United States Department of Labor
Employees' Compensation Appeals Board

DEBORAH A. KEIFABER, Appellant	)	
and	)	**Docket No. 06-267**
	)	**Issued: March 1, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
Joseph J. Bakula, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 15, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated September 26, 2005. Under 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained a back injury in the performance of duty.

FACTUAL HISTORY

Appellant, a 44-year-old mail clerk, filed a claim for benefits on July 20, 2004, alleging that she strained her back while throwing a catalog into a bin on June 15, 2004. In a July 20, 2004 letter, appellant's supervisor, Diane Lackie, controverted the claim. Ms. Lackie stated that appellant told her on July 13, 2004 that she hurt her back on June 28, 2004 while throwing a J.C. Penny catalog into a bin. She stated that appellant gave her incomplete paperwork on July 13,

2004 indicating that she injured her back on different dates. Ms. Lackie attached an incomplete, undated Form CA-2, on which appellant stated that she first realized the disease or illness was caused or aggravated by her employment on June 28, 2004. Appellant also stated on the form, "I aggravated my back a couple of weeks ago, which happens often[;] I've taken time off and worked a lighter schedule with no improvement." The record contains a July 13, 2004 form report from Dr. Steven J. Arnold, a Board-certified orthopedic surgeon, who indicated that appellant sustained an L5-S1 disc protrusion due to an injury which occurred on June 28, 2004.

In a July 23, 2004 letter, Nancy E. Emerson, the employing establishment's injury compensation specialist, stated:

> "We question how [appellant] was able to continue to work for nearly a month (from June 15, 2004 to July 13, 2004) if her back had been injured so badly on June 15, 2004 that she needed to be put out of work for a least a week to recover. [Appellant] also seems to be confused about the date of injury as she first started to complete a CA-2 with a date of injury of June 28, 2004, not June 15, 2004."

By letter dated August 2, 2004, the Office advised appellant that she needed to submit additional factual and medical evidence in support of her claim. The Office provided 30 days to submit the requested information.

In a report dated August 31, 2004, Dr. Arnold stated:

> "[Appellant] was first seen on July 13, 2004 for two separate injuries sustained at work on June 15, 2004. [Appellant] states back injury has been aggravated due to throwing off heavy catalogs at her current job at the [employing establishment]....
>
> "I believe lifting the catalogs that weigh four pounds each multiple times, in addition to increased strain from clearing jams at the MT machine has ... aggravated [appellant's] back injury as mentioned above.... [Appellant's] disability commenced on June 15, 2004 and is current and continuing as of August 30, 2004."

In an August 11, 2004 statement, appellant's coworker stated that she witnessed appellant lifting heavy trays overloaded with catalogs which could have injured appellant. However, she did not state that she witnessed appellant sustaining an injury. Appellant also submitted an undated statement from a neighbor, Tami Andrews, who asserted that appellant hurt her back at work in June, but did not witness the alleged incident at work.

In a statement received by the Office on September 2, 2004, appellant reiterated that she injured her back while lifting catalogs at work on June 15, 2004. Regarding the discrepancy in dates listed on the two forms she submitted, appellant stated:

> "The discrepancy of dates on the CA-1 and CA-2 forms is a result of not knowing the proper form to use or how to fill them out. The date of injury was June 15, 2004 as shown on the CA-1 form, which is the correct form I needed to file. The CA-2 form that I filled out was found to be not the form I needed to file because it

was for an illness. The date in block 12 was the date I realized I needed to see a doctor for I was not feeling better after almost two weeks and I was just continuing to hurt the same affected area."

By decision dated September 3, 2004, the Office denied appellant's claim, finding that she failed to establish fact of injury. It found the evidence insufficient to establish the June 15, 2004 incident.

On September 29, 2004 appellant requested an oral hearing, which was held on June 29, 2005.

At the hearing, appellant testified that, when she sustained her back injury, the person in authority on duty was a temporary supervisor who was unfamiliar with the procedure for reporting injuries and claiming compensation. She was directed to a union representative, who mistakenly gave her a Form CA-2. Appellant stated that she didn't realize she needed to submit a Form CA-1 for her traumatic injury until two weeks later, when her regular supervisor, Ms. Lackie, called her and told her she needed to complete a Form CA-1.

By decision dated September 26, 2005, an Office hearing representative affirmed the September 3, 2004 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

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.[4] 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.[5]

[1] 5 U.S.C. § 8101 *et seq*.

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

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(e)(e).

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty,[6] nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and the circumstances and her subsequent course of action.[7] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may case doubt on an employee's statements in determining whether he or she has established his or her claim.[8]

ANALYSIS

In this case, there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Appellant alleged on her CA-1 form that she injured her back on June 15, 2004 while throwing a catalog. However, this is contradicted by her statement on the Form CA-2 that she began experiencing back pain at work as of June 28, 2004. The July 13, 2004 form report from Dr. Arnold noted that she sustained an L5-S1 disc protrusion due to a June 28, 2004 work injury. Further, appellant's lack of awareness of how to file a claim or how to fill out a form -- which she claimed in her September 2, 2004 statement and at the hearing -- does not account for the discrepancies in the dates of injury she provided. This evidence creates a uncertainty as to the time, place and in the manner in which appellant sustained her alleged lower back injury. The record reflects that appellant was able to continue to work for nearly a month after June 15, 2004, the date that she specified as the original date of injury, despite the fact that she alleged that she injured her back so badly on that date that she needed to be released from work for a least a week in order to recover.

In addition, appellant failed to submit evidence from witnesses supporting her claim. This casts additional doubt on appellant's assertion that she strained her back while throwing a catalog on June 15, 2004. The Office requested that appellant submit additional factual and medical evidence explaining how she injured her lower back on the date in question, and requested additional medical evidence in support of her claim that her back pain was related to the alleged work incident of June 15, 2004. Appellant failed to submit such evidence. Given the inconsistencies in the evidence regarding how appellant sustained injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.[9]

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[6] *Elaine Pendleton*, *supra* note 2.

[7] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[8] *See Constance G. Patterson*, 42 ECAB 206 (1989).

[9] *See Mary Joan Coppolino,* 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a back injury in the performance of duty.[10]

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[10] On appeal, appellant has submitted new evidence. However, the Board cannot consider new 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).