

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSA M. VAZQUEZ and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 98-1166; Submitted on the Record;
Issued February 7, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury on June 8, 1994 as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on September 3 and October 21, 1997.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet her burden of proof in establishing that she sustained in injury on June 8, 1994 as alleged.

Appellant, a letter carrier, filed a claim on April 4, 1996 alleging on June 8, 1994 she injured her upper back lifting bags in the performance of duty. The Office denied this claim by decision dated June 25, 1996 finding that appellant failed to establish fact of injury. Appellant requested reconsideration on August 13, 1996. By decision dated October 15, 1996, the Office denied modification of its June 25, 1996 decision. Appellant, through her attorney, requested reconsideration on April 21, 1997. The Office denied modification of its prior decision on July 7, 1997. Appellant requested reconsideration on August 21 and September 10, 1997. The Office refused to reopen appellant's claim for consideration of the merits in decisions dated September 3 and October 21, 1997, respectively.

An employee seeking benefits under the Federal Employees' Compensation Act 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 filed within the applicable time limitation 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 is causally related to the employment injury."¹ These are the essential

¹ Elaine Pendleton, 40 ECAB 1143, 1145 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.²

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another.

The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred.³ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁴ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁵ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁶

In this case, appellant claimed that she sustained an injury from lifting on June 8, 1994 in an April 4, 1996 claim form. On the reverse of the form, appellant's supervisor stated that appellant had not previously claimed an injury on that date.

Appellant submitted a narrative statement and asserted her supervisor sent a coworker, Patricia Troccoli, to bring appellant to the employing establishment after she reported her injury. Appellant stated that she discussed her injury with her supervisor and sought medical treatment. In a statement dated June 8, 1996, Ms. Troccoli, a coworker, stated that she picked appellant up from a delivery and returned appellant to the employing establishment. Ms. Troccoli stated that she did not remember the time or date. Appellant also submitted a statement dated June 11, 1996 from Julio Rivera, a customer, who stated that on June 8, 1996 he provided appellant with medication and allowed her to call her supervisor to report back pain. He stated that someone in a postal truck came for appellant shortly thereafter.

In a statement dated November 19, 1996, Ms. Troccoli stated that she picked appellant up in a postal truck from a delivery and returned her to the employing establishment. She stated that appellant's supervisor directed her to do so, but that she could not recall the time or date. On November 20, 1996 appellant's husband reported that on June 8, 1994 the babysitter stated that appellant had injured her back and sought medical treatment. Appellant's babysitter submitted a statement dated November 26, 1996 and stated that on June 8, 1994 a coworker brought appellant home and took her to the doctor's office. A treatment note dated June 8, 1994

² *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

³ *Elaine Pendleton*, *supra* note 1.

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁶ *Id.* at 255-56.

stated that appellant sought treatment for pain in her right shoulder and upper arm, which began after lifting mail.

The Office conducted a telephonic conference with appellant's supervisor on September 6, 1996. He stated that appellant did not report the injury and that he did not dispatch any employee to retrieve appellant. The employing establishment submitted appellant's time sheets, which indicated that she used eight hours of sick leave on June 8, 1994.

The Board finds that the evidence does not establish that appellant sustained an injury in the performance of duty on June 8, 1994. Although appellant provided consistent statements on her claim form in 1996 and when she sought medical treatment on June 8, 1994, the employing establishment records establish that appellant was not in the performance of duty on June 8, 1994 as she utilized eight hours of sick leave. As appellant was not at work on June 8, 1994 she has not established that she sustained an injury on that date causally related to her employment.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on September 3 and October 21, 1997.

Appellant requested reconsideration of the Office's July 7, 1997 decision by letter dated August 21, 1997. Appellant did not submit any evidence or argument in support of her request. The Office denied this request by decision dated September 3, 1997. Appellant again requested reconsideration on September 10, 1997. In support of this request, appellant submitted a medical report from Dr. Peter Herman, an osteopath. The Office denied this request by decision dated October 21, 1997.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁷ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review of the merits of the claim.⁸

The Board finds that, as appellant did not submit evidence or argument in support of her August 21, 1997 reconsideration request, the Office properly denied that request without review of the merits. The Board further finds that the Office properly refused to reopen appellant's claim for review of the merits on October 21, 1997. In support of her September 10, 1997 reconsideration request, appellant submitted a report dated September 9, 1997 from Dr. Herman who stated, "Her injury was not of sudden nature and related to her job picking up heavy bags as a letter carrier." This report is not relevant to the issue for which the Office denied appellant's claim, whether the June 8, 1994 employment incident occurred as alleged. As Dr. Herman did not offer personal knowledge regarding the date of appellant's alleged injury, his report is not

⁷ 20 C.F.R. § 10.138(b)(1).

⁸ 20 C.F.R. § 10.138(b)(2).

relevant to the issue for which appellant's claim was denied and the report is not sufficient to require the Office to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated October 21, September 3 and July 7, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 7, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member