United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 09-245**
	)	**Issued: September 9, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Columbia, SC, 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 November 3, 2008 appellant timely appealed an October 14, 2008 nonmerit decision of the Office of Workers' Compensation Programs finding that she abandoned her request for an oral hearing and from a May 28, 2008 decision denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a traumatic injury on January 13, 2006 in the performance of duty; and (2) whether the Office properly determined that she had abandoned her hearing request.

FACTUAL HISTORY

On April 14, 2008 appellant, then a 50-year-old clerk, filed a traumatic injury claim alleging that on January 13, 2006 she injured her neck vertebrae while working the window as a clerk. She had attended a physical therapy session earlier that day for a previous neck injury on December 15, 2005 and her neck muscles were tired and sore. Appellant stopped work on May 12, 2007 and did not return. The employing establishment confirmed that she had

undergone physical therapy once or twice a week for several weeks for a claimed neck sprain of December 15, 2005. It advised that appellant did not file a claim at the time of the alleged January 13, 2006 injury and continued to work until May 12, 2007.

By letter dated April 16, 2008, the Office asked appellant to submit additional factual and medical information, including a comprehensive medical report from a treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by her contributed to her claimed injury. It noted that appellant had also filed neck injury claims of April 21, 2006 and March 19, 2007.[1]

Appellant submitted an April 9, 2008 magnetic resonance imaging (MRI) scan report of the cervical spine and reports from Dr. Steven C. Poletti, a Board-certified orthopedic surgeon, dated May 21, 2007 to April 30, 2008. Dr. Poletti noted that she had neck pain since December 2005 when a customer tried to push a package towards her. Appellant's pain increased after physical therapy and she had not worked since May 10, 2007. Dr. Poletti diagnosed retrolisthesis C5-7 and indicated that she should remain off work until an MRI scan. On June 6, 2007 he noted the results of the MRI scan and indicated that appellant's pain was consistent with cervical spondolytic radiculopathy. Dr. Poletti recommended surgical intervention and that she remain off work. In an April 9, 2008 report, he stated that appellant apparently had two work-related injuries. Dr. Poletti stated that he did not have the specifics of the injuries, but it appeared that she had a work-related injury with disc herniations in her cervical spine. Appellant underwent physical therapy during the prior year and returned to work and was reinjured. Since that time, she reported unremitting neck pain. Dr. Poletti opined that appellant's neck was injured on the job and her herniated discs were due to her work injury as well as her need for surgery. He recommended that she undergo an updated MRI scan and remain off work. On April 17, 2008 Dr. Poletti noted the results of appellant's cervical MRI scan. He indicated that appellant was to remain off work. On April 30, 2008 Dr. Poletti reported on appellant's status. He noted appellant's cervical disc disorder was the result of the January 13, 2006 work injury.

The employing establishment controverted the claim. In an April 18, 2008 letter, Marsha Rogers, health and resource management specialist, referenced appellant's other claims involving her neck. She indicated that, in the present claim, appellant provided no explanation or medical documentation for her work stoppage. In an April 17, 2008 statement, Carla H. Hardee, supervisor customer service, advised that, on January 13, 2006, appellant did not ask to file a CA-1 form for an injury occurring on that date. She confirmed that appellant went to physical therapy for a December 15, 2005 injury and that she had a physical therapy appointment on January 13, 2006 at 3:30 p.m. Ms. Hardee stated that appellant worked with restrictions after the December 15, 2005 injury but stopped work on May 12, 2007. She indicated that appellant had not returned to work or provided regular medical documentation.

By decision dated May 28, 2008, the Office denied appellant's claim. It found that she did not submit sufficient evidence establishing that her injury occurred as alleged and there was no medical evidence diagnosing a specific injury occurring on January 13, 2006. The Office

[1] File No. xxxxxx024 was accepted for neck sprain/stain sustained on April 21, 2006. File No. xxxxxx642 was accepted for neck sprain sustained on December 15, 2005. These claims are not presently before the Board.

noted that appellant had other claims but that there was no evidence that she sustained a new traumatic injury on January 13, 2006 or that she was injured in any way as a result of the January 13, 2006 physical therapy session.

On June 4, 2008 appellant requested a telephone hearing before an Office hearing representative.

In a July 10, 2008 letter, the Office confirmed receipt of appellant's request for an oral hearing. In an August 25, 2008 letter, it notified appellant that her telephone hearing will take place on October 3, 2008 at 9:30 a.m. Eastern time. The Office further instructed appellant to call the toll free number listed below and provided her with a pass code to use to connect her to the telephone hearing.

