

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

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EDITH U. SALVADOR, Appellant)	
)	
and)	Docket No. 05-1838
)	Issued: November 1, 2005
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SAFETY)	
ADMINISTRATION, Los Angeles, CA, Employer)	
)	

Appearances:
Edith U. Salvador, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 6, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated February 28 and August 10, 2005. Under 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 to her right foot in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

Appellant, a 44-year-old baggage screener, filed a Form CA-2 claim for benefits on November 23, 2004, alleging that she experienced a sharp pain in her right foot as of July 7, 2004 causally related to factors of her employment.¹

In a report dated October 6, 2004, Dr. Jim Park, an osteopath, stated that appellant was seen for an “illness.” Appellant also submitted return to work certificates dated October 14 and 28, 2004.

By letter dated December 23, 2004, the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. The Office asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition, and an opinion as to whether her claimed condition was causally related to her federal employment. The Office requested that appellant submit the additional evidence within 30 days. Appellant did not submit any additional evidence.

By decision dated February 28, 2005, the Office denied appellant’s claim. The Office stated that it had requested additional factual and medical evidence by letter dated December 23, 2004, but that appellant had failed to respond to this request.

By letter dated June 27, 2005, appellant requested an oral hearing.

By decision dated August 10, 2005, the Office denied appellant’s request for an oral hearing. The Office stated that appellant’s request was postmarked June 29, 2005, which was more than 30 days after the issuance of the Office’s February 28, 2005 decision, and that she was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant’s request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act² has the burden of establishing that 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 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.³ These are the

¹ Although appellant filed a Form CA-2 claim for benefits based on an occupational condition, the Office adjudicated the claim as one for traumatic injury.

² 5 U.S.C. § 8101 *et seq.*

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶ The medical evidence required to establish causal relationship is usually rationalized medical evidence. 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.⁷

ANALYSIS -- ISSUE 1

In this case, appellant has not established fact of injury because she has failed to present any evidence indicating that the specific event or incident occurred at the time, place and in the manner alleged. Although appellant alleged that she felt a sharp pain in her right foot while engaged in the performance of duty as of July 7, 2004, she has not submitted any factual or medical evidence to support this assertion. This lack of evidence created an uncertainty as to the time, place and the manner in which appellant sustained her alleged right foot injury.

Appellant failed to submit to the Office a description of the employment activities which she believed caused the alleged right foot injury. Appellant’s inability to describe any incident or event, casts doubt on her assertion that she strained her right foot while in the performance of duty on July 7, 2004. The Office requested that appellant submit additional factual and medical evidence explaining how she injured her right foot on the date in question, and requested additional medical evidence in support of her claim that her right foot pain was caused by factors of her employment. Appellant failed to submit such evidence. Therefore, given the lack of evidence regarding how appellant sustained her injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of the Office’s final

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

⁶ *Id.* For a definition of the term “injury,” *see* 20 C.F.R. § 10.5(a)(14).

⁷ *Id.*

decision.⁸ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.⁹ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁰ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹¹

ANALYSIS -- ISSUE 2

In the present case, because appellant's June 27, 2005 request for a hearing was postmarked more than 30 days after the Office's February 28, 2005 decision denying compensation for a claimed right foot injury, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing. The Board therefore affirms the Office's August 10, 2005 decision denying appellant an oral hearing by an Office hearing representative.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained a right foot injury in the performance of duty. The Board finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative.¹²

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. § 10.131(a)(b).

¹⁰ *William E. Seare*, 47 ECAB 663 (1996).

¹¹ *Id.*

¹² On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 501(c).

ORDER

IT IS HEREBY ORDERED THAT the August 10 and February 28, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: November 1, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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