. He pushed it directly behind me and 27 pieces of mail, hit the back of my right leg in calf and hit knee on metal. Left knee hit the back of my gondola when the calf of left was hit from back with employee mail." At the bottom of the claim form, James J. Vessey provided a witness statement which stated "I was pushing a second gondola behind [appellant]. I angled the gondola towards the left to give her room to push the gondola (her[s]). As I stopped my gondola, 27 pieces of mail fell out of one of the spaces near her and hit Miss Green's leg below the knee cap."

In a report dated July 28, 1994, Dr. Knolly E. Millett, who is Board-certified in family practice, noted the history of injury as follows: "The above-named patient stated that while on the job she was accidentally struck by a mail cart on back of her left knee, the cart was unloaded. Since then, painful left knee and calf with stiffness." Dr. Millett noted that appellant's left knee and left calf were painful and stiff; and that there was soft tissue swelling with pains on flexion and extension on passive range of motion. He diagnosed contusion of left knee. A July 23, 1994 disability certificate from Dr. Millett indicated that appellant was totally disabled with a contusion of the left knee and calf. A July 21, 1994 emergency room report indicated that appellant was treated for a left knee sprain and was considered unable to return to work. It is not clear whether this report was signed by a physician.

In a letter dated September 2, 1994, a representative of the employing establishment disputed the fact that appellant was hit by a piece of metal on the gondola, but noted that Supervisor Jiles and the witness, Mr. Vessey, were in agreement that mail fell out of the gondola and hit appellant on the lower left leg.

By decision dated September 16, 1994, the Office denied benefits on the basis that fact of injury was not established as the evidence of record did not establish that the incident occurred as alleged. The Office noted conflicting or inconsistent statements as to the manner in which the incident occurred. Appellant requested an oral hearing.

Appellant submitted a hand drawn diagram which showed witness Vessey pushing a gondola behind appellant, as she was pushing her own gondola. Appellant wrote "27 pieces fall on back of leg forcing my left knee to the iron on my gondola." She further stated that "his gondola came up on me hitting my left leg on the calf forcing my knee into the gondola." At the hearing, in which appellant did not appear due to illness, her union representative, addressed the events of July 21, 1994 by trying to tie together information from the statements of appellant and the witness on the CA-1 form in conjunction with the diagram appellant submitted which described the accident.

Submitted at the hearing was an August 4, 1994 medical report from Dr. Ronald Richman, a Board-certified orthopedic surgeon, which noted pain and swelling of the left knee. Dr. Richman noted that appellant stated "on July 27, 1994, she was at work and was struck from the back with the knee being forced forward into a drawer of the desk where she was standing." He diagnosed an acute sprain of the right knee (apparently an erroneous reference to the left knee) and noted that it was secondary to the accident of July 27, 1997 (apparently an erroneous reference to July 21, 1997).

By decision dated and finalized June 21, 1995, the Office hearing representative found that fact of injury had not been established, citing that appellant had provided unclear and internally inconsistent statements as to the manner in which the injury occurred and that the medical reports conflicted with appellant's statement reported on Form CA-1. Accordingly, the Office's decision of September 16, 1994 was affirmed.

Appellant requested reconsideration. In support of the request, appellant submitted an August 10, 1995 narrative medical report from Dr. Richman in which the physician stated that the history of injury given in his prior reports was due to a "misunderstanding or miscommunication" between appellant and himself. Dr. Richman noted that the history of injury should have stated that appellant "was struck by some mail that fell out of a gondola and hit the back of her left leg which pushed the knee into the gondola iron rail." Dr. Richman further stated that the history and the symptoms are compatible with the findings and is causally related to the injury of July 27, 1994.

By decision dated November 20, 1994, the Office denied appellant's request for modification, after conducting a merit review, on the grounds that fact of injury had not been established at the time, place and in the manner alleged.

The Board finds that the July 21, 1994 employment injury occurred at the time, place and in the manner described by appellant.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim² including the fact that the individual is an "employee of the United States" within the meaning of the Act,³ that the claim was timely filed within the applicable time limitation period of the Act,⁴ 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.⁵ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To determine whether an 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.⁷ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.⁸ An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.⁹ The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.¹¹ 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.¹²

¹ 5 U.S.C. §§ 8101-8193.

² See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

³ See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁴ 5 U.S.C. § 8122.

⁵ See *Melinda C. Epperly*, 45 ECAB 196 (1993); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ See *John J. Caralone*, 41 ECAB 354 (1989).

⁸ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

⁹ As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, i.e., a physical impairment resulting in loss of wage-earning capacity; see *Frazier v. Nichol*, 37 ECAB 528 (1986).

¹⁰ *Elaine Pendleton*, *supra* note 5.

¹¹ *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹² *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

Although there are some minor discrepancies regarding the order in which mail, from a coworker's gondola, hit the back of appellant's legs on July 21, 1994 and the precise mechanism by which this caused appellant to strike her own gondola, this is not fatal to appellant's claim in these circumstances.¹³ The relevant evidence is essentially consistent in indicating that on July 21, 1994, mail fell from the coworker's gondola and struck the back of appellant's legs, in the calf area, and caused her in some manner to stumble into or otherwise strike her left knee on metal from the gondola that she was pushing. Appellant's statement on her CA-1 form and the diagram that she later submitted are consistent regarding this. As noted above, 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. While initial medical reports noting the history of injury indicated that a gondola struck appellant, this is not so inconsistent with the incident reported by appellant as to cast serious doubt on the claim since appellant's account mentions mail falling from one gondola and striking her left leg on her gondola. Furthermore, the coworker's witness statement on the CA-1 form corroborates that the mail fell as alleged by appellant and does not purport to refute any aspect of the incident claimed by appellant. There is no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.¹⁴ In view of this, the Board finds that the claimed July 21, 1994 incident occurred as alleged.

With respect to whether the July 21, 1994 work incident resulted in an injury, appellant sought medical treatment on the date of the incident and initial medical reports are consistent in diagnosing a contusion of the left knee and calf. Dr. Millett made these diagnoses on July 23, 1994 and in a July 28, 1994 report which noted the history of injury on July 21, 1994 and diagnosed a left knee contusion. Subsequently, in a CA-20 form report received on September 26, 1994, Dr. Millett specifically opined that appellant's left knee contusion was employment related. The Board finds that there is no strong or persuasive evidence refuting that appellant sustained a left knee contusion as alleged.

Consequently, the Board finds that appellant sustained an injury at the time, place and in the manner alleged.¹⁵ Because of this, the case must be remanded for the Office to determine

¹³ See *Doyle W. Ricketts*, 48 ECAB ____ (Docket No. 95-435, issued November 6, 1996).

¹⁴ See *Thelma Rogers*, 42 ECAB 866, 870 (1991).

¹⁵ The Board notes that the mere fact that appellant had prior leg problems does not preclude her from sustaining a separate work injury, that may result in disability, affecting the same area. The Board has held that it matters not what the state or condition of the health of the employee might be; if the conditions of employment constitute the precipitating cause of disability, such disability is compensable as having resulted from accidental injury arising out of the employment. *Thomas J. O'Donnell*, 3 ECAB 179, 183 (1950).

whether the July 21, 1994 employment injury resulted in any continuing condition, for which she would be entitled to medical benefits, or any periods of disability.

The decisions of the Office of Workers' Compensation Programs dated November 20, 1995 and September 16, 1994 are hereby reversed and the case is remanded for further action consistent with this decision to be followed by a *de novo* decision.

Dated, Washington, D.C.
January 5, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member