By decision dated October 14, 2008, the Office found that appellant abandoned her hearing. It found that appellant was given 30 days notice of the scheduled hearing, she did not appear at the scheduled hearing and there was no evidence that she attempted to contact the Office either prior to or subsequent to the scheduled hearing to explain her absence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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, that an injury was sustained in the performance of duty as alleged and that any disability and specific condition for which compensation is claimed is causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

Section 10.5(ee) of Office regulations defines 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.[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. 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.[5]

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific incident occurred at the time, place and in the manner

[2] 5 U.S.C. §§ 8101-8193.

[3] *Gary J. Watling*, 52 ECAB 357 (2001).

[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007).

alleged or whether the alleged injury was in the performance of duty.[6] 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.[7] 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 the circumstances and his subsequent course of action.[8] 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.

ANALYSIS -- ISSUE 1

The Board finds that appellant has not submitted sufficient evidence to establish that she sustained an injury on January 13, 2006 at the time, place and in the manner alleged. Appellant contends that she injured her neck while working at a window as a clerk after attending a physical therapy session earlier that day for a previous neck injury of December 15, 2005. She did not file her claim until April 14, 2008, more than two years after the alleged incident. Moreover, appellant did not clearly describe how particular aspects of working at a window caused a new traumatic injury on January 13, 2006.

There is no evidence that appellant stopped work or lost any time from work due to the January 13, 2006 incident. Appellant's supervisor did not receive notice of an injury until appellant filed her claim on April 14, 2008. The supervisor advised that appellant continued to work with restrictions until she stopped work on May 12, 2007. There is no evidence of record that appellant worked with difficulty following the alleged January 13, 2006 incident or statements from coworkers supporting that she mentioned having any sort of neck injury on January 13, 2006. Additionally, appellant did not submit any statement explaining the delay in filing her claim.

Moreover, Dr. Poletti's reports do not identify working at a window on January 13, 2006 as alleged by appellant as a cause of her neck condition. His reports do not articulate a clear history of any work incidents giving rise to the alleged neck injury on January 13, 2006. On April 9, 2008 Dr. Poletti specifically stated that he did not have the specifics of appellant's injuries. He was under the impression appellant had two work-related injuries for cervical disc herniations and that she underwent some form of physical therapy during the prior year and returned to work and was reinjured. Although Dr. Poletti noted that appellant had unremitting neck pain since that time, he did not identify a particular job duty or incident on January 13, 2006 that caused an injury. Consequently, his reports do not support that a traumatic injury occurred at the time, place and in the manner alleged.

[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *Shirley A. Temple*, 48 ECAB 404 (1997).

[8] *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

Appellant provided late notification of the claimed injury and continued to work some 16 months without apparent difficulty. The Board finds that her actions were not consistent with her claimed injury and cast serious doubt on the validity of her claim. The Office properly found that appellant did not establish that the January 13, 2006 incident occurred as alleged. Consequently, appellant has not established her claim.[9]

LEGAL PRECEDENT -- ISSUE 2

With respect to hearing requests, Chapter 2.1601.6(e) the Office's procedure manual provides in relevant part:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled hearing request.
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> "Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]."[10]

ANALYSIS -- ISSUE 2

In finding that appellant had abandoned her June 4, 2008 request for a hearing, the Office noted that a telephone hearing had been scheduled for October 3, 2008. The record shows that it mailed her appropriate notice of the hearing to her address of record. Appellant received written notification of the hearing 30 days in advance, but failed to telephone the hearing representative as instructed. While she maintains on appeal that on the date of the hearing she had the telephone with her at all times but was never contacted by the Office, the Board notes that it was her responsibility to telephone the hearing representative. The record contains no evidence that appellant contacted it within 10 days to reschedule the hearing or explain her failure to participate in the scheduled telephonic hearing. Appellant asserts that she called the Office on October 14, 2008. However, there is no documentation of such a call. Additionally, appellant advised that she was checking on the status of her case.

The Board finds that the record contains no evidence that appellant requested postponement of the hearing. Appellant failed to participate in the scheduled hearing and did not provide any notification of such failure within 10 days of the scheduled hearing. As the circumstances of this case meet the criteria for abandonment as provided in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that she abandoned her request for an oral hearing.

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[9] As appellant has not established that the claimed January 13, 2006 incident occurred as alleged, it is not necessary to consider whether the medical evidence establishes that the incident caused an injury. *Supra* note 5.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearing and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see also Claudia J. Whitten*, 52 ECAB 483 (2001); 20 C.F.R. § 10.622.

CONCLUSION

The Board finds that appellant failed to establish that the January 13, 2006 alleged incident occurred. The Board further finds that the Office properly determined that appellant abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 14 and May 28, 2008 are affirmed.

Issued: September 9, 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