

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MURIEL S. GAY and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Brunswick, ME

*Docket No. 99-129; Submitted on the Record;
Issued June 7, 2000*

DECISION and ORDER

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

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on November 13, 1995; and (2) whether the Office of Workers' Compensation Programs abused its discretion, under section 8128 of the Federal Employees' Compensation Act, by denying appellant's request for a review of the written record.

The Board has duly reviewed the case on appeal and finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on November 13, 1995.

On April 13, 1998 appellant, then a 50-year-old painter/worker, filed a claim for traumatic injury alleging that on November 13, 1995 she injured her lower back while moving steel plates. In the supervisor's section of the claim form, the employing establishment stated that at the time of the incident in November 1995 "it was believed to be an aggravation of a preexisting condition injury that occurred in 1991, so no CA-1 was filed at that time."

In an attached narrative dated April 16, 1998, appellant stated that she did not file a claim at the time of the injury because she was out of work for so long and that she did not believe she was required to file a claim for an injury which she believed to be an aggravation of a previous injury. Appellant noted that she had not recovered from a 1991 back injury which she believed caused the November 13, 1995 injury. Appellant also submitted a December 8, 1997 medical report from Dr. Philip R. Kendall, Board-certified in orthopedic surgery and an Office medical consultant, who stated that appellant related a back injury in November 1995 while she was on light duty. He noted that Dr. Ernest G. Ballesteros, appellant's treating physician and a Board-certified orthopedic surgeon, operated on appellant's back on December 1, 1995.¹ Dr. Kimball

¹ Dr. Kimball was selected by the Office to evaluate appellant's recurrence of disability claim which is not before the Board. Further, Dr. Ballesteros was appellant's treating physician and is Board-certified in orthopedic surgery.

also noted appellant's computerized tomography (CT) scan performed as a result of appellant's back and left leg pain initially related in 1990 which revealed a herniated lumbar disc at L4-5 on the left. He also referenced a November 22, 1995 CT scan which revealed degeneration of the facet joints of the lumbar spine on the left at L4-5 and L5-S1, greater on the right.

On May 28, 1998 the Office advised appellant that she had 30 days from the date of the notice regarding the type of evidence she would need to submit to support her claim for traumatic injury.

In a decision dated June 25, 1998, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that an injury occurred on November 13, 1995 as alleged by appellant.

On August 11, 1998 appellant requested an oral hearing. On September 18, 1998 the Branch of Hearings and Review denied appellant's request for an oral hearing noting that her request was untimely. The Office also noted that additional evidence on the issue of fact of injury could be submitted and fully considered accompanying a request for reconsideration.

The Board finds that appellant has not established that an injury occurred on November 13, 1995.

An employee seeking benefits under the Act² 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 timely filed within the applicable time limitation period 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.³ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

In this case, appellant merely asserted that she sustained an injury on November 13, 1995 while moving steel plates. However she failed to submit sufficient factual evidence regarding the injury or submit medical evidence that would support an injury on that day. Indeed, in its June 25, 1998 decision, the Office noted that appellant submitted substantial medical evidence regarding a recurrence of disability claim which covered the time frame of the alleged injury in this case, yet none of the medical reports which were prepared at the time of the alleged injury made mention of

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *David M. Ibarra*, 48 ECAB 218 (1996).

such an event.⁵ Appellant submitted insufficient evidence⁶ to support the alleged incident and medical evidence to support her claim, she failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on November 13, 1995. The Office properly denied her claim.

Regarding the second issue, the Board finds that the Office did not abuse its discretion by denying appellant's request for an oral hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁷

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 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 established 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 a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁸

In the present case, the Office issued a June 25, 1998 decision denying appellant's claim for a November 13, 1995 lower back injury on the grounds that fact of injury was not established. Appellant did not request a hearing until she submitted her letter postmarked August 11, 1998, more than 30 days after the June 25, 1998 decision.

Appellant's August 11, 1998 hearing request was made more than 30 days after the date of issuance of the Office's June 25, 1998 decision, hence, the Office was correct in finding in its September 10, 1998 decision that appellant was not entitled to a hearing as a matter of right. The Office also exercised its discretion and further considered the request for review, but concluded that, since the case involved a factual and medical issue, appellant could pursue her claim by

⁵ The Board notes that the record contains the medical reports filed in connection with appellant's recurrence of disability claim which the Office relied on in developing both appellant's claim for recurrence of disability and the present claim for traumatic injury.

⁶ The Board notes that appellant's supervisor's statement that appellant complained about soreness is insufficient to establish that she sustained an injury that day particularly when medical reports prepared at the same time did not address the alleged incident. Similarly, a coworker's February 27, 1998 statement regarding the stressful nature of the November 13, 1995 work injury is insufficient to establish that appellant sustained an injury.

⁷ 5 U.S.C. § 8124(b)(1); see *Joseph K. Johnson*, 41 ECAB 328, 332 (1989).

⁸ *Henry Moreno*, 39 ECAB 475 (1988).

requesting reconsideration along with the submission of medical evidence. The Office exercised its discretionary powers in denying appellant's request for a review of the written record, and in so doing, did not act improperly.⁹

The decisions of the Office of Workers' Compensation Programs dated September 10 and June 25, 1998 are hereby affirmed.

Dated, Washington, D.C.
June 7, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Ella M. Garner*, 36 ECAB 238 (1984).