United States Department of Labor
Employees' Compensation Appeals Board

CAROLZENA SNOW, Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, BAY PINES VETERANS ADMINISTRATION MEDICAL CENTER, St. Petersburg, FL, Employer	)	**Docket No. 05-138** **Issued: November 8, 2005**

Appearances:
Carolzena Snow, pro se
Miriam Ozur, Esq., for the Director

Oral Argument September 28, 2005

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 13, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 4, 2004, which found that she did not establish an injury in the performance of duty and a September 3, 2004 nonmerit decision denying her request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she sustained an injury while in the performance of duty on March 24, 2004; and (2) whether the Office properly denied appellant's request for a hearing as untimely.

FACTUAL HISTORY

On March 24, 2004 appellant, a 55-year-old food service worker, filed a traumatic injury claim alleging that she injured her left thumb on that date while pushing a food cart.

By letter dated March 30, 2004, the Office advised appellant that the employing establishment was controverting the claim and advised her regarding information needed to process her claim. The Office requested that she submit a detailed medical report from her attending physician, which included a firm diagnosis of the injury and the relationship of the diagnosed condition to the employment incident.

On April 5, 2004 the Office received a report dated March 24, 2004 from Edward White Hospital, signed by Dr. Kelly,[1] a treating emergency room doctor,[2] a March 23, 2004 accident/injury report, a March 24, 2004 duty status report (Form CA-17) and a March 24, 2004 emergency room report. In the March 24, 2004 treatment note, Dr. Kelly diagnosed a ganglion cyst, released appellant to work with restrictions and referred her for surgery. The March 23, 2004 accident/injury report noted the date of injury as March 18, 2004 and diagnosed a cyst on the left wrist. The unsigned report attributed the cyst to the "continuous pushing of the foot carts."

By decision dated May 4, 2004, the Office denied appellant's claim on the grounds that the record contained no medical evidence providing a diagnosis for the March 24, 2004 event.[3]

On July 8, 2004 the Office received a June 11, 2004 request for review of the written record and an oral hearing, which was postmarked June 15, 2004.[4]

By decision dated September 3, 2004, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed as her request was postmarked June 15, 2004. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

[1] None of the reports signed by Dr. Kelly contain either an initial or a first name for the physician.

[2] This specialty was noted on the March 24, 2004 duty status report signed by Dr. Kelly.

[3] The Board notes that subsequent to the Office's May 4, 2004 decision, the Office received additional evidence including disability certificates. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).

[4] The Board notes that the record contains an envelope for a hearing request with the date June 15, 2004.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees Compensation Act[5] has the burden of establishing the essential elements of 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; that an injury was sustained while 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.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.[7]

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 or exposure, which is alleged to have occurred.[8] In order to meet her burden of proof to establish the fact that she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[9] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[10] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[11]

ANALYSIS -- ISSUE 1

Initially, the Board notes that appellant contended at the oral argument before the Board that she did not receive a copy of the Office's March 30, 2004 letter advising of the employing establishment's controversion of the claim until October 7, 2004. The Board finds, however, this

[5] 5 U.S.C. §§ 8101-8193.

[6] *Phillip L. Barnes*, 55 ECAB ___ (Docket No. 02-1441, issued March 31, 2004); *Elaine Pendleton*, 40 ECAB 1143 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *See Ellen L. Noble*, 55 ECAB ___ (Docket No. 03-1157, issued May 7, 2004); *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 6.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995); *see also Ellen L. Noble*, *supra* note 7.

[9] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[10] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[11] *Charles E. Evans*, 48 ECAB 692 (1997).

argument to be without merit. Under the "mailbox rule," it is presumed in the absence of evidence to the contrary that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing customs or practices of the Office itself will raise the presumption that the original was received by the addressee.[12] There is no indication in the record that the Office's March 30, 2004 letter was not received by appellant. The letter was addressed to appellant at her current address. The Office regularly corresponded with appellant prior and subsequent to the issuance of its March 30, 2004 letter. The Board finds that appellant has not submitted sufficient evidence to rebut the presumption that she received the Office's letter.

In this case, the Office accepted that appellant was pushing a food cart in the performance of duty on March 24, 2004 as alleged. However, the Office found that the medical evidence submitted was not sufficient to establish that this incident resulted in appellant's diagnosed conditions of a ganglion cyst. Appellant has the burden of proof in establishing that her diagnosed ganglion cyst condition is causally related to her accepted employment incident. The Board finds, however, that the medical evidence of record is insufficient to establish that this incident caused an injury.

The only medical evidence submitted by appellant was reports by Dr. Kelly. In a March 24, 2004 report, the physician diagnosed a ganglion cyst and released appellant to work with restrictions and made a referral for surgery. Dr. Kelly failed to address whether the diagnosed condition was caused by the accepted employment incident. The March 24, 2004 duty status report completed by Dr. Kelly is also insufficient to support appellant's claim. Dr. Kelly released appellant to light-duty work but provided no diagnosis. Therefore, the Board finds that Dr. Kelly's duty status report and treatment note are insufficient to establish appellant's claim.

The March 23, 2004 accident/injury report was unsigned. As such, it does not constitute probative medical evidence as the preparer cannot be identified as a physician.[13]

Appellant has failed to submit sufficient medical evidence based on an accurate history and providing an opinion that the March 24, 2004 employment incident caused or contributed to her ganglion cyst. Therefore, appellant has failed to meet her burden of proof and the Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

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 her claim before a representative of the Secretary.[14]

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[12] *See Joseph R. Giallanza*, 55 ECAB ___ (Docket No. 03-2024, issued December 23, 2003). *See also Marlon G. Massey*, 49 ECAB 650 (1998); *Charles R. Hibbs*, 43 ECAB 699 (1992).

[13] *See Merton J. Sills*, 39 ECAB 572 (1988).

[14] 5 U.S.C. § 8124(b)(1).

Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[15] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[16] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[17]

ANALYSIS -- ISSUE 2

In this case, the 30-day period for determining the timeliness of appellant's hearing request would commence on May 5, 2004 the date following the issuance of the Office's May 4, 2004 decision denying his claim for compensation. 30 days from May 5, 2004 would be June 3, 2004. Appellant's hearing request would be timely if filed by June 3, 2004.

In this case, the record contains the envelope in which appellant's request was sent, which reveals a postmark date of June 15, 2005. Because her request for a hearing was postmarked more than 30 days after the Office issued the May 4, 2004 decision, the Board finds that it was not timely filed and she is not entitled to a hearing as a matter of right. Further, the Office considered appellant's request and advised her that she could equally well address the issue in her case through the reconsideration process. Under these circumstances, the Board finds that the Office properly denied a discretionary hearing on the matter.[18]

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty. The Board further finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

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[15] 20 C.F.R. §§ 10.616, 10.617.

[16] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (b)(3) (October 1992).

[18] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Andre' Thyratron*, 54 ECAB ___ (Docket No. 02-1833, issued December 20, 2002); *Jeff Micono*, 39 ECAB 617 (1988).

ORDER

IT IS HEREBY ORDERED THAT the September 3 and May 4, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 8, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board