

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

D.J., Appellant)

and)

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Dallas, TX, Employer**)

**Docket No. 09-1533
Issued: March 2, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2009 appellant filed a timely appeal of the merit decision of the Office of Workers' Compensation Programs dated January 9, 2009 denying his claim for compensation. The appeal is also timely filed from the April 28, 2009 nonmerit decision denying his request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on November 15, 2008, as alleged; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

FACTUAL HISTORY

On November 24, 2008 appellant, then a 32-year-old mail handler, filed a traumatic injury claim alleging that, on November 15, 2008, while pushing a container, he sustained an injury to his left shoulder. On the claim form, the employing establishment indicated that, if a

container is too heavy to push, an employee must ask for assistance. By letter dated November 25, 2008, the Office controverted appellant's claim listing the contested factors as performance of duty, fact of injury and causal relationship.

In support of his claim, appellant submitted a Texas State form dated November 21, 2008 wherein Dr. Jose Trevino, a Board-certified family practitioner, noted a work injury on November 15, 2008, which occurred when appellant was pushing/pulling and fell and had pain in his left shoulder. Dr. Trevino indicated that appellant could return to work on November 21, 2008 with restrictions of not carrying items more than 10 pounds. Appellant also submitted the physician's note from the same visit wherein Dr. Trevino assessed acute left shoulder strain/sprain. He also submitted a November 21, 2008 physical therapy evaluation form.

By letter dated December 2, 2008, the Office informed appellant that the evidence was insufficient to establish his claim because he had not submitted evidence sufficient to establish that he actually experienced the incident or employment factor alleged to have caused the injury. It further noted that a physician's opinion as to how the incident resulted in the condition diagnosed has not been provided.

In response to this letter, appellant resubmitted various items. He also provided a copy of a physician's notes and Texas State work status reports signed by Dr. Trevino evincing his treatment of appellant on December 1, 8 and 22, 2008. In appellant's December 22, 2008 report, Dr. Trevino listed: "[w]ork [i]njury [d]iagnosis [i]nformation" as sprain/strain upper shoulder; arthralgia of shoulder, sprain/strain subscapularis; and sprain/strain ankle, deltoid.

By decision dated January 9, 2009, the Office denied appellant's claim because it found that the evidence was insufficient to establish that the event occurred as alleged.

On April 1, 2009 appellant requested review of the written record. He submitted additional medical evidence.

By decision dated April 28, 2009, the Office denied appellant's request for review of the written record as it was not filed within 30 days after issuance of the decision. It also reviewed the request under its discretionary authority and determined that the issue in this case could be equally well addressed by requesting reconsideration and submitted new evidence which establishes that he sustained an injury as alleged.

LEGAL PRECEDENT -- ISSUE 1

The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected.¹ An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing

¹ 20 C.F.R. § 10.5(ee).

² 5 U.S.C. §§ 8101-8193.

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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

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. 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. An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁴

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an injury to his left shoulder while pushing a container on November 15, 2008. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁵ In this case, however, appellant has not provided a complete statement; he merely makes a general allegation that his left shoulder injury occurred while he was pushing a container. Without a complete statement or some sort of supporting evidence, he has not provided sufficient information to establish that the incident occurred as alleged, especially noting that the employing establishment controverted the claim. Appellant has not

³ *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

⁴ *Id.*

⁵ *Constance G. Patterson*, 41 ECAB 206 (1989).

presented corroborating evidence, such as witness statements, to substantiate that an incident occurred as alleged. Furthermore, there is no evidence that he sought medical attention on the date of the alleged incident. In fact, the first medical record with regard to the incident is not until November 21, 2008. Finally, the Board notes that Dr. Trevino indicated that appellant fell but he did not note a fall on his claim form. An employee has not met his burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt on the validity of his claim.⁶ Accordingly, the Board finds that the factual evidence of record is not sufficiently detailed to establish that an employment incident occurred on November 15, 2008. Due to these deficiencies and inconsistencies in the factual evidence appellant's claim was properly denied.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary.⁷ Section 10.615 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.⁸ The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁹

The Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹⁰ 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 or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.¹²

⁶ *Caroline Thomas*, 51 ECAB 451 (2000).

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. § 10.615.

⁹ *Id.* at § 10.616(a).

¹⁰ *Supra* note 2.

¹¹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹² *Teresa M. Valle*, 57 ECAB 542 (2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ANALYSIS -- ISSUE 2

As previously discussed, the Office denied appellant's claim by decision dated January 9, 2009. Appellant's request for review of the written record is dated April 1, 2009, which was more than 30 days after the issuance of its final decision. Accordingly, the Office properly found that his request for a review of the written record was not timely filed under section 8123(b)(1) of the Act and that he was not entitled to such review as a matter of right.

The Office then properly exercised its discretion and determined that the issue in the case could equally well be addressed in a request for reconsideration. As the only limitation on its authority is reasonableness, 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 deductions from known facts.¹³ The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. The Board notes that appellant's request can be addressed by requesting reconsideration from the Office and submitting further evidence which establishes that he sustained an injury as alleged. Thus, the Board finds that the Office's denial of appellant's request for review of the written record was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on November 15, 2008, as alleged. The Board further finds that the Office properly denied his request for a review of the written record as untimely.

¹³ *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 28 and January 9, 2009 are affirmed.

Issued: March 2, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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