

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WAYNE A. DECK and DEPARTMENT OF DEFENSE,  
DEFENSE PRINTING SERVICE, PATRICK AIRFORCE BASE, FL

*Docket No. 00-1969; Submitted on the Record;  
Issued December 3, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained an injury to his lower back and legs while in the performance of duty on September 30, 1999; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

On October 1, 1999 appellant, then a 37-year-old printer, filed a traumatic injury claim (Form CA-1) alleging that on September 30, 1999 he hurt his lower back and legs while "clearing [a] paper jam in [the] lower portion of the Docutech when my back went totally stiff with massive pain. Pain continued down towards [my feet]." In support of his claim, appellant submitted Forms CA-7 and CA-16 authorization for examination and/or treatment signed by Mr. Ron C. Lee, Director, authorizing appellant's treatment for his injury on September 30, 1999. Appellant also submitted a notice of first injury from Cape Canaveral Hospital's emergency room where he was treated for his initial injury and referred to an orthopedic specialist.

By letter dated November 16, 1999, the Office advised appellant and the employing establishment that the information submitted was not sufficient to establish that appellant sustained an injury as alleged. The Office provided appellant and the employing establishment with a detailed list of evidence needed and questions to be followed. The Office allotted appellant 30 days in which to submit the requested information.

On November 29, 1999 appellant submitted excuse from work forms dated October 1, November 9 and 18, 1999, a medical bill dated September 30, 1999, a referral care plan form referring appellant for evaluation and treatment in a comprehensive spine program and a request for an epidural treatment. Appellant was diagnosed with degenerative disc disease -- L5 from Dr. Anthony J. Lombardo, a Board-certified orthopedic specialist, on October 11, 1999 in an office visit work up report. Also submitted were physical therapist referral reports and an epidural treatment report. In a report dated November 23, 1990, Dr. Reginald Simmons noted that appellant had been referred to epidural steroid injection for a history of low back complaints

over a course of four years. Dr. Simmons stated that magnetic resonance imaging examinations showed small central herniations and tears of the posterior annular fibers at L4-5 and L5-S1.

On December 22, 1999 the employing establishment again controverted appellant's claim noting that appellant did not submit sufficient medical evidence to support his claim and failed to be consistent in explaining the course of events that caused his alleged injury.

By decision dated January 11, 2000, the Office denied appellant's claim as the evidence submitted failed to establish fact of injury. The Office noted that the evidence submitted supported that appellant did experience the claimed accident, however, no medical condition was diagnosed in connection with the September 30, 1999 incident at work. The Office also noted that appellant was advised of the deficiencies in the claim and afforded the opportunity to provide supporting evidence.<sup>1</sup>

On February 17, 2000 appellant submitted a request for an oral hearing before an Office hearing representative. By letter dated March 7, 2000, the Office's Branch of Hearings and Review acknowledged the receipt of additional evidence and appellant's request for an oral hearing.

In a decision dated April 4, 2000, the Office's Branch of Hearing and Review found that appellant was not entitled to an oral hearing as his request was untimely. The Office, however, found that the issue in the case could equally well be addressed by requesting reconsideration from the Office's district office and by submitting evidence not previously considered which supports a determination that an injury was sustained as alleged.

The Board has duly reviewed the case record and finds that appellant failed to meet his burden of proof to establish that he sustained an injury.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing that 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.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

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<sup>1</sup> The Board notes that subsequent to the Office's January 11, 2000 decision, appellant submitted additional evidence. The Board cannot review evidence for the first time on appeal which was not before the Office at the time it rendered its decision.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *Id.*

<sup>4</sup> *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.<sup>5</sup> The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

The second requirement to establish fact of injury is that the employee must submit sufficient evidence, usually in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>6</sup> As part of this burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current condition and the accepted employment factors.<sup>7</sup>

In this case, while it is undisputed that appellant was clearing a paper jam in the office's copier, there is insufficient medical evidence in the file to support that appellant's low back condition was aggravated by this incident. From the evidence before the Office at the time of its January 11, 2000 decision, the medical reports of record fail to contain a rationalized opinion explaining the relationship between the process of appellant's clearing a jam in the copier and his diagnosed degenerative disc disease at L5 and herniated disc conditions. Neither Dr. Lombardo, nor Dr. Simmons offered any explanation to causally relate these conditions to the September 30, 1999 paper jam incident. Rather, Dr. Simmons noted a four-year history of back complaints. Moreover, the Office provided appellant with opportunities to cure the deficiencies in the claim, but he failed to submit the requested medical evidence to substantiate his claim. Appellant, therefore, has failed to meet his burden of proof to establish that he sustained an employment injury and thus has failed to establish fact of injury.

The Board further finds that the Office properly denied appellant's request for an oral hearing.

Section 8124(b)(1) of the Act provides that "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."<sup>8</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing,

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<sup>5</sup> *Elaine Pendleton*, *supra* note 2.

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>7</sup> *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982); *Steven J. Wagner*, 32 ECAB 1446 (1981).

<sup>8</sup> 5 U.S.C. § 8124(b)(1).

a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>9</sup>

In this case, the Office issued its decision on January 11, 2000. Appellant's request for a hearing was postmarked February 14, 2000, outside the 30-day statutory limitation. Since appellant did not request a hearing within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has the discretion to grant the hearing request and must exercise that discretion.<sup>10</sup> The Office denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. The Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

The April 4 and January 11, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
December 3, 2001

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>9</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>10</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).