

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORENZO DAVIS and DEPARTMENT OF VETERANS AFFAIRS,
ST. ALBANS HEALTH & HUMAN SERVICES, St. Albans, NY

*Docket No. 03-1777; Submitted on the Record;
Issued January 13, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant established that he sustained an injury in the performance of duty on February 27, 2003.

On April 3, 2003 appellant, then a 51-year-old housekeeping aid, filed a notice of traumatic injury, Form CA-1, alleging that on February 27, 2003 he “stuck [his] hand in [the] elevator door” at the nursing home. The employing establishment stated that the “employee was sent home, after seeing the doc[tor] in Brooklyn, also called in the next day.” The Form CA-1 revealed that there was a witness to the incident, an A. James with a “signed witness statement to follow.”

On April 16, 2003 the Office of Workers' Compensation Programs received a March 7, 2003 medical slip by Dr. Elias Kassapidis, an orthopedic surgeon, who authorized physical therapy for someone other than appellant.

By letter dated April 17, 2003, the Office requested detailed factual and medical information from appellant. Specifically, a description of how and where the injury occurred, and the immediate effects of the injury. Appellant was also asked to arrange for the submission of a medical report from his treating physician which included a history of injury given by him to the physician, a description of findings, results of test and x-rays, a diagnosis and course of treatment and the physician's rationalized opinion as to how the reported incident caused or aggravated the claimed injury. Appellant was informed that the physician's opinion was crucial to his claim. The Office allotted him 30 days to submit the requested information.

By decision dated May 29, 2003, after receiving no response from appellant within the allotted time, the Office denied appellant's claim for failure to establish fact of injury. The Office found that appellant failed to submit factual evidence to support that the claimed February 27, 2003 incident occurred at the time, place and in the manner alleged, and failed to submit medical evidence to support the presence of a medical condition which was caused or aggravated by the claimed incident.

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on February 27, 2003.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim,² including the fact that the individual is an "employee of the United States" within the meaning of the Act,³ that the claim was filed within the applicable time limitation of the Act,⁴ 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.⁵

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.⁶ In this case there is insufficient factual evidence to establish that the claimed incident occurred at the time, place and in the manner alleged. On the Form CA-1 appellant stated that "[he] stuck [his] hand in [the] elevator door" at a nursing home. Appellant failed to provide a statement stating that he was assigned to work in a nursing home and that he was injured during his work shift on February 27, 2003. On the form under witness statement, a witness was identified, A. James, and it was stated that a witness statement would follow. However, the record is devoid of such a statement. The Board notes that the March 7, 2003 medical certificate by Dr. Kassapidis did not support appellant's contention that he was in the performance of duty at the time of the alleged employment incident as the medical certificate referred to someone other than appellant.⁷

The Office advised appellant of the specific factual and medical evidence needed to establish his claim; however, such evidence has not been submitted. The Board finds that, as appellant did not comply with the Office's April 17, 2003 request for factual evidence regarding the occurrence of the injury at the time, place and in manner alleged, he has failed to meet his burden of proof.

¹ 5 U.S.C. §§ 8101-8193.

² See *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

³ *James A. Lynch*, 32 ECAB 216 (1980.)

⁴ See 5 U.S.C. § 8122.

⁵ See *Daniel R. Hickman*, *supra* note 2.

⁶ *Robert G. Morris*, 48 ECAB 238 (1996); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ Appellant has failed to meet the first element of his burden of proof as he has not established that he was in the performance of duty at the time of the alleged incident or to resolve the issue of time, place and manner. Therefore, the second element as to whether appellant sustained an injury causally related to the alleged employment incident is moot.

The decision of the Office of Workers' Compensation Programs dated May 29, 2003 is hereby affirmed.⁸

Dated, Washington, DC
January 13, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ The Board notes that appellant submitted medical evidence with his appeal. As this evidence was not previously considered by the Office prior to its decision of May 29, 2003, the evidence represents new evidence which cannot be considered for the first time on appeal by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may submit this evidence and any other evidence he may have to the Office together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).