

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

R.L., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVY)
MUNITIONS COMMAND, CONUS EAST)
DIVISION, DETACHMENT EARLE,)
Colts Neck, NJ, Employer)

**Docket No. 09-262
Issued: August 13, 2009**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 4, 2008 appellant filed a timely appeal from a May 5, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for fact of injury and an October 21, 2008 decision of an Office hearing representative finding that he abandoned his oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury on January 30, 2008 in the performance of duty, as alleged; and (2) whether the Office properly determined that appellant abandoned his request for an oral hearing before an Office hearing representative. On appeal, appellant contends that he notified the Office that he would not be able to attend the scheduled oral hearing and enclosed a copy of the alleged notification.

FACTUAL HISTORY

On March 26, 2008 appellant, then a 51-year-old traffic management specialist, filed a traumatic injury claim alleging that on January 30, 2008 he experienced pain and stiffness in his upper back and both shoulders. In an April 7, 2008 statement, he stated that, at the time of the injury, he was inspecting semitrailer loads in a holding yard. He was on the ground with the rear door open when heavy winds blew the door closed and pinned him between the open door and the trailer.

On March 28, 2008 the Office notified appellant of the deficiencies in his claim and requested that he provide additional information.

In forms dated January 30 through February 26, 2008, appellant's supervisors reported that high winds caused a rear door to hit appellant in the back and threw him into a trailer. Several employing establishment medical officers indicated that appellant was qualified for light duty and provided work restrictions. In a March 10, 2008 form, a medical officer indicated that appellant could return to full duty as of March 10, 2008 and stated that appellant would see his doctor for possible physical therapy.

Appellant also submitted an April 7, 2008 prescription note from Dr. Martin Riss, an osteopath, for a magnetic resonance imaging (MRI) scan of the right shoulder.

By decision dated May 5, 2008, the Office denied the claim on the grounds that appellant did not submit any evidence containing a firm medical diagnosis that could be connected to the January 30, 2008 employment incident.

On May 12, 2008 appellant filed a request for an oral hearing before an Office hearing representative.

In a June 17, 2008 letter, the Office confirmed receipt of the request for an oral hearing. By letter dated August 12, 2008, the Office notified appellant, at his address of record, that his hearing was scheduled for September 17, 2008.

By decision dated October 21, 2008, an Office hearing representative found that appellant abandoned his request for a hearing. The hearing representative stated that appellant was given 30 days' notice of the scheduled hearing, that he did not appear at the scheduled hearing and that there was no evidence that he attempted to contact the Office either prior or subsequent to the scheduled hearing.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable,

¹ 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,² including that he is an “employee” within the meaning of the Act³ and that he filed his claim within the applicable time limitation.⁴ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. 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.⁶ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

ANALYSIS -- ISSUE 1

The Office accepted that on January 30, 2008 appellant was hit by a semitrailer door due to high winds. The issue is whether appellant established that he sustained an injury causally related to this employment incident.

In support of his claim, appellant submitted forms dated January 30 through February 26, 2008 signed by the employing establishment medical officers indicating that appellant was qualified for light duty and a form dated March 10, 2008 indicating that he could return to full duty. He also submitted an April 7, 2008 prescription note from Dr. Riss ordering a right shoulder MRI scan.

The Board finds that none of this evidence is sufficient to meet appellant’s burden of proof. Because medical officers are not included in the definition of a physician under the Act, and because there is no evidence of record to establish that the medical officers are actually physicians, the forms signed by the medical officers are of diminished probative value.⁸ Further,

² *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁴ *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O’Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁵ *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁷ *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁸ Under section 8101(2), the definition of physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). *See D.L.*, Docket No. 07-367 (issued May 15, 2007) (where the Board held that a medical services officer is not included in the definition of a physician under the Act).

the April 7, 2008 prescription note of Dr. Riss does not contain a diagnosis or address the cause of appellant's condition. Thus, this note is also of diminished probative value.⁹

Because appellant did not submit sufficient medical evidence to support his claim, the Board finds that he failed to establish that the January 30, 2008 work event caused an injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Federal Employees' Compensation Act provides that a claimant not satisfied with a decision on her claim is entitled, upon timely request, to a hearing before a representative of the Office.¹⁰

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual provides as follows:

“e. Abandonment of Hearing Requests:

(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

Under these circumstances, H&R (Branch of Hearings and Review) will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO (district Office).”¹¹

ANALYSIS -- ISSUE 2

On May 16, 2008 appellant filed a request for an oral hearing before an Office hearing representative. By letter dated August 12, 2008, the Office notified him that his oral hearing was scheduled for September 17, 2008. This notice was sent to appellant's last address of record and was not returned as undeliverable. Thus, under the mailbox rule, the presumption is that he received proper notification of his hearing.¹² The record shows that appellant did not request a postponement of the hearing and failed to provide an explanation for his failure to attend within

⁹ See *Robert Broome*, 55 ECAB 339 (2004).

¹⁰ 5 U.S.C. § 1824(b).

¹¹ Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Abandonment of Hearing Request*, Chapter 2.1601.6(e) (January 1999).

¹² Under the mailbox rule, a letter properly address and mailed in the due course of business, such as in course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. See *James A. Gray*, 54 ECAB 277 (2002); *Charles R. Hibbs*, 43 ECAB 699 (1992).

10 days of the scheduled date of the hearing. As the circumstances of this case meet the criteria for abandonment, the Board finds that he abandoned his request for a hearing.¹³

The Board notes appellant's contention on appeal that he notified the Office that he could not attend the scheduled oral hearing. No such correspondence is contained in the record. Although appellant submitted a copy of the alleged notification with his appeal, the notice constitutes new evidence not previously before the Office and, thus, cannot be considered by this Board on appeal.¹⁴

CONCLUSION

The Board finds that appellant did not establish that he sustained an injury in the performance of duty on January 30, 2008, as alleged. The Board also finds that the Office properly determined that appellant abandoned his request for an oral hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the October 21 and May 5, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ See *G.J.*, 58 ECAB ___ (Docket No. 07-1028, issued August 16, 2007).

¹⁴ See 20 C.F.R. § 501.2(c); *Mary A. Ceglia*, 55 ECAB 626 (2004).