United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 07-2175**
	)	**Issued: March 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
Joshua E. Birocco, Esq., for the appellant
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 August 27, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated May 23, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a back injury in the performance of duty.

FACTUAL HISTORY

This is the second appeal before the Board. On July 20, 2004 appellant, a 44-year-old mail clerk, alleged that she strained her back while throwing a catalog into a bin on June 15, 2004. The employing establishment controverted the claim and submitted evidence that she hurt her back on June 28, 2004 not June 15, 2004 and that she submitted incomplete paperwork on July 13, 2004 indicating that she injured her back on different dates. The medical evidence of record indicated that appellant sustained an L5-S1 disc protrusion due to an injury which occurred

on June 28, 2004. She alleged that the discrepancy in dates listed on the two forms she submitted resulted from not knowing the proper form to use or how to fill them out.

By decision dated September 3, 2004, the Office denied appellant's claim, finding that she failed to establish fact of injury. Appellant requested an oral hearing. She testified that, when she sustained her back injury, the person in authority who was on duty at the time was a temporary supervisor who was unfamiliar with the procedure for reporting injuries and claiming compensation. A union representative mistakenly gave appellant a Form CA-2. She did not realize she needed to submit a Form CA-1 for a traumatic injury until two weeks later, when her regular supervisor 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 Office decision. In a decision dated March 1, 2006,[1] the Board affirmed the Office decisions. The facts of this case, as set forth in the Board's March 1, 2006 decision, are incorporated herein by reference.

By letter dated September 25, 2006, appellant's attorney requested reconsideration. Appellant submitted a June 9, 2006 report from Dr. Robert L. Verosloff, Board-certified in internal medicine, who stated:

> "[Appellant] states that she felt a pop while at work and has been in pain since, [which] to me suggests that the work caused the injury. Now, though, to be able to say that the kind of work she did definitely caused this is difficult. I am not a bone and joint specialist and did not examine her after the injury. This type of problem is seen after overuse and underconditioning, but to be able to say exactly what caused what and what other things played a part in the final outcome is almost impossible."

By decision dated December 20, 2006, the Office denied reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated February 28, 2007, counsel requested reconsideration. In a January 23, 2007 statement, Debra L. Brodie, appellant's union steward at the time she filed her claim in June 2004, asserted that appellant injured her back on June 15, 2004 and that she was asked to help appellant complete the necessary paperwork. She reiterated appellant's contentions that: her regular supervisor was not present at the time she was filling out the claim forms; a clerk from another employing establishment was brought in to supervise appellant's unit; and the acting supervisor was unfamiliar with the process and required assistance from another supervisor. When Ms. Brodie was helping appellant, they discovered that a form was incorrect because it pertained to a claim for an occupational disease. She stated that appellant did not complete this form, but assumed that appellant must have turned it in by accident when she turned in her other papers. Ms. Brodie asserted:

> "[Supervisor] Lackie, who was not even present during this time, filled out the supervisor's portion of the paperwork and wrote a statement disputing

[1] Docket No. 06-267 (issued March 1, 2006).

> [appellant's] word. She said that [appellant] had past claims denied. The dates were different because different questions were asked. One form asked for the date on which the injury occurred, which was June 15, 2004 and the other asked the date she first realized the disease or illness was caused or aggravated by [her] employment, which was on June 28, 2004. I believe this was either the date she went to the doctor or when the pain from her back had subsided enough for her to realize her shoulder and arm were affected and that she needed to see a doctor. As to [supervisor] Lackie's statement that past claims were denied, I am not sure this is strictly true. According to [appellant], she has only filed one previous claim and it was denied because she decided not to pursue it and so did not turn in the required paperwork.
>
> "In closing, I believe [appellant] filled out these forms truthfully. She answered the questions as they were asked. I do recall discussing the dates on the forms and [appellant] never claimed any other date than June 15, [2004] for the date of injury. The wording on these forms, as well as the fact that one form was incorrect led to the so-called discrepancies for which [the Office] denied the claim. [Appellant] filled out one form that asked for the date the injury occurred and another form which asked when she became aware of the disease or illness and when she first realized it was work related. She answered those questions as they were asked, there really was no date discrepancy. The [Office] denied the claim based on a form that they should never have received and the statement of a supervisor who was not even present at the time of the injury."

Appellant also submitted a March 2, 2006 report from Dr. W.F. McDonald, a specialist in orthopedic surgery. He stated:

> "I do not think I can supply medical evidence that [appellant's] overhead activities were a direct cause of her rotator cuff problems. She did, however, in her history present a history of a lifting injury, which accentuated her pain and brought her to my attention. Subsequent treatment led to a repair of the rotator cuff and I am comfortable with making that relationship."

By decision dated May 23, 2007, the Office denied modification of the September 26, 2005 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 essential

[2] 5 U.S.C. § 8101 *et seq.*

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

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 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.[7] 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 circumstances and her subsequent course of action.[8] 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.[9]

The Office rejected appellant's claim of injury on June 15, 2004, finding that she did not establish the lifting incident due to inconsistencies as to the date of the alleged injury. This was affirmed by the Board in the prior appeal.

ANALYSIS

The evidence appellant submitted with her request for reconsideration is not sufficient to establish the fact of injury. In a January 23, 2007 statement, Ms. Brodie merely reiterated appellant's contentions that she received the wrong forms from an acting supervisor, became confused and listed June 28, 2004 instead of June 15, 2004 as the date of injury. This statement does not establish that Ms. Brodie was a witness to the June 15, 2004 incident. The fact remains that appellant submitted two statements which contradict her assertion that she injured her back on June 15, 2004: the undated Form CA-2 in which she indicated that she began experiencing back pain at work as of June 28, 2004 and Dr. Arnold's July 13, 2004 form report, which noted that she

[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(e)(e).

[7] *Elaine Pendleton*, *supra* note 3.

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

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

sustained an L5-S1 disc protrusion due to a June 28, 2004 work injury. As the Board stated in its March 1, 2006 decision:

> "[I]t is hard to comprehend how appellant's lack of awareness of how to file a claim or how to fill out a form ... could account for the discrepancies in the dates of injury she provided to several different people. [She] can be reasonably imputed to have knowledge of when she sustained an injury that caused her to be medically released from work.[10] This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained his alleged lower back injury."

In addition, appellant alleged that she injured her back so badly on June 15, 2004 that she needed to be released from work for a least a week in order to recover. However the record indicates that she continued to work for nearly a month afterward. The March 2006 report from Dr. McDonald merely indicates that appellant's lifting overhead activities may have caused her rotator cuff problems; it has no probative value bearing on to the issue of whether she established that she actually experienced the employment incident at the time, place and in the manner alleged.

Accordingly, given the inconsistencies which still exist in the evidence, casting serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged that appellant sustained her injury, the Board finds that she did not meet her burden of proof to establish fact of injury.[11] The Board affirms the Office's May 23, 2007 decision.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained a back injury in the performance of duty.

[10] The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

[11] *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).

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 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