

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA F. PUTMAN and DEPARTMENT OF THE ARMY,
ANNISTON ARMY DEPOT, Anniston, AL

*Docket No. 01-1495; Submitted on the Record;
Issued January 16, 2002*

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion pursuant to 5 U.S.C. § 8128 by denying merit review on March 21, 2001.

On October 20, 1998 appellant, then a 46-year-old heavy mobile equipment operator, filed a traumatic injury claim alleging that on October 16, 1998 she sustained pain in her left knee while in the performance of duty.

In a report dated October 20, 1998, Dr. Lisa Black, an osteopath, stated that she had examined appellant on that date who related a work-related injury on October 16, 1998. Dr. Black opined that the etiology of appellant's left knee pain was not job related, noting a "morbidly obese woman with difficulty bearing weight 2 degrees [of] pain."

By letter dated November 11, 1998, the Office advised appellant to describe how the incident occurred. It also requested a report from her treating physician describing her symptoms and the physician's opinion, with medical reasons, on the cause of her condition if the doctor believed that her condition was caused by her employment.

In a report dated October 20, 1998 and received by the Office on November 16, 1998, Dr. J.R. Payne, a Board-certified orthopedic surgeon, stated that appellant had been treated for osteoarthritis and traumatic arthritis of his right knee since "her injury back in March 1994. She reports that gradually she has been having increasing problems since that time." He then stated that: "On Friday, she was walking across a level concrete floor. The left knee gave way and she almost fell. She states that since then she has had a great deal of increase in pain." In the assessment section of his report, Dr. Payne stated that appellant has osteoarthritis of the left knee, relating that "Last Friday [the left leg] gave way because of the pain and inflammation related to the arthritis."

In a narrative dated December 3, 1998, appellant stated that she had a painful right knee and that when she took a step, the pain in the right knee caused her to shift her weight to the left knee which became painful. Both her knees buckled and she “could not immediately continue walking.”

By decision dated December 8, 1998, the Office denied appellant’s claim on the grounds that the claimed incident occurred, but that the evidence failed to establish that a condition occurred as a result of the incident.

By letter dated January 14, 1999, appellant, through her representative, requested reconsideration.

By decision dated March 21, 2001, the Office denied appellant’s request for reconsideration. The Office indicated that due to its delay in processing appellant’s request, she would be afforded full appeal rights in accordance with Board precedence.

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury while in the performance of duty.

Establishing whether an injury, traumatic or occupational, was sustained in the performance of duty as alleged, *i.e.*, “fact of injury,” and establishing whether there is a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed, *i.e.*, “causal relationship,” are distinct elements of a compensation claim. While the issue of “causal relationship” cannot be established until “fact of injury” is established, acceptance of fact of injury is not contingent upon an employee proving a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed. An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.¹

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an “injury.” The term “injury” as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.² The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.³

In this case, the medical evidence includes a report dated October 20, 1998 from Dr. Black, an osteopath, who stated that appellant’s injury was not job related, while noting a

¹ As used in the Federal Employees’ Compensation Act, the term “disability” means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; see *Frazier V. Nichol*, 37 ECAB 528 (1986).

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *John J. Carlone*, 41 ECAB 354 (1989).

morbidly obese woman with difficulty bearing weight....” Further, Dr. Payne’s October 20, 1998 report noted appellant’s history of injury including her March 1994 osteoarthritis and traumatic arthritis. Although he noted that appellant fell on October 16, 1998 because of pain and inflammation related to her arthritis,” Dr. Payne did not attribute her condition to the October 16, 1998 incident, nor did he describe the mechanism of injury for the diagnosed condition.

Although the Office advised appellant of the type of evidence needed to establish her claim, such evidence was not submitted. Therefore, the evidence of record is insufficient to meet appellant’s burden of proof.

The Board also finds that the Office acted within its discretion by denying merit review on March 21, 2001.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ the Office’s regulations provide that an application for reconsideration must set forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁷

In this case, appellant did not submit any evidence in support of her request for reconsideration and thus failed to meet the requirements set forth at 20 C.F.R. § 10.606. For these reasons, the Office’s refusal to reopen the case for a merit review did not constitute an abuse of discretion.

⁴ Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b).

⁶ *Carol Cherry*, 47 ECAB 658 (1996).

⁷ 20 C.F.R. § 10.607.

The March 21, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.⁸

Dated, Washington, DC
January 16, 2002

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁸ The Board notes that due to the Office's delay in processing appellant's request for reconsideration, appellant was afforded merit review of the initial December 8, 1998 decision.