United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 08-2106**
	)	**Issued: May 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Oak Creek, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 25, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 19, 2008, which denied his request for a hearing and a February 20, 2008 decision, which found that he did not sustain an injury, as alleged. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these issues .

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on October 25, 2007; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On November 14, 2007 appellant, then a 52-year-old letter carrier, filed a traumatic injury alleging that, on October 25, 2007, the rear door of his mail truck became stuck. He sustained an injury to his left shoulder, arm and neck after he pulled on the door. Appellant stopped work on November 9, 2007.

By letter dated December 4, 2007, the Office informed appellant of the evidence needed to support his claim. It requested that he submit additional evidence within 30 days.

The Office received reports dated November 21 and 28, 2007, from Dr. Dan Heffez, a Board-certified neurosurgeon, who noted that appellant related the onset of severe neck pain due to lifting or closing a truck door while at work. Dr. Heffez diagnosed cervical myelopathy that was likely caused by cervical spinal cord compression. He noted ventral disc compression and bone spur and recommended an anterior discectomy and fusion. The Office also received a physical therapy report dated April 5, 2007.

By decision dated January 15, 2008, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. It found that the medical evidence was insufficient to support that the accepted employment incident caused a diagnosed condition. On February 20, 2008 the Office reissued the decision as an incorrect address had been placed on the original decision.

On May 5, 2008 appellant requested a hearing. The accompanying envelope was a postmarked on May 5, 2008.

By decision dated June 19, 2008, the Office found that appellant was not entitled to a hearing as his request was not made within 30 days of the February 20, 2008 decision. It determined that it would not grant a discretionary hearing as the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered.

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 timely filed within the applicable time limitation period of the Act[2] and that an injury was sustained in the performance of duty.[3] These are the essential elements of each 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

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyet*, 41 ECAB 992 (1990).

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

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an injury to his left shoulder, arm and neck on October 25, 2007 after he pulled on the door of his mail truck. There is no dispute that he pulled on the door of his mail truck while in the performance of duty on October 25, 2007. Therefore, appellant has established that the employment incident occurred as alleged.

However, the medical evidence is insufficient to establish that the October 25, 2007 incident caused an injury.

In reports dated November 21 and 28, 2007, Dr. Heffez noted that appellant related that he had an onset of severe neck pain due to lifting or closing a truck door while at work. He diagnosed cervical myelopathy for which he recommended a cervical discretionary and fusion. However, Dr. Heffez did not provide adequate medical opinion explaining how appellant's cervical condition was due to pulling the door of his mail truck on October 25, 2007. He did not provide a comprehensive medical report addressing appellant's history, noting that appellant was doing well despite some past illnesses. Dr. Heffez also noted that appellant took a trip to Florida, during which he experienced increased neck pain. Although diagnostic testing revealed degenerative changes at the cervical spine, most severe at L5-6, he did not explain how pulling a truck door would cause or contribute to cervical degenerative disease or the need for surgery. Dr. Heffez merely noted that appellant's symptoms began in relation to his work. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic is insufficient, without greater rationale, to establish causal relation.[7] Consequently, the Board finds that this evidence is insufficient to establish appellant's claim.

Appellant also submitted a physical therapy report dated April 5, 2007. However, physical therapists are not physicians as defined under the Act. Their opinions on causal relationship do not constitute medical evidence and have no probative value.[8]

The medical reports submitted by appellant do not adequately address how the October 25, 2007 incident caused or aggravated his cervical conditions, they are insufficient to establish that the October 25, 2007 employment incident caused or aggravated his cervical degenerative disease or the need for surgery.

LEGAL PRECEDENT -- ISSUE 2

Under the Act and its implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date

[6] *Id*.

[7] *See Michael S. Mina*, 57 ECAB 379 (2006).

[8] *Jane A. White*, 34 ECAB 515, 518 (1983).

of the decision for which a hearing is sought.[9] If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[10]

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[11] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[12]

ANALYSIS -- ISSUE 2

Appellant requested a hearing on May 5, 2008. The postmark reveals that is was mailed on May 5, 2008. The Board notes that the request for a hearing was more than 30 days after the Office issued its February 20, 2008 decision. Appellant was not entitled to a hearing as a matter of right.

The Office properly exercised its discretion in denying a hearing upon appellant's untimely requests by determining that the issues could be equally well addressed by requesting reconsideration and submitting new evidence. The only limitation on the Office's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions from known facts.[13] There is no evidence of record that the Office abused its discretion in denying appellant's requests for a hearing under these circumstances.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty on October 25, 2007. The Board also finds that the Office properly denied appellant's request for a hearing.[14]

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[9] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[10] *Teresa Valle*, 57 ECAB 542 (2006).

[11] *Bettye Richardson*, 59 ECAB ___ (Docket No. 08-693, issued August 19, 2008); *Marilyn Wilson*, 52 ECAB 347 (2001) (the Office has discretion to grant or deny a request made after the 30-day period, and the Office will determine whether a discretionary hearing should be granted).

[12] *P.B.*, 59 ECAB ___ (Docket No. 08-839, issued October 15, 2008); *Teresa Valle*, *supra* note 10.

[13] The only limitation on the Office's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions from known facts. *See Daniel J. Perea*, 42 ECAB 214 (1990). There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

[14] The Board notes that subsequent to the Office's June 19, 2008 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2008 decision Office of Workers' Compensation Programs' hearing representative and the February 20, 2008 decision are affirmed.

Issued: May 5, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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