

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

V.R., Appellant

and

**INTERNAL REVENUE SERVICE,
Chamblee, GA, Employer**

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**Docket No. 08-553
Issued: July 3, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 19, 2007 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated April 27, 2007, which denied appellant's traumatic injury claim. She also timely appealed the Office's September 20, 2007 nonmerit decision which found she had abandoned her hearing request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant established that she sustained a traumatic injury in the performance of duty; and (2) whether the Office properly found that appellant abandoned her request for a hearing.

FACTUAL HISTORY

On January 18, 2007 appellant, a remittance performance technician, filed a traumatic injury claim alleging that on October 5, 2006 while walking toward a turn style she stepped off

the curb and twisted her knee sustaining torn tissue, cartilage, ligaments and fluids in her right knee.

In a March 23, 2007 letter, the Office informed appellant that her employing establishment was controverting her claim on the grounds that she was not on the premises when the injury occurred. The Office also requested additional factual evidence to establish that she actually experienced the incident and medical evidence to establish that she sustained a diagnosed condition related to the alleged incident.

Additional information was submitted. In a January 17, 2007 magnetic resonance imaging (MRI) scan report, Dr. Byron D. Rosenstein, a Board-certified orthopedic surgeon, diagnosed appellant with oblique tear of posterior horn of the lateral meniscus, large joint effusion and large baker's cyst.

An October 5, 2006 occupational health note recorded that appellant reported to the nurse that she had right knee pain after she fell in the employing establishment parking lot that morning. Also submitted were December 22, 2006 discharge instructions which provided instructions on knee effusion and a January 9, 2007 insurance note.

In an April 27, 2007 decision, the Office denied appellant's traumatic injury claim finding that appellant had not established that she sustained an injury in the performance of duty.

On May 23, 2007 appellant requested an oral hearing.

On July 30, 2007 appellant was informed that a telephone hearing was scheduled for September 6, 2007 at 11:00 eastern time. The hearing did not take place.

On September 20, 2007 the Office found that appellant had abandoned her request for a hearing as she failed to appear at the hearing and failed to contact the Office prior or subsequent to the hearing to explain her failure to appear.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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.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

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

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.⁴ 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 Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.⁶ Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in incidental acts and is based on the circumstance of the employee's activity.⁷ However, presence at the employing establishment's premises during work hours, or a reasonable period before or after a duty shift, is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury "arising out of the employment." This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.⁸

ANALYSIS -- ISSUE 1

To meet the first element of her burden of proof, appellant must establish the claimed incident as factual. She must submit sufficient evidence that she experienced the October 5, 2006 incident at the time, place and in the manner alleged.⁹ While there is evidence that appellant twisted her knee it is unclear what she was doing or where she was at the time. In her claim form, she stated that she was walking toward a turn-style, stepped off the curb and twisted her knee. However, the occupational health note stated that appellant fell in a parking lot. The factual evidence of record is so limited that the Board is unable to ascertain the mechanism of the alleged injury. Appellant has not established that an employment incident occurred in the time, place and in the manner alleged. She has not provided any factual evidence to establish that the injury occurred at a time that would place her in the performance of duty, that it occurred on the

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

⁵ *Id.* For a definition of the term traumatic injury, see 20 C.F.R. § 10.5(ee). For a definition of the term occupational disease or illness, see 20 C.F.R. § 10.5(g).

⁶ *Narbik A. Karamian*, 40 ECAB 617 (1989).

⁷ *Maryann Battista*, 50 ECAB 343 (1999).

⁸ *Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

⁹ *Barbara L. Middleton*, 56 ECAB 634 (2005).

premises of the employment, or that the alleged injury occurred at such other time and place within the performance of duty.

It is appellant's burden to establish that an employment incident occurred in the performance of duty and that she sustained a medical condition as a result of the employment incident. She has failed to meet her burden to establish that she sustained a traumatic injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."

With respect to abandonment of hearing requests, Chapter 2.1601.6.e of 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 date of the hearing. 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

The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.¹¹

ANALYSIS -- ISSUE 2

By decision dated April 27, 2007, the Office denied appellant's traumatic injury claim. Appellant timely requested an oral hearing on May 23, 2007. In a July 30, 2007 letter, the Office notified appellant that a telephone oral hearing was to be held on September 6, 2007. On appeal, appellant informed the Board that her father had passed away three weeks before the hearing and she was in no shape to participate in the hearing.

The evidence establishes that appellant did not request a postponement of the hearing, failed to appear at the hearing and failed to provide adequate explanation for her failure to appear within 10 days. Although she eventually provided an explanation for her failure to appear it was

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999). See also *Chris Wells*, 52 ECAB 445 (2001).

¹¹ *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002).

not until three months after she failed to appear at the hearing. The Board finds that appellant abandoned her request for a hearing.

CONCLUSION

The Board finds that appellant has not established that she sustained a traumatic injury in the performance of duty and that the Office properly determined that appellant abandon her hearing request.

ORDER

IT IS HEREBY ORDERED THAT the September 20 and April 27, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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