

**United States Department of Labor
Employees' Compensation Appeals Board**

CHERI M. WALLS, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Kansas City, KS, Employer**

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**Docket No. 04-1075
Issued: July 30, 2004**

Appearances:
Cheri M. Walls, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 15, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 20, 2003, finding that she failed to establish that she sustained an injury on March 2, 2003 as alleged. The record also contains an Office decision dated June 17, 2003 denying appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions in this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on March 2, 2003; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 5, 2003 appellant, then a 41-year-old clerk, filed a notice of traumatic injury alleging that she sprained her neck lifting sacks in the performance of duty on March 2, 2003. In support of her claim, appellant submitted a form report dated April 5, 2003 from Dr. Charles Gerwick, a physician Board-certified in emergency medicine, noting that she complained of an insidious onset of neck pain over the past three weeks. He found that on physical examination she demonstrated a limited range of motion in her neck and tender paraspinous muscles. Dr. Gerwick did not provide a diagnosis.

In a letter dated April 17, 2003, the Office requested additional factual and medical information from appellant who did not respond. By decision dated May 20, 2003, the Office denied appellant's claim finding that she had not submitted sufficient factual evidence to establish that the employment incident occurred as alleged. The Office also found that appellant failed to submit the necessary medical evidence in support of her claim.

Appellant requested reconsideration of the Office's April 17, 2003 decision on June 1, 2003 through a form request. She indicated that she planned to submit additional evidence. By decision dated June 17, 2003, the Office denied appellant's request for reconsideration finding that she failed to submit either new and relevant evidence or legal contentions not previously considered.¹

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation 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 filed within the applicable time limitation 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."² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or 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.

¹ On appeal to the Board, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

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 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

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, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁸

ANALYSIS -- ISSUE 1

Appellant completed a notice of traumatic injury on April 5, 2003 alleging on March 2, 2003 she injured her neck lifting in the performance of duty. She did not seek medical treatment until April 5, 2003. The medical evidence consisting of a form report from Dr. Gerwick, a physician Board-certified in emergency medicine, did not support the history of injury provided by appellant. Rather than attributing her neck condition to the events of a single workshift on March 2, 2003 he indicated that appellant "complained o[f] insidious onset of neck pain over three weeks." As noted above, in order to establish a traumatic injury as a result of an employment incident, the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action. 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. Appellant did not seek medical treatment for more than a month after the alleged employment incident and did not provide a history of a lifting injury on a specific date in March to her physician. Instead, appellant apparently reported that her neck pain was only of three weeks' duration and that it was insidious, rather than being attributable to a specific work shift or event.

As appellant failed to meet the first test to determine whether she sustained an injury in the performance of duty, the Office properly denied her claim.

⁴ *Elaine Pendleton*, *supra* note 2.

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

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

⁷ *Id.* at 255, 256.

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

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ the Office's regulation provide that a claimant's application for reconsideration must be submitted in writing and set forth arguments or contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹²

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on June 1, 2003 and indicated that she planned to submit additional evidence. The Office did not receive any additional documentation from appellant and by decision dated June 17, 2003 denied her request for reconsideration. As appellant did not submit evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; did not advance a relevant legal argument not previously considered by the Office and did not submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that appellant failed to submit the necessary factual evidence to establish that an employment incident occurred on March 2, 2003 as alleged. The Board further finds that the Office properly denied appellant's request for reconsideration.

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

¹⁰ 20 C.F.R. §§ 10.609(a) and 10.606(b).

¹¹ 20 C.F.R. §10.607(a).

¹² 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the June 17 and May 20, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 30, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member