

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

L.K., Appellant	)	
	)	
and	)	<b>Docket No. 07-1187</b>
	)	<b>Issued: September 12, 2007</b>
<b>U.S. POSTAL SERVICE, KEYSTONE STATION, Harrisburg, PA, Employer</b>	)	
	)	

*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 March 29, 2007 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 27, 2006 denying his traumatic injury claim and a nonmerit decision dated March 6, 2007 denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the March 6, 2007 nonmerit decision.

**ISSUES**

The issues are: (1) whether appellant sustained an injury in the performance of duty on November 2, 2006; and (2) whether the Office properly denied his request for a hearing as untimely under 5 U.S.C. § 8124.

**FACTUAL HISTORY**

On November 8, 2006 appellant, then a 38-year-old city carrier, filed a claim for a traumatic injury occurring on November 2, 2006 when he experienced severe pain in the left side of his stomach after loading and lifting bags. He did not stop work. On the reverse side of the

claim form, a supervisor noted that appellant did not inform him of the injury at the time that it occurred. The supervisor also indicated that he previously underwent surgery for a hernia in the same location.

By letter dated November 20, 2006, the Office requested that appellant submit additional factual and medical information in support of his claim within 30 days. The Office requested further information about the occurrence of the injury, a description of any similar conditions and a comprehensive medical report addressing causation. In a decision dated December 27, 2006, the Office denied his claim on the grounds that he did not establish that the incident occurred at the time, place and in the manner alleged. The Office further noted that appellant had submitted no medical evidence.

On a form dated January 11, 2007, postmarked January 27, 2007, appellant requested a review of the written record. By decision dated March 6, 2007, the Office denied his request for a review of the written record as untimely under section 8124.

### **LEGAL PRECEDENT -- ISSUE 1**

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

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>4</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>5</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>3</sup> *See Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>4</sup> *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>5</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>6</sup> *Id.*

### **ANALYSIS -- ISSUE 1**

Appellant filed a traumatic injury claim on November 8, 2006 alleging that on November 2, 2006 he sustained pain in the left side of his stomach due to loading and lifting bags. His supervisor noted that he was not informed at the time of the injury and that appellant had previously undergone a hernia repair in the same location. By letter dated November 20, 2006, the Office requested additional factual and medical information from appellant, including a factual description of the events on November 2, 2006, a discussion of any preexisting condition and a detailed medical report from his attending physician addressing the causal relationship between any diagnosed condition and the November 2, 2006 employment incident. He did not respond to the Office's request for information within the allotted 30 days. When an employee claims an injury in the performance of duty, the employee must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury.<sup>7</sup> Despite being provided the opportunity to do so, appellant did not submit the evidence necessary to establish the factual or medical basis for his claim. Accordingly, the Board finds that he has not established a *prima facie* claim for compensation.<sup>8</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>9</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>10</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."<sup>11</sup>

Section 10.616(a) further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as

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<sup>7</sup> *Joseph W. Kripp*, 55 ECAB (2003).

<sup>8</sup> Subsequent to the Office's last merit decision on December 27, 2006, appellant submitted additional factual and medical evidence. The Board may not review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not, however, preclude him from requesting reconsideration by the Office based on the newly submitted evidence pursuant to 5 U.S.C. § 8128(a).

<sup>9</sup> 5 U.S.C. § 8124(b)(1).

<sup>10</sup> *Frederick D. Richardson*, 45 ECAB 454 (1994).

<sup>11</sup> 20 C.F.R. § 10.615.

determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."<sup>12</sup>

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.<sup>13</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Office issued a decision on December 27, 2006 denying appellant's claim that he sustained an injury on November 2, 2006 in the performance of duty. Appellant sought a review of the written record by letter postmarked January 27, 2007. In a decision dated March 6, 2007, the Office denied appellant's hearing request on the grounds that it was untimely. As appellant's request for a hearing was postmarked January 27, 2007, more than 30 days after the Office issued its December 27, 2006 decision, he was not entitled to a hearing as a matter of right.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.<sup>15</sup> The Office properly exercised its discretion by stating 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 case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>16</sup> The evidence of record does not establish that the Office committed any action in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. For these reasons, the Office properly denied his request for a review of the written record as untimely under section 8124 of the Act.

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<sup>12</sup> 20 C.F.R. § 10.616(a).

<sup>13</sup> See *André Thyratron*, 54 ECAB 257 (2002).

<sup>14</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>15</sup> *Afegalai L. Boone*, 53 ECAB 533 (2002).

<sup>16</sup> See *André Thyratron*, *supra* note 13.

**CONCLUSION**

The Board finds that appellant has not established that he sustained an injury in the performance of duty on November 2, 2006. The Board further finds that the Office properly denied his request for a hearing as untimely under 5 U.S.C. § 8124.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 6, 2007 and December 27, 2006 are affirmed.

Issued: September 12, 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