

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN A. JOHNSON and U.S. POSTAL SERVICE,  
POST OFFICE, Merrifield, Va.

*Docket No. 96-392; Submitted on the Record;  
Issued March 23, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury on February 21, 1989 in the performance of duty, causally related to factors of his federal employment.

On February 28, 1989 appellant, then a 43-year-old letter carrier, filed a claim alleging that on February 21, 1989 he sustained low back strain while picking up trays for delivery of mail. Thereafter he contended, in different statements, that he injured his back during the week of February 13, 1989 on February 21, 22 and 23, 1989. The employing establishment controverted appellant's claim indicating that the medical evidence supported that this was not a work-related injury but was a preexistent problem related to a military incident in 1973, and that appellant had reported to his supervisor on February 21, 1989 that he had injured his back over the preceding weekend.

On November 20, 1989 the Office of Workers' Compensation Programs denied appellant's claim finding that he failed to establish fact of injury. The Office found that there existed multiple inconsistencies in the factual and medical evidence, such that appellant had not established that the alleged injury occurred at the time, place and in the manner alleged.

Appellant requested a hearing, which was held on April 25, 1990. By decision dated October 1, 1990, the hearing representative affirmed the November 20, 1989 decision finding that the evidence of record was not clear or consistent enough to demonstrate that appellant sustained an employment injury at the time, place and in the manner alleged.

Appellant appealed the October 1, 1990 decision,<sup>1</sup> and following an oral hearing before the Board, the Board issued a decision dated January 3, 1992 affirming the October 1, 1990 hearing representative's decision. On May 12, 1992 the Board denied appellant's petition for reconsideration. A second petition for reconsideration was denied on January 12, 1993.

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<sup>1</sup> Docketed as No. 91-626.

Appellant requested reconsideration before the Office, which was denied by decision dated January 31, 1994 finding that it was untimely requested more than three years after the October 1, 1990 decision.

Thereafter appellant again requested an appeal and the Director of the Office made a motion to remand, which was granted by the Board on June 16, 1995.

In support of the request for reconsideration appellant submitted duplicates of previously submitted medical reports and factual evidence, duplicates of previous proceedings before the Office and the Board, medical records dating from before his alleged February 21, 1989 employment injury, and documents related to his claim made under the Federal Tort Claims Act.

By decision dated August 15, 1995, the Office denied modification of the October 1, 1990 decision finding that the evidence submitted was insufficient to warrant modification. The Office reviewed all of the evidence submitted, noted that many of the documents submitted were irrelevant, repetitious or procedural in nature, and found that none of the evidence submitted provided additional factual evidence sufficient to establish that appellant sustained an employment injury at the time, place or in the manner as alleged.

The Board finds that appellant has failed to establish that he sustained an injury on February 21, 1989 in the performance of duty, causally related to factors of his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim.<sup>3</sup> 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 and place and in the manner alleged.<sup>4</sup> 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.<sup>5</sup>

In the instant case, appellant has failed to submit sufficient factual and medical evidence to establish that he actually experienced the employment incident at the time, place and in the

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See *Margaret A. Donnelley*, 15 ECAB 40 (1963).

<sup>4</sup> *John J. Carlone*, 41 ECAB 354 (1989). To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a prima facie case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim. *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); see also *George W. Glavis*, 5 ECAB 363 (1953).

<sup>5</sup> *Id.* For a definition of the term "injury," see 20 C.F.R. §10.5(a)(14).

manner alleged. The evidence is contradictory as to when appellant was injured, as he has alleged at different times that he was injured the week of February 13, 1989, that he was injured the weekend before February 21, 1989, and that he was injured on February 21, 22, and 23, 1989. These inconsistencies cast serious doubt on the probity of appellant's claim. Further, medical evidence appellant submitted attributes his back condition to preexisting back problems relating to a 1973 military incident, rather than to any specific February 1989 work incident. This inconsistency with appellant's allegations further diminishes the probity of his claim. In support of appellant's most recent request for reconsideration he submitted evidence repetitious of that previously submitted and considered by the Office, copies of proceedings regarding his case, and medical evidence predating the dates of his alleged employment incident, which would be irrelevant. None of the evidence submitted by appellant is sufficient to warrant modification of the prior Office decision finding that he has failed to establish fact of injury.

As the evidence of record is still inconsistent with respect to the facts surrounding appellant's alleged employment incident, the Board finds that he has failed to establish fact of injury.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 15, 1995 is hereby affirmed.

Dated, Washington, D.C.  
March 23, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member