

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

B.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 09-1578
Issued: March 2, 2010**

Appearances:
Arthur Wiley, for the appellant
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 June 3, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated May 13, 2009. Under 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained left leg and lower back injuries in the performance of duty on April 4, 2007.

FACTUAL HISTORY

Appellant, a 59-year-old customer service representative, filed a claim for benefits on April 3, 2009, alleging that she strained her left leg and lower back on April 4, 2007 when she fell into a hamper while counting mail.

In a letter dated April 7, 2009, the Office stated that the evidence was not sufficient to establish that she actually experienced the incident or employment factor alleged to have caused injury. It asked appellant to submit statements from any persons who witnessed her injury or had

immediate knowledge of it, to state the immediate effects of the injury and indicate what he did immediately thereafter, and to explain why she delayed seeking medical attention. The Office requested copies of all medical reports pertaining to the alleged work incident. It advised her that she had 30 days to submit the requested information.

In a March 26, 2009 statement, received by the Office on April 9, 2009, appellant stated:

“These are the facts and factors of employment that I believe to be responsible for my condition:

On about April 4, 2007 at approximately 7:15 a.m., I was lifting and moving tubs and trays of mail from a hamper, when I fell into the hamper as I was lifting up a tub of mail. The area manager at the time, Mr. Ayala helped me up. I stated I felt fine at the time and did not wish to seek medical attention. Therefore, I continued to lift and move trays weighing (approximately two to five pounds and tubs weighing at approximately 35 pounds.

Then in June 2007, while in the supply room, I started moving and lifting supplies weighing at approximately 55-60 pounds to clear the aisles and entrance way, because could not walk in the supply room to obtain supplies.

Approximately three weeks later in July, I begin to have pain in my left leg, when I dressed, use the bathroom and drive. I continued to go about my duties, but the pain became unbearable. I went to my primary physician Dr. Lillian Howard on August 14, 2007 complaining of the pain in left leg, who then referred me to Dr. Kants’ office.”

Appellant also submitted an employing establishment routing slip dated April 4, 2007, received by the Office on April 10, 2009, which contained the following handwritten notation, addressed to “management”:

“This is to inform you of the accident I had on April 4, 2007 at about 7:15 a.m. this morning. I do not wish medical treatment at this time.”

In a Form CA-20, attending physician’s report dated April 2, 2009, Dr. Lillian Howard, Board-certified in family practice, indicated that the date of injury was April 4, 2007. She stated in a handwritten notation, however, that appellant had been referred to an orthopedic physician on October 24, 2007 and had reported no fall and no trauma.

In a Form CA-17 report dated April 8, 2009, received by the Office on April 15, 2009, Dr. Andrew P. Kant, Board-certified in orthopedic surgery, advised that appellant sustained injuries to her left leg and lower back on April 4, 2007 while lifting and moving trays of mail. He indicated that the history of injury appellant provided was consistent with the injuries she sustained. Dr. Kant placed appellant on disability until April 22, 2009, at which time he could return to work with restrictions. In a Form CA-20 report dated April 8, 2009, received by the Office on April 16, 2009, he diagnosed a herniated nucleus pulposus at L5-S1 and left lumbar

radiculopathy. Dr. Kant reiterated that appellant sustained a work injury on April 4, 2007 and restated her work restrictions.¹

In an April 9, 2009 letter from appellant's health and resource manager, Sharon R. Boatner, received by the Office on April 15, 2009, the employing establishment controverted the claim. Ms. Boatner stated that, based on its investigation of the circumstances surrounding the claim, appellant had not established fact of injury or a causal relationship between the alleged incident and her claimed injuries. She noted that there was no record of a report of injury in the employing establishment's records. Ms. Boatner asserted that the employing establishment did not have a copy of appellant's April 4, 2007 routing slip, despite reviewing its files in the health and resource management office, the safety office and her work unit.

Appellant also submitted a copy of a single page from an undated hearing transcript in which she and her husband indicated that she sustained an injury on April 4, 2007 while moving mail in a supply room.²

In a May 1, 2009 response to the Office's developmental letter, appellant stated that she informed management that she had been injured on April 4, 2007 but delayed seeking medical treatment because she felt okay. She also stated that she experienced pain on August 14, 2007 and had experienced pain in her left leg since her injury.

