United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
and	)	**Docket No. 07-357**
	)	**Issued: August 15, 2007**
U.S. POSTAL SERVICE, FRIENDSHIP STATION, Washington, DC, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 21, 2006 appellant filed a timely appeal of a June 16, 2006 merit decision of the Office of Workers' Compensation Programs finding that she did not sustain an injury in the performance of duty on October 4, 2005 and an August 18, 2006 nonmerit decision, denying her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction of the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty on October 4, 2005; and (2) whether the Office properly denied her request for a review of the written record on the grounds that it was untimely filed.

FACTUAL HISTORY

On October 6, 2005 appellant, then a 57-year-old clerk, filed a traumatic injury claim, alleging that on October 4, 2005 she hurt her neck, back, arms, shoulder and wrist when she fell at work. She explained that her foot became caught in a plastic tie that had come off a bundle of

mail and that she fell forward holding out her hands to break the fall. An employing establishment medical form signed by appellant in October 2005 indicated that she chose not to receive medical care or file a traumatic injury claim at that time. On appellant's claim form, the employing establishment controverted the claim.

By letter dated May 4, 2006, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the factual and medical evidence she needed to submit to establish her claim.

In a May 20, 2006 letter, appellant stated that immediately following the October 4, 2005 incident, her supervisor, Toussaint Person, and a coworker, Ms. Skinner, who witnessed the incident, helped her off the floor. She went home and soaked in a tub of hot water and put heat on her back, neck and shoulder. Appellant delayed seeking medical treatment because she was not in a lot of pain until October 6, 2005 when she awoke aching and sore. She stated that her work duties caused pain in her shoulder and numbness in her hand. Appellant was first examined by Dr. Peter S. Trent, an attending Board-certified orthopedic surgeon, on April 17, 2006. She stated that she could not obtain an appointment with him until that day. At that time the pain in her shoulder was waking her up in the middle of the night and she experienced increased numbness and tingling in her hand.

An undated form report which contained a physician's illegible signature provided a history that, while at work on October 4, 2005, appellant's feet became caught in a plastic tie that came off a bundle of mail and she fell forward with her hands out to break the fall.

In an April 18, 2006 narrative report, Dr. Trent noted appellant's complaint of pain in her left elbow and shoulder. He reported essentially normal findings on physical examination with the exception of mild tenderness over the trapeziums and supraspinatus muscles on the left side. Dr. Trent ordered a magnetic resonance imaging (MRI) scan of appellant's left shoulder. His April 18, 2006 x-ray report found that her left elbow was normal with no evidence of a fracture. Appellant's left shoulder had some mild degenerative changes consistent with her age. Dr. Trent, however, stated that the x-rays did not explain the source of appellant's pain or its continuation for more than five months.

By decision dated June 16, 2006, the Office found the evidence of record sufficient to establish that the October 4, 2005 incident occurred at the time, place and in the manner alleged, but insufficient to establish that appellant sustained an injury causally related to the accepted employment incident.

On June 26, 2006 the Office received Dr. Trent's June 15, 2006 report which stated that appellant had clinical signs of carpal tunnel syndrome of the left upper extremity. In a July 17, 2006 report, Dr. Trent opined that appellant remained symptomatic from an axial compression injury due to the accepted employment incident. He diagnosed rotator cuff syndrome with an associated acromioclavicular joint injury. Dr. Trent concluded that appellant's current symptoms were a direct result of the October 2005 employment incident. His July 17, 2006 x-ray found no evidence of a fracture.

In an undated request, postmarked July 29, 2006 and received by the Office on August 2, 2006, appellant requested a review of the written record by an Office hearing representative regarding the Office's June 16, 2006 decision.

By decision dated August 18, 2006, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. It exercised its discretion and further denied her request on the basis that the issue in the case could be addressed by requesting reconsideration and submitting additional evidence establishing that she sustained an injury while in the performance of duty.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 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.[2] 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.[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. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.[4] 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.[5]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[6] 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

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *See Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[5] *Linda S. Jackson*, 49 ECAB 486 (1998).

[6] *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).

identified factors.[7] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[8]

ANALYSIS -- ISSUE 1

The record supports that on October 4, 2005 appellant fell at work when her foot became caught in a plastic tie that had come off a bundle of mail. The Board finds, however, that the medical evidence of record is insufficient to establish that the accepted employment incident caused neck, back, arm, shoulder and wrist conditions.

The undated form report revealed a history of the October 4, 2005 employment incident. However, it did not provide a diagnosis causally related to the accepted employment incident.

Dr. Trent's April 18, 2006 narrative report revealed essentially normal findings on physical examination with the exception of mild tenderness over the trapezius and supraspinatus muscles on the left side. His April 18, 2006 x-ray report found that appellant's left elbow was normal and that her left shoulder had mild degenerative changes consistent with her age. However, Dr. Trent's findings are insufficient to establish that appellant sustained an injury causally related to the October 4, 2005 employment incident as he stated that the x-rays did not explain the source of appellant's pain and or its continuation for more than five months. Moreover, he neither attributed the mild tenderness over the trapezius and supraspinatus muscles on the left side to the accepted employment incident, nor explained the nexus. A physician's mere diagnosis of pain does not constitute a basis for payment of compensation.[9]

Appellant did not submit any additional medical evidence establishing a causal relationship between her neck, back, arm, shoulder and wrist conditions and the accepted October 4, 2005 employment incident. The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained an injury in the performance of duty on October 4, 2005. Therefore, she failed to meet her burden of proof.

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.[10] Sections 10.615, 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.[11]

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

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

[9] *Robert Broome*, 55 ECAB 0493 (2004).

[10] 5 U.S.C. § 8124(b)(1).

[11] 20 C.F.R. §§ 10.615, 10.616, 10.617.

Section 10.616(a) of the federal regulation provides that a request for a review of the written record or an oral hearing must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought.[12] 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.[13] 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.*), [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."[14]

ANALYSIS -- ISSUE 2

By decision dated August 18, 2006, the Office denied appellant's request for a review of the written record on the grounds that it was not timely filed. The Office properly found that appellant was not, as a matter of right, entitled to a record review since her undated request was postmarked July 29, 2006 had not been made within 30 days of the June 16, 2006 decision.

The Office also has the discretionary power to grant a request for a written record review when a claimant is not entitled to such as a matter of right. In the August 18, 2006 decision, the Office properly exercised its discretion by noting that it had considered the matter in relation to the issue involved and denied appellant's request for a review of the written record on the basis that the issue of whether she sustained an injury in the performance of duty on October 4, 2005 could be addressed through a reconsideration application.[15]

CONCLUSION

The Board finds that appellant did not provide the necessary medical evidence to establish that she sustained an injury caused by the October 4, 2005 employment incident. The Board further finds that the Office properly denied appellant's request for a review of the written record on the grounds that it was untimely filed.

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[12] *Id.* at § 10.616(a).

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

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

[15] On appeal, appellant contends for the first time that her request for a review of the written record was timely filed. She asserts that the envelope containing the Office's June 16, 2006 decision was postmarked July 3, 2006 and received by her on July 5, 2006. Appellant thus, contends that she had 30 days from July 5, 2006 to submit a request for review of the written record. She concluded that, as the Office determined that her request was postmarked July 29, 2006, her request was made within 30 days of the June 16, 2006 decision and, therefore, timely filed. This contention was not raised before or adjudicated by the Office and cannot be considered for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the August 18 and June 16, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 15, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board