

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IDA M. HARRY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, N.Y.

*Docket No. 97-1363; Submitted on the Record;
Issued January 12, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury to her back while in the performance of duty on October 24, 1995; 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 March 6, 1996 appellant, then a 65-year-old nursing assistant, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she sustained an employment-related injury to her back on October 24, 1995. Appellant stated that, on October 24, 1995, she was transferring a patient from the bed to a litter (stretcher) when she suffered lower back pain. On March 28, 1996 appellant filed a separate claim for compensation on account of traumatic injury or occupational disease (Form CA-7) indicating that her pay stopped on February 26, 1996¹ and requested compensation for wages loss for the period of November 4, 1995 through March 28, 1996.

The employing establishment controverted appellant's claim contending: (1) that appellant was off duty and did not work on October 24, 1995, the day of the alleged incident; (2) that a certificate to return to work from Dr. Mavis Polidore, Board-certified in internal medicine dated October 25, 1995, indicated that appellant was under her care and unable to work on October 25 and 26, 1995 because of acute bronchitis but resumed work on October 27, 1995; (3) that appellant did not report the incident to her supervisor in a timely manner; (4) because of the length of time appellant spent off duty or out of work because of the incident; and (5) because of the lack of medical documentation establishing a causal relationship.

In a decision dated May 16, 1996, the Office rejected appellant's claim on the grounds that fact of injury was not established. In an accompanying memorandum, the Office found that

¹ The notice of traumatic injury claim Form CA-1 indicates that appellant's pay stopped on February 19, 1996, rather than February 26, 1996 as indicated by her claim for compensation Form CA-7.

there was insufficient and conflicting evidence in the file regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged. The Office also found that a medical condition resulting from the alleged work incident or exposure was not supported by the medical evidence of file.

Appellant requested reconsideration of the Office's May 16, 1996 decision and submitted additional factual and medical evidence. In an August 1, 1996 decision, the Office denied modification of the May 16, 1996 decision.

Thereafter appellant requested a hearing before an Office hearing representative.² In a December 20, 1996 decision, the Office denied appellant's hearing request on the grounds that she had previously requested reconsideration and was not entitled to a hearing as a matter of right. The Office stated that it had carefully considered appellant's request following reconsideration, determined that the issues involved could be equally resolved through the reconsideration process and advised appellant that she could submit evidence not previously considered.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury to her back in the performance of duty on October 24, 1995, as alleged.

An employee who claims benefits under the Federal Employees' Compensation Act³ has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁴ An injury does not have to be confirmed by eyewitnesses in order to establish the fact 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.⁵ An employee has not met 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.⁶ 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁷ However, an employee's

² The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Since appellant submitted additional evidence following the Office's August 1, 1996 merit decision on reconsideration the Board lacks jurisdiction to consider the evidence for the first time on appeal. 20 C.F.R. § 501.2(c). This, however, does not preclude appellant from having such evidence considered by the Office as part of a reconsideration request.

³ 5 U.S.C. §§ 8101-8193.

⁴ *William Sircovitch*, 38 ECAB 756 (1987); *John G. Schaberg*, 30 ECAB 389 (1979).

⁵ *Charles B. Ward*, 38 ECAB 667 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175 (1984).

⁶ *Tia L. Love*, 40 ECAB 586 (1989); *Merton J. Sills*, 39 ECAB 572 (1988).

⁷ *Samuel J. Chiarella*, 38 ECAB 363 (1987); *Henry W.B. Stanford*, 36 ECAB 160 (1984).

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.⁸

In the instant case, appellant filed a traumatic injury claim on March 6, 1996, alleging an employment-related injury to her back on October 24, 1995. The record shows that appellant did not report the incident to her supervisor until March 6, 1996, five months following the alleged incident. The employing establishment reported that appellant was not at work on October 24, 1995, the day of the alleged incident and that appellant submitted an October 25, 1995 certificate to return to work from Dr. Polidore, noting that she was being treated for acute bronchitis and was out of work due to this illness on October 25 and 26, 1995 and that she returned to work on October 27, 1995 without restriction. The record also shows that Ms. Beverly Waters, a charge nurse, reported on appellant's Form CA-1, that "I [Ms. Beverly Waters] did not witness any occurrence of this nature nor was this reported to me." Nevertheless, in an undated letter received by the Office on May 8, 1996, appellant reported that she immediately reported the incident to her charge nurse, Ms. Waters and requested two Tylenol because of the pain she felt on the night of October 24, 1995. Appellant also stated that she informed a Ms. O'Lovfe of the October 24, 1995 incident on the following day. In addition, the record shows that although appellant sought medical treatment on an unspecified date from Dr. Polidore who stated that he was treating appellant for a "job[-]related low back pain -- injured October 24, 1995," there is nothing in the record to determine the date and time appellant actually sought this medical treatment. The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged or if the evidence establishes that the specific event or incident to which the employee attributes the injury was not in the performance of duty.⁹ The evidence of record raises substantial question as to the October 24, 1995 incident alleged by appellant and is insufficient to establish the fact of injury.¹⁰ The Board finds that appellant has failed to establish the incident alleged in this case.

The Board further finds that the Office properly denied appellant's request for a hearing in this matter.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under 8128(a) of this title, 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."¹¹ As section 8124(b)(1) is unequivocal in setting forth

⁸ *Robert A. Gregory*, 40 ECAB 478 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

⁹ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *See spura* note 2.

¹¹ 5 U.S.C. § 8128(b)(1)

the time limitations 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.¹²

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹³

Appellant's hearing request was made after reconsideration in connection with her claim and, thus, appellant was not entitled to a hearing as a matter of right. Appellant's request for reconsideration of the Office's May 16, 1996 decision was denied by the Office on August 1, 1996. The Office properly found that appellant was not entitled to a hearing as a matter of right because it was made following her reconsideration request under section 8128.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 20, 1996 decision, properly exercised its discretion by finding that the issues in this case could equally be addressed by requesting reconsideration from the district office and submitting evidence not previously considered. Consequently, appellant was not entitled to a hearing as a matter of right under section 8124(b)(1) as appellant had previously exercised her right to reconsideration under 5 U.S.C. § 8128 and the Office properly exercised its discretion in deciding not to otherwise grant appellant's hearing request.

¹² *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹³ *Henry Moreno*, 39 ECAB 475 (1988).

The decisions of the Office of Workers' Compensation Programs dated December 20, 1996, August 1, 1996 and May 16, 1996 are affirmed.

Dated, Washington, D.C.
January 12, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member