U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KYU MALASHUS and U.S. POSTAL SERVICE,
AIR MAIL CENTER, San Francisco, CA

Docket No. 98-2609; Submitted on the Record;
Issued March 7, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned her request for a hearing.

On June 27, 1997 appellant, then a 60-year-old custodian, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that on June 13, 1997 she sustained "cervical thoracic spinal stenosis sprain" while in the performance of duty. She explained that, while attempting to sit on a step stool, her "buttocks hit the side of the step stool and [her] butt hit the floor." Appellant did not cease work at the time of her alleged injury. The Form CA-1 included a June 27, 1997 witness statement from Rosa Gomes, indicating that appellant advised her on June 13, 1997 that "she had tried to sit down on the stool's first step and slipped and her buttock hit the second step [and] hurt her tailbone [and] butt." Ms. Gomes did not indicate that she witnessed the incident firsthand, but merely that appellant advised her of the incident around 11:00 a.m. Additionally, a June 24, 1997 statement from Orlando P. Trias, Jr. indicates that appellant advised him of her injury on June 17, 1997 and she reportedly stated that another employee, "Val," witnessed the incident. In another statement dated June 30, 1997, Valente R. Tolero indicated that he did not witness appellant fall off the stool as alleged. Mr. Tolero further indicated that if he had seen appellant fall, he would have asked if she were okay and would have assisted her.

By letter dated August 21, 1997, the Office advised appellant of the need for additional information in order to make a determination regarding her alleged injury of June 13, 1997. In addition to requesting a comprehensive medical report, the Office requested a detailed description of how the injury occurred. The Office also asked appellant to "explain how the other employee present at the time of [her] injury did not notice that the injury occurred as alleged."

In her September 16, 1997 response, appellant explained that on June 13, 1997 she was doing some filing in the operation support office and while attempting to sit on a step stool to access the bottom drawer of the file cabinet, the stool slipped out from beneath her causing her to fall to the floor. Appellant indicated that as she fell, her buttock first struck the lower step of the stool and then she hit the floor. She further stated that Mr. Tolero was in the room with her at the time seated at his desk "doing something." As to why the incident went unnoticed by Mr. Tolero, appellant explained that his desk was at a height that did not permit "any type of observation." She also speculated that Mr. Tolero might have been "engrossed in work" at the time. Finally, appellant explained that she did not immediately report the incident because she was embarrassed and she thought the pain would go away.

By decision dated September 23, 1997, the Office denied appellant's claim on the basis that the evidence of record failed to establish that an injury was sustained as alleged. The Office explained that appellant's speculation as to why the alleged incident of June 13, 1997 went unnoticed by Mr. Tolero, despite his proximity, was insufficient to carry her burden.

Appellant subsequently filed a timely request for an oral hearing before the Office, which was scheduled for June 23, 1998. Appellant, however, failed to appear for the scheduled hearing and the Office, by decision dated June 30, 1998, advised appellant that her request for a hearing was deemed to have been abandoned. On August 28, 1998 appellant filed an appeal with the Board.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[1] The second component is whether the employment incident caused a personal injury. This latter component generally can be established only by medical evidence.[2]

In the instant case, appellant failed to establish that she actually experienced the employment incident that is alleged to have occurred. As noted by Mr. Trias in his June 24, 1997 statement, appellant reported that Mr. Tolero witnessed her fall on June 13, 1997. However, Mr. Tolero, despite being in the same room with appellant at the time of the alleged incident, denied witnessing appellant fall from a stool as alleged. Mr. Tolero's proximity to appellant at the time of the alleged incident and the fact that he neither saw nor heard anything, calls into question appellant's allegation that she injured herself when she fell to the floor on June 13, 1997. Although appellant attempted to explain why it was that the alleged incident went unnoticed by Mr. Tolero, her explanation amounted to no more than speculation.

[1] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[2] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

Consequently, appellant has failed to establish that she experienced the employment incident as alleged.

The Board further finds that the Office properly determined that appellant abandoned her request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides that a claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before a representative of the Office.[3] On October 6, 1997 the Office received appellant's timely request for an oral hearing in connection with the September 23, 1997 decision, denying appellant's claim. In a May 22, 1998 notice, addressed to appellant at her address of record,[4] the Office advised appellant that the hearing she requested had been scheduled for June 23, 1998. Appellant, however, did not appear at the scheduled hearing.

Section 10.137 of Title 20 of the Code of Federal Regulations, which pertains to the postponement, withdrawal or abandonment of a hearing request, provides in relevant part:

> "A scheduled hearing may be postponed or canceled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown."
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> * * *
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> "A claimant who fails to appear at a scheduled hearing may request in writing within ten days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days … shall constitute abandonment of the request for a hearing."[5]

In the present case, appellant neither requested postponement at least 3 days prior to the scheduled date of the hearing, nor did she request another hearing within 10 days after the date of the previously scheduled hearing. Appellant's failure to make such requests, together with her failure to appear at the scheduled hearing, constitutes abandonment of her request for a hearing and the Board finds that the Office properly so determined in its June 30, 1998 decision.

On appeal, appellant contends that she did not receive notice of the scheduled hearing. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[6] This presumption, commonly

[3] 5 U.S.C. § 8124(b).

[4] In her October 1, 1997 request for a hearing, appellant advised the Office of her recent change of address. Appellant's new address appears on both the May 22, 1998 notice of hearing and the Office's June 30, 1998 decision.

[5] 20 C.F.R. § 10.137(a) and (c).

[6] *George F. Gidicsin*, 36 ECAB 175 (1984).

referred to as the "mailbox" rule, arises when it appears from the record that the notice was properly addressed and duly mailed.[7] The Office's finding of abandonment in this case rests on the strength of this presumption. When the Office issued its decision on June 30, 1998 the record contained no explanation for appellant's failure to appear. The Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.[8] The Board, therefore, is precluded from considering whether the explanation offered by appellant for the first time on appeal is sufficient to rebut the presumption of receipt raised by the "mailbox rule."[9] Inasmuch as the record at the time the Office issued its decision contained no explanation for appellant's failure to appear, the Office's June 30, 1998 decision was proper.

The decisions of the Office of Workers' Compensation Programs dated June 30, 1998 and September 23, 1997 are hereby affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[7] *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[8] 20 C.F.R. § 501.2(c).

[9] Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.