

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIDA DUTKANICZ and U.S. POSTAL SERVICE,
PROCESSING DISTRIBUTION CENTER, Wallingford, CT

*Docket No. 01-189; Submitted on the Record;
Issued August 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant met her burden of proof to establish that she sustained an injury while in the performance of duty.

On July 22, 1998 appellant, a 42-year-old mailhandler, filed an occupational disease claim alleging that on July 8, 1998 she felt a shock down her right hip while in the performance of duty. Appellant stated that on that day she lifted trays of mail and pushed a gurney of mail to her work area and that later that day she "walked back to my workstation and felt an 'electric' type shock down my right hip. I waited for a while to see if it would go away and I told my supervisor." Appellant was off work from July 10 to 20, 1998.

In a report dated July 7, 1998, an emergency room physician noted that appellant was seen on that day for back pain and was released to return to work in three days.

By letter dated August 4, 1998, the Office of Workers' Compensation Programs advised appellant that the materials she had submitted were insufficient to determine whether she was eligible for compensation. The Office advised appellant regarding the evidence she needed to support her claim.

In a report dated July 27, 1998, Dr. Laurie R. Margolies, Board-certified in radiology, noted that appellant's magnetic resonance imaging (MRI) scan revealed discogenic end plate changes at L3-4, minimal anterior osteophytes at L1-2, no significant abnormalities at L2-3 or L5-S1 and a right-sided L3-4 disc herniation and bulging of the L4-5 intervertebral disc.

In a report dated September 1, 1998, Dr. Patrick P. Mastroianni, Board-certified in neurological surgery, stated that appellant injured her back on July 9, 1998 when she stepped off a stool. He added that she "experienced immediate pain in the back and right leg."

By decision dated October 1, 1998, the Office denied appellant's claim on the grounds that the evidence failed to establish fact of injury. By letter dated October 20, 1998, appellant requested an oral hearing.

In a report dated January 12, 1999, Dr. Mastroianni stated that appellant injured her back when she reached forward from a distributor's position to pick up a letter tray and while so doing, stepped off the stool and wrenched her back in the process. Appellant then felt severe pain. He stated that it was probable that appellant sustained a herniated disc at that time.

At the April 21, 1999 hearing, appellant testified that she injured her back when she turned "to put the mail into the next person's job area, that I got a shot of pain going down the left hand side of my leg. And I yelled and I held onto the side of the (work desk area) until it went away." Appellant noted that she told another employee of her discomfort and was encouraged to report the incident to her supervisor, which she did.

In a June 24, 1999 decision, the hearing representative evaluated appellant's claim for a traumatic injury and determined that she had not established fact of injury.¹

On June 12, 2000 appellant requested reconsideration. By merit decision dated September 12, 2000, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury while in the performance of duty on June 6, 1998.

An employee seeking benefits under the Federal Employees' Compensation 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 Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁴

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁵

¹ At the hearing, appellant's representative stated that the claim was for a traumatic injury, noting that appellant had filled out a claim form for an occupational disease.

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Ronald K. White*, 37 ECAB 176, 178 (1985).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶ An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her condition for which compensation is claimed is causally related to the injury.

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to undermine appellant's credibility on whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.⁷ Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. An injury does not have to be confirmed by witnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.⁸ 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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.⁹

In this case, appellant initially stated that she injured her lower back when she lifted trays of mail and pushed a gurney of mail to her work area and that later that day she "walked back to my workstation and felt an 'electric' type shock down my right hip." However, this narrative differs substantially from what appellant related at hearing.

Appellant testified that she injured her back when she turned to put mail into a colleague's job area, at which time she sustained severe pain down the left side of her leg, which caused her to verbalize her pain. Appellant then noted that she immediately advised a colleague who then told appellant to relate her circumstances to her supervisor. Appellant alleged that she did so, but the record does not include corroborative evidence to support appellant's account. Further, Dr. Mastroianni, appellant's surgeon, related a detailed explanation of the July 8, 1998 injury as related by appellant which closely tracked her hearing testimony but, again, is so distinguishable from her description in her initial claim form that the disparity undermines appellant's credibility in establishing that the incident occurred as alleged.

In light of appellant's substantially different descriptions of the incident, her 13-day delay in filing the claim, the absence of corroborative witness testimony when appellant testified that she had discussions with a colleague and her supervisor at a time and place proximate to the alleged incident and her physician's detailed explanation, which differs sharply from appellant's initial account, the Board finds that serious doubt exists on whether the incident, as alleged by appellant in either her July 13, 1998 account or her April 21, 1999 account, occurred as alleged. Consequently, the Board concludes that appellant has failed to carry her burden of proof to establish fact of injury.

⁶ *Id.*

⁷ See *Elaine Pendleton*, *supra* note 3.

⁸ See *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *Joseph H. Surgener* 42 ECAB 541, 547 (1991).

⁹ *Constance G. Patterson*, 41 ECAB 206 (1989).

The September 12, 2000 and June 24, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 16, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member