

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARY DILL and U.S. POSTAL SERVICE,
POST OFFICE, Hartland, WI

*Docket No. 01-1747; Submitted on the Record;
Issued April 12, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an injury to her left shoulder and head in the performance of duty on January 29, 2001, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

On March 22, 2001 appellant, then a 65-year-old rural carrier, filed a traumatic injury claim (Form CA-1), alleging that on January 29, 2001 she sustained injuries to her head and shoulder while "getting out of [the] truck, it was icy [and I] hit [my] head and shoulder on the step of [the] truck." On the reverse side of the CA-1 form, appellant's supervisor noted that he was notified of the incident on March 22, 2001 and check marked "yes" the employee was injured in the performance of duty.

In a letter dated March 23, 2001, the employing establishment notified appellant of the deficiencies in her claim.

By letter dated April 2, 2001, the Office advised appellant and the employing establishment that additional information was needed to determine appellant's claim. 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. No response was received within the allotted time.

By decision dated May 9, 2001, 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 January 29, 2001 work-related incident. The Office also noted

that appellant was advised of the deficiencies in the claim and afforded the opportunity to provide supporting evidence.¹

On July 20, 2001 appellant submitted a request for an oral hearing before an Office hearing representative.

By decision dated August 30, 2001, the Office's Branch of Hearings and Review acknowledged receipt of additional evidence and appellant's request for an oral hearing. The Office found that appellant was not entitled to an oral hearing as her request was untimely. The Office, however, found that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and by submitting evidence not previously considered which supports a determination that an injury was sustained as alleged.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an injury, as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act² 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.³ 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.⁴

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.⁵

The second component 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.⁶ As part of this burden, the employee must submit rationalized

¹ The Board notes that, subsequent to the Office's May 9, 2001 decision, appellant submitted additional evidence; however, the Board cannot review evidence for the first time on appeal not previously before the Office at the time it rendered its decision.

² 5 U.S.C. §§ 8101-8193.

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

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

⁵ *Elaine Pendleton*, *supra* note 3.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

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.⁷

In this case, while it is undisputed that appellant was getting out of the employing establishment's truck when she fell, the deficiency in this case is the lack of medical evidence to establish that this activity caused or aggravated a medical condition. Moreover, the Office provided appellant with opportunities to cure the deficiencies in this claim, but she failed to submit the requested medical evidence to substantiate her claim. Appellant, therefore, has failed to meet her burden of proof to establish that she sustained an employment injury and thus has failed to establish fact of injury.

The Board further finds that the Office's refusal to grant appellant an oral hearing before an Office hearing representative did not constitute an abuse of discretion.

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."⁸ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁹

In the present case, the Office issued its decision on August 30, 2001. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was dated July 20, 2001, and thus it is outside the 30-day statutory limitation for the decision. Since appellant did not request a hearing within 30 days, she 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.¹⁰ In the present case, the Office exercised its discretion and 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. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

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

⁸ 5 U.S.C. § 8124(b)(1).

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

¹⁰ *Herbert C. Holley*, 33 ECAB 140 (1981).

The decisions of the Office of Workers' Compensation Programs dated May 9 and August 30, 2001 are affirmed.

Dated, Washington, DC
April 12, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member