

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA L. KULIS and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

*Docket No. 98-1155; Submitted on the Record;
Issued December 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on November 21, 1995, as alleged.

On August 8, 1996 appellant, then a 37-year-old letter carrier, filed a traumatic injury alleging that on November 21, 1995 she experienced pain in her lower back extending into her right leg after "bending over to pick up a tub of mail off the floor." The Office of Workers' Compensation Programs assigned the claim File Number A10-458734. Appellant stopped work on June 3, 1996 and returned to work on August 12, 1996.

In a progress note dated November 21, 1995, Dr. M. Seidman, a chiropractor, related that he treated appellant on that date for complaints of right leg pain with numbness extending into the foot. He stated, "[appellant] indicated onset of her most recent episode of symptoms on November 1, 1995, gradually, without any relationship to trauma."

By letter dated September 16, 1996, the Office requested that appellant submit additional medical and factual information in support of her claim. Appellant did not respond within the 30 days provided.

In a decision dated October 24, 1996, the Office denied appellant's claim on the grounds that she did not establish fact of injury. The Office found that appellant did not establish that the

November 21, 1995 incident occurred at the time, place and in the manner alleged due to inconsistencies in the factual evidence.¹

In a report dated February 26, 1996, Dr. James Hollowell, a neurosurgeon and appellant's attending physician, related that appellant initially experienced back problems in 1979, injured her back at work in 1993 and in October or November 1995 experienced a "burning numbness" from the right low back into the right buttock down the outside of the calf in the dorsolateral aspect of the foot." He diagnosed "degenerative changes of the lower lumbar spine with encroachment on the exiting lower roots," and recommended objective testing.

On June 4, 1996 Dr. Hollowell performed surgery on appellant for a herniated disc at L4-5.

Appellant submitted office visit notes dated June through August 1996 from Dr. Hollowell which described her progress after surgery. In an office visit note dated July 25, 1996, Dr. Hollowell noted appellant's history of work-related back injuries in May 1992 and July 1995. He stated:

"The next injury event occurred in November 1995 after a period of heavy bending and lifting. It would appear clear that [appellant] has sustained multiple low back injuries which have caused pain extending into the lower extremities. This has resulted in disc herniation and associated stenosis of the lateral recess requiring surgery."

By letter dated November 4, 1996, the Office informed appellant that Dr. Hollowell's reports were insufficient to establish that she sustained an injury on November 21, 1995. The Office noted that Dr. Hollowell described multiple work injuries as contributing to her condition and related that it was including his reports in appellant's occupational disease claim, assigned Office File Number A10-456614.

In a letter received by the Office on November 25, 1996, appellant requested a hearing before an Office hearing representative on her traumatic injury claim.

At the hearing, held on October 22, 1997, the Office hearing representative explained to appellant the distinction between a recurrence of disability, a traumatic injury and an occupational disease. He held the record open for 30 days for appellant to submit additional evidence in support of her traumatic injury claim.

¹ The Office noted that appellant had previously filed a claim for a recurrence of disability on November 20, 1995 causally related to a May 26, 1992 employment injury. The record indicates that the Office accepted that appellant sustained lumbosacral strain due to an injury on May 26, 1992, and assigned the claim File Number A10-414704. By letter dated August 6, 1996, the Office noted that appellant had sustained two more traumatic injuries to her back since May 26, 1992 and had also filed an occupational disease claim for a back condition in May 1996. The Office recommended that appellant pursue the occupational disease claim rather than her claim for a recurrence of disability on November 20, 1995.

Appellant submitted evidence relating to her May 1992 injury, previously submitted office visit notes from Dr. Hollowell, and progress notes from her chiropractor describing his treatment of appellant. Appellant further submitted a report dated November 11, 1997 from Dr. William Treichel, who is Board-certified in family practice. Dr. Treichel described appellant's back injuries in 1992, 1995 and a reinjury "on approximately November 1, 1995." He stated:

"My opinion as to a reasonable degree of medical probability is that [appellant] sustained several work-related injuries in May of 1992, June of 1995 and November of 1995 which resulted in a herniated disc which required neurosurgery by Dr. Hollowell on June 4, 1996. The diagnosis is lumbosacral strain with lumbar radiculopathy secondary to a herniated disc at L4-5."

By decision dated December 23, 1997, the hearing representative affirmed the Office's October 24, 1996 decision after finding that appellant did not establish that an injury occurred on November 21, 1995 as alleged due to inconsistencies in the factual record.

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on November 21, 1995, as alleged.

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.² 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 surrounding facts and circumstances and his or her subsequent course of action.³ An employee has not met his or her burden of proof of 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.⁴ 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.⁵ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.⁶

² See *Elaine Pendelton*, 40 ECAB 1142 (1989).

³ *Charles B. Ward*, 38 ECAB 667 (1989).

⁴ *Tia L. Love*, 40 ECAB 586 (1989).

⁵ *Merton J. Sills*, 39 ECAB 572 (1988).

⁶ *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

In the instant case, appellant has not established fact of injury because inconsistencies in the evidence cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Although appellant indicated on the claim form that she injured herself on November 21, 1995, a medical report from her chiropractor dated November 21, 1995 relates the history of injury as a gradual onset on symptoms beginning November 1, 1995 “without any relationship to trauma.” Further, the Board notes that appellant waited almost nine months after November 21, 1995 to file a claim for injuries that allegedly occurred on that date. The Board also notes that appellant originally claimed on June 6, 1996 that she had sustained a recurrence of disability on November 20, 1995 due to a May 1992 injury. Appellant’s inconsistent statements regarding the cause and date of onset of her back condition, together with the lack of contemporaneous medical reports relating a history of the incident, create uncertainty as to the time, place and manner in which appellant sustained a back injury. Thus, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.⁷

The decision of the Office of Workers’ Compensation Programs dated December 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 6, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The narrative reports of record tend to support that appellant’s back condition developed over a period of time greater than a single workday. The record indicates that appellant filed an occupational disease claim for bulging discs in her back on May 17, 1996. The Office assigned the claim File Number A10-456614 and, by decision dated January 8, 1997, denied the claim. As the January 8, 1997 decision was issued more than one year prior to appellant’s filing of her current appeal with the Board on March 4, 1998, the decision is not before the Board; *see* 20 C.F.R. § 501.3(d)(2). By letter dated February 11, 1998, appellant requested reconsideration of the claim but the Office has not yet adjudicated the reconsideration request.