By decision dated May 13, 2009, the Office denied appellant's claim, finding that she failed to establish fact of injury. It noted that appellant had indicated three different dates of injury: April 4, 2007, when she alleged that she was injured when he fell into the hamper while lifting out a tub of mail; June 2007, when she asserted that he was injured while moving and lifting supplies in the supply room; and July 2007, when she stated that she experienced pain in her left leg while dressing, using the bathroom and driving. The Office indicated that these conflicting dates of injury cast doubt that she sustained an injury to her left leg and lower back on April 4, 2007.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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.⁴ These are the essential

¹ Dr. Kant indicated that he had performed an L5-S1 decompression/lumbar decompression on appellant. He did not, however, provide any documentation or indicate the date of this procedure.

² The Board notes that appellant has filed a separate, Form CA-2 claim for an occupational disease, Docket No. 09-1658, OWCP claim number xxxxxx615, seeking benefits for a low back condition.

³ 5 U.S.C. § 8101 *et seq.*

⁴ *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.⁵

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.⁶ 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.⁷

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,⁸ 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.⁹ 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 cast doubt on an employee’s statements in determining whether he or she has established his or her claim.¹⁰

ANALYSIS

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. She stated on her April 3, 2009 CA-1 form that she injured her left leg and lower back on April 4, 2007 when she fell into a hamper while counting mail. However, the record contains no contemporaneous medical reports documenting that appellant received treatment for left leg and lower back injuries. In her May 1, 2009 response to the Office’s developmental letter, appellant stated that she informed management that she had been injured on April 4, 2007 but delayed seeking medical treatment because she felt okay. Although she submitted the April 7, 2007 routing slip, which was addressed to “management,” this document was lacking in probative value because it merely contains her unsubstantiated assertion that she sustained an injury on April 4, 2007 for which she received medical treatment. There is no

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Id.* For a definition of the term “injury,” see 20 C.F.R. §10.5(e)(e).

⁸ *Pendleton*, *supra* note 4.

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

¹⁰ See *Constance G. Patterson*, 42 ECAB 206 (1989).

evidence that appellant ever submitted this routing slip prior to April 10, 2009; the employing establishment indicated that it had reviewed its records and found no record of having received such a document.¹¹ In addition, she was unable to ascertain the exact date of injury. While appellant reported to several physicians that she was injured on April 4, 2007, she indicated in her March 26, 2009 statement that she sustained left leg and lower back injuries on three different dates. She can be reasonably imputed to have knowledge of when she sustained an injury that caused her to be medically released from work. This contradictory evidence created an uncertainty as to the time, place and the manner in which appellant sustained her alleged left leg and lower back injuries.

Based on the instant record, therefore, there are discrepancies in the accounts of injury appellant provided to different people. Appellant allegedly injured her left leg and lower back on April 4, 2007, but there is no documentation that she sought treatment for these injuries prior to October 24, 2007. Moreover, she did not provide notification of her injury to the employing establishment for two years.¹² In addition, appellant failed to submit to the Office a corroborating witness statement in response to the Office's request. This casts additional doubt on her assertion that she strained her left leg and lower back on April 4, 2007 when she fell into a hamper while counting mail. The Office requested that appellant submit additional factual and medical evidence explaining how she injured her left leg and lower back on the date in question. Appellant failed to submit such evidence. Therefore, given the inconsistencies in the evidence regarding how she sustained this injury, the Board finds that there is insufficient evidence to establish that she sustained an injury in the performance of duty as alleged.¹³

CONCLUSION

The Board finds that the Office of Workers' Compensation Programs properly found that appellant failed to meet her burden of proof to establish that she sustained injuries to her left leg and lower back in the performance of duty.¹⁴

¹¹ 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).

¹² *Id.*

¹³ *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).

¹⁴ The Board notes that appellant submitted additional evidence to the record following the April 12, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501(c).

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2009 decision of the Office of Workers' Compensation Programs is 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