

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NOAH QUINN and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 98-867; Submitted on the Record;
Issued October 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on July 15 or August 5, 1995.

The Board has duly reviewed the case on appeal and finds that appellant has failed to meet his burden of proof to establish an injury in the performance of duty.

Appellant filed a claim on August 4, 1996 alleging that, on August 5, 1995, he injured his back in the performance of duty while pushing a mail hamper. The Office of Workers' Compensation Programs denied his claim on October 15, 1996 finding that he failed to establish that his employment incident occurred as alleged. Appellant requested reconsideration on November 15, 1996 and changed his date of injury to July 15, 1996. By decision dated December 20, 1996, the Office denied modification of its October 15, 1996 decision. On January 27, March 12 and September 30, 1997 appellant requested that the Office reconsider his claim with the new date of injury. By decisions dated February 25 and April 29, 1997, the Office denied modification. Appellant requested reconsideration and by decision dated December 15, 1997, the Office denied appellant's claim on the grounds that he failed to establish that his injury occurred in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act 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 filed within the applicable time limitation 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."¹ These are the essential

¹ Elaine Pendleton, 40 ECAB 1143, 1145 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.²

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.³ In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.⁴ An alleged work incident 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 statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁵ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁶

In this case, appellant filed a claim on August 5, 1996 and indicated that he was injured at work on August 4, 1995 at approximately 10:00 a.m. The employing establishment submitted leave statements indicating that appellant was not at work on August 4, 1995 as he used sick leave for that date. Appellant submitted a report from Dr. Merrimon W. Baker, a Board-certified orthopedic surgeon, dated March 5, 1996, noting appellant's history of injury as pushing a mail cart in September 1995.

The evidence does not support that appellant sustained the alleged employment incident on August 4, 1995. Appellant later changed the date of injury to July 15, 1995. Furthermore his leave records indicated that he used eight hours of sick leave on the date in question and his history of injury to his physician was not consistent.

Appellant alleged that the employment incident which resulted in his back condition occurred on July 15, 1995 at 10:00 a.m. by filing a second claim on March 3, 1997. He stated that he used sick leave after his injury. In a narrative statement, appellant stated that his injury occurred on July 15, 1996 that he left work after his injury. He stated that he first sought medical treatment on July 17, 1995. Through his representative, appellant alleged that his injury occurred only "a couple" of hours into this shift, that his supervisor intentionally altered his time card and that his supervisor failed to provide the proper procedure for filing a claim.

² *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

³ *Elaine Pendleton*, *supra* note 1.

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁶ *Id.* at 255-56.

Appellant's supervisor again disputed appellant's claim, noted appellant's regular hours were 5:30 a.m. to 2:30 p.m. and submitted leave records indicating that appellant used eight hours of sick leave on July 15, 1996. The leave record indicates that on other dates appellant used less than eight hours of sick leave.

In a note dated July 24, 1995, Dr. Robert Behrns, a pathologist, indicated that appellant was under his care from July 17, 1995 due to back strain. Dr. Behrns did not provide a history of injury and did not indicate that appellant's condition was work related. Dr. Baker completed a note on August 8, 1995 and stated that appellant had a long history of back pain, worse over the last two weeks. On November 5, 1996 Dr. Baker submitted a report stating that appellant sustained injury to his lower back on July 15, 1995. He provided a history of injury consistent with appellant's statements. Dr. Baker opined that appellant's current condition was due to the alleged employment incident. In a report dated March 3, 1997, Dr. Frank L. Barnes, a Board-certified orthopedic surgeon, noted reviewing the medical records and listed appellant's history of injury as July 15, 1995.

The medical records do not provide a consistent history of injury necessary to establish that appellant's employment incident occurred as alleged. Dr. Behrns did not provide any history of injury. Dr. Baker provided reports indicating that appellant's back condition was long-standing, as well as reports listing his date of injury as July 15, August 5 and September 1995. Neither Dr. Baker nor appellant has offered any explanation for the variety of dates claimed. Finally, Dr. Barnes' report indicates that he examined appellant two years after the alleged employment incident and one year after appellant changed the date that he alleged his injury occurred.

Appellant submitted witness statements. Three witnesses did not remember the date of appellant's injury and noted that coworkers informed them of his back injury. These statements are not sufficient to support that appellant sustained the employment incident as alleged, as the witnesses could not provide a date of injury. W.C. Mangum, Jr., stated that he spoke with appellant on July 15, 1995 at a convenience store and that appellant related that he had injured his back at work. While this statement supports appellant's claim for injury on July 15, 1995, this undated statement is not sufficient to meet appellant's burden of proof given the lack of contemporaneous evidence and the lack of consistency in appellant's claims and the medical reports.

As appellant has provided two dates of injury, both of which were controverted by the employing establishment as appellant used eight hours of sick leave on both dates and as the medical evidence indicates that appellant initially reported his condition as a back injury of long duration with a recent exacerbation and only several months later provides a variable date of injury, the Board finds that appellant has failed to establish that the employment incident occurred as alleged.

The decision of the Office of Workers' Compensation Programs dated December 15, April 29 and February 25, 1997 are hereby affirmed.

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member