

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARCIA A. MILLER and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Baltimore, MD

*Docket No. 00-2086; Submitted on the Record;  
Issued May 23, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained lumbar, right hand and right leg injuries on September 21, 1999 in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a review of the written record.

On September 22, 1999 appellant, then a 37-year-old tax examining clerk, filed a claim for low back, right hand and right leg injuries sustained on September 21, 1999 when she fell after her chair tipped over.<sup>1</sup>

Appellant submitted work absence slips signed by a physician's assistant holding her off work from September 23 to October 4, 1999 and from October 20 to 31, 1999.

By decision dated February 9, 2000, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that the September 21, 1999 incident occurred at the time, place and in the manner alleged, but appellant submitted insufficient evidence to establish that she sustained an injury resulting from that incident.

Appellant disagreed with this decision and in a letter dated March 6, 2000 and received by the Office on March 15, 2000, requested a review of the written record by a representative of the Office's Branch of Hearings and Review. She submitted new evidence.

By decision dated and finalized April 11, 2000, an Office hearing representative denied appellant's request for a review of the written record, as it was untimely. The Office exercised

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<sup>1</sup> In a December 14, 1999 letter, the Office advised appellant of the type of additional medical and factual evidence needed to establish her claim.

its discretion and found that appellant's case could be advanced equally well by submitting new, relevant evidence accompanying a valid request for reconsideration.

Regarding the first issue, the Board finds that appellant has not established that she sustained lumbar, right hand and right leg injuries on September 21, 1999 in the performance of duty as alleged.

A person who claims benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim, including that he sustained an injury while in the performance of duty and that he had disability as a result.<sup>3</sup> In accordance with the Federal (FECA) Procedure Manual, in order to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components, which must be considered in conjunction with each other. First, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.<sup>4</sup> Second, it must be established that the employment incident caused a personal injury.<sup>5</sup> The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.<sup>6</sup> The belief of claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.<sup>7</sup>

The only evidence considered by the Office regarding whether appellant sustained an injury as a result of the September 21, 1999 incident in which her chair tipped over, were work absence slips signed by a physician's assistant holding her off work from September 23 to October 4, 1999 and from October 20 to 31, 1999. These slips were not signed or reviewed by a physician and, therefore, are not considered probative medical evidence in this case.<sup>8</sup>

Appellant submitted additional evidence, September 23 and November 17, 1999, and February 1, 2000 reports from Dr. Suter, an attending internist, accompanying her March 15, 2000 request for a review of the written record. However, the Office has not consider this evidence on its merits, evaluating the reports regarding whether or not it established that

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Daniel R. Hickman*, 34 ECAB 1220 (1983).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

<sup>5</sup> *John C. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

<sup>6</sup> *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>7</sup> *Manuel Garcia*, 37 ECAB 767 (1986).

<sup>8</sup> *Merton J. Sills*, 39 ECAB 572 (1988).

appellant sustained a low back, right hand or right leg injury as a result of the accepted September 21, 1999 incident.<sup>9</sup>

Consequently, appellant has failed to establish that she sustained low back, right hand or right leg injuries in the performance of duty on September 21, 1999 as she submitted insufficient rationalized medical evidence to establish fact of injury as of the February 9, 2000 decision of the Office.

Regarding the second issue, the Board finds that the Office properly denied appellant's request for a review of the written record as untimely.

The Act<sup>10</sup> is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing or written review of the record before a representative of the Office.<sup>11</sup> Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative states, in pertinent part: "Before review under section 8128(a) of this title, 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>12</sup> The Office's procedures require it to exercise its discretionary authority to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a). The Board has held that the Office's exercise of this discretion is a proper interpretation of the Act and Board precedent.<sup>13</sup>

In this case, the Office denied appellant's claim by decision dated February 9, 2000. However, appellant's request for a review of the written record was not received by the Office until March 15, 2000, more than 30 days after issuance of the February 9, 2000 decision. Thus, appellant's request was clearly untimely. Also, the Board finds that the Office properly exercised its discretion in reviewing the evidence accompanying her request for a review of the written record and determined that her case could be advanced equally well by submitting such evidence accompanying a valid request for reconsideration.

Therefore, the Board finds that the Office properly denied appellant's request for a review of the written record as untimely.

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<sup>9</sup> Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> *Henry Moreno*, 39 ECAB 475 (1988).

The decisions of the Office of Workers' Compensation Programs dated April 11 and February 9, 2000 are hereby affirmed.

Dated, Washington, DC  
May 23, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member