

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE BLACKSHEAR and U.S. POSTAL SERVICE,
POST OFFICE, New Brunswick, NJ

*Docket No. 01-2199; Submitted on the Record;
Issued April 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On May 9, 2000 appellant, then a 37-year-old carrier technician, filed a notice of injury alleging that her right hand was swollen when she left work. She attributed this to lifting trays of flats out of the cart on May 6, 2000. The record contains no indication that appellant stopped working.

By letter dated September 30, 2000, the Office requested additional medical evidence from appellant stating that the initial information submitted was insufficient to establish an injury as alleged. In response to the Office's request, appellant submitted medical reports dated August 23, 1999, October 11 and November 2, 2000 from Dr. Harlan E. Hiramoto, a Board-certified orthopedic surgeon. In the August 23, 1999 report, Dr. Hiramoto noted a date of injury as being July 24, 1995 with symptoms being pain in the neck, right shoulder and pain in the right hand along with some swelling around the hand and shoulder. Appellant was diagnosed with: cervical strain; cervical radiculopathy; thoracic sprain/strain; lumbar sprain/strain; right shoulder strain with a magnetic resonance imaging scan positive for tendinitis but no rotator cuff tear; reflex sympathetic dystrophy; and chronic pain syndrome. In an October 11, 2000 report, Dr. Hiramoto noted the same date of injury as being July 24, 1995 and listed the same diagnoses as in his previous report. He further stated that "patient is told within a reasonable medical probability, the problems with her right hand are due to repetitive use and due to previous injuries to the right upper extremity causing weakness in that hand. She is at increased risk for accumulative stress disorder of the hand." Electromyogram (EMG) and motor nerve conduction studies were performed and in a November 2, 2000 report, Dr. Hiramoto advised the EMG and nerve conduction studies do not show any permanent damage occurring to the right carpal tunnel. He also stated that there was a reasonable medical probability that appellant's symptoms

were related to her work. Dr. Hiramoto further stated that “patient is aware that some of her injuries dating back to 1995 are probably permanent in nature and it is probable that she will continue to have pain involving the neck and upper extremity.”

In a decision dated January 23, 2001, the Office denied appellant’s claim as the medical evidence was not sufficient to establish that appellant sustained any injuries in the performance of duty, as required by the Federal Employees’ Compensation Act.¹ The Office found that there was no medical evidence submitted which contained a diagnosis of appellant’s condition and discussed the causal relationship between the diagnosed condition and appellant’s employment.

In a February 22, 2001 letter, postmarked February 23, 2001, appellant requested an oral hearing before an Office representative.

By decision dated July 16, 2001, the Office denied appellant’s request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Act.

The Board finds that appellant has failed to establish that she developed a medical condition in the performance of duty as alleged.

An employee seeking benefits under the Act 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 the 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.² 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.³

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.⁴ In some traumatic injury cases, this component can be established by an employee’s uncontroverted statement on the Form CA-1.⁵ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee’s statement

¹ 5 U.S.C. §§ 8101-8193.

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

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *Elaine Pendleton*, *supra* note 2.

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

must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁶ A consistent history of the injury, as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁷ In this case, it is undisputed that appellant lifted trays of flats out of a cart on May 6, 2000 as alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment incident, or activity, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁸ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹

In this case, the medical evidence is insufficient to establish that the work factor alleged by appellant, lifting trays of flats, caused or aggravated a medical condition. The medical evidence of record consists of medical reports from Dr. Hiramoto, a Board-certified orthopedic surgeon, who continued to reference the date of injury as being July 1995, approximately five years earlier than what appellant claimed, and opined that the problems with appellant's right hand were due to repetitive use and due to previous injuries to the right upper extremity which was causing weakness in the right hand. Therefore, the record contains no probative medical evidence, which provides any explanation of the causal relationship, if any, between the current claimed employment activity of May 6, 2000 and appellant's right hand condition. The medical record is insufficient to meet appellant's burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."¹⁰

⁶ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁷ *Id.* at 255-56.

⁸ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁹ *James Mack*, 43 ECAB 321 (1991).

¹⁰ 5 U.S.C. § 8124(b)(1).

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.¹¹

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹²

In this case, the Office issued its decision denying appellant's claim for her right hand condition on January 23, 2001. Subsequently, appellant requested an oral hearing by letter dated February 22, 2001, which was postmarked February 23, 2001, 31 days after the Office's decision. The Board finds that the hearing request was made more than 30 days after the Office's decision, and thus, it was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

¹¹ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹² *Henry Moreno*, 39 ECAB 475 (1988).

The July 16 and January 23, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 22, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member