

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

C.E., Appellant)

and)

**FEDERAL EMERGENCY MANAGEMENT
AGENCY, Trujillo Alto, Puerto Rico, Employer**)

**Docket No. 08-683
Issued: July 11, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2007 appellant filed a timely appeal from a December 10, 2007 nonmerit decision of the Office of Workers' Compensation Programs that denied her hearing request as untimely filed, and a February 27, 2007 decision that denied her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a traumatic injury on September 22, 2006; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely filed.

FACTUAL HISTORY

On September 22, 2006 appellant, then a 55-year-old human services specialist, filed a traumatic injury claim alleging that she sustained neck and lower back injuries in the performance of duty on that day. During an emergency evacuation of her office building, she

became dizzy and developed back and lower extremity pain. In a September 22, 2006 witness statement, Miriam Barreto stated that she was advised that appellant was not feeling well and was “in extreme pain and that she was located in the backfloor.” Appellant stopped work on September 22, 2006 and did not return.

In support of her claim, appellant provided an illegible paramedics report.

By correspondence dated January 24, 2007, the Office requested additional information concerning appellant’s claim. It advised her that the evidence was not sufficient to establish that she actually experienced the incident alleged to have caused the injury. It asked that appellant provide, within 30 days, a detailed description as to how the injury occurred.

By decision dated February 27, 2007, the Office denied appellant’s traumatic injury claim on the grounds that the evidence of record did not establish that she experienced an incident in the performance of duty as alleged.

On August 31, 2007 appellant requested an oral hearing.

By decision dated December 10, 2007, the Office denied appellant’s hearing request as untimely filed. It noted also considering the request in relation to the issue involved but further denied the hearing request on the grounds that appellant could equally well pursue her claim through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act¹ has the burden of establishing the essential elements of 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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.² 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. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.⁴ Second, the employee must

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

Regarding whether the employee actually experienced the employment incident which is alleged to have occurred, the Board has held that an injury 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 statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁶ An employee has not met her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁷ 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, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.⁸ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof in establishing that she sustained a traumatic injury on September 22, 2006 because the record does not reflect that an incident occurred as alleged.

Appellant's claim form stated that she experienced neck and back injuries during an emergency evacuation of her office building. She did not explain the circumstances under which her claimed injuries took place, or identify the specific employment factors or conditions that caused her injuries. Appellant did not explain what happened to her back and neck during the evacuation process. Although she reported her injury to her supervisor immediately, she did not fully explain what happened during the emergency evacuation or how she injured herself. A witness statement from Ms. Barreto merely noted that appellant was in pain but did not describe any injury. In support of her claim, she provided only an illegible paramedics report. On January 24, 2007 the Office advised appellant of the deficiency in her claim and asked that she provide a detailed description as to how her claimed injury occurred. However, appellant did not respond. Appellant has not sufficiently identified the particular employment factors or incidents that caused her claimed neck and low back injury. The Board finds that she has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

⁵ *Id.*

⁶ *See Gene A. McCracken*, 46 ECAB 593 (1995).

⁷ *See Louise F. Garnett*, 47 ECAB 639 (1996).

⁸ *Linda S. Christian*, 46 ECAB 598 (1995).

⁹ *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

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 her claim before a representative of the Secretary.¹⁰ 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.¹¹ 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.¹²

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹³ 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.¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely filed. Appellant requested an oral hearing in response to the Office's decision issued on February 27, 2007. She submitted her hearing request on August 31, 2007, more than 30 days after the decision was issued.¹⁶ Consequently, appellant was not entitled to a hearing as a matter of right because the request was not made within 30 days of the Office's February 27, 2007 decision.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by examining appellant's request for an appeal. The Office determined that appellant's case would be best served by her submission of a request for reconsideration

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ 20 C.F.R. § 10.615.

¹² 20 C.F.R. § 10.616(a).

¹³ 5 U.S.C. §§ 8101-8193.

¹⁴ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁵ *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).

¹⁶ On appeal and in support of his hearing request, appellant submitted additional medical and factual evidence. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

along with new supporting evidence. Accordingly, the Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because appellant failed to file the request within the statutory time limitation.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a traumatic injury in the performance of duty on September 22, 2006, and that the Office properly denied her oral hearing request as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the December 10 and February 27, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 11, 2008
Washington, DC

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

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

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