U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLINE THOMAS and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Memphis, TN

Docket No. 98-2353; Submitted on the Record;
Issued April 6, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained an injury in the performance of duty on June 6, 1997, 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 June 9, 1997 appellant, then a 44-year-old mailhandler, filed a notice of traumatic injury (Form CA-1) alleging that, on June 6, 1997, she sustained an "arm injury, head injury, back injury, shoulder injury, multiple injury, hearing loss, double hernia" in the performance of duty. Appellant alleged that another employee ran her down with a forklift. On June 7, 1997 the employing establishment controverted the claim stating that the "statements of witnesses do not concur with statement of [appellant]. It appears that [appellant] struck the pallet willfully."

On June 6, 1997 appellant was treated at Methodist Central Hospital by Dr. Deanna Sills, a Board-certified internist, who reported that appellant was hit by a forklift on her right hand and forearm. She diagnosed muscle strain in the right hand and indicated that the condition was caused by her work-related injury. Dr. Sills indicated that appellant was able to return to work with no restrictions. A June 6, 1997 emergency room nurse's note stated that appellant reported being struck on the right hand and lower arm at work by a forklift. On June 13, 1997 Dr. Manuel Carro, a Board-certified physiatrist, examined appellant on June 12, 1997 and reported that a forklift had struck her left arm and that she "fell, hit her head against the forklift and ground." He noted that she had headaches, nausea and confusion. Dr. Carro diagnosed post-traumatic headache/numbness and indicated that the condition was caused by the employment injury.

In an employing establishment accident injury report dated June 7, 1997, Charles Thompson, appellant's supervisor, reported that appellant was allegedly struck by a pallet being transported by forklift driver Janice Lyles. Mr. Thompson indicated that "from the

statements of witnesses the alleged accident did not occur as employee stated." The diagnosed condition was listed as a strain and sore right hand.

By letter to the Office dated June 19, 1997, the employing establishment requested that the Office deny benefits to appellant. The employing establishment alleged that appellant claimed her injury to circumvent a notice of removal issued on May 28, 1997.

In an undated witness statement received by the Office on June 25, 1997, Ms. Lyles stated:

> "At 5:00 a.m., I was transporting 3 pallets of mail…. [Appellant] was standing in the aisle with a float of mail. I blew my horn to get by her…. She pushed the container back…. I told her not to pull the float back up because I was coming back by her. She did anyway. Then she told me to push the float. I said no but then I told her to move and when she did I pushed the float. And she thanked me by putting her hand in front of my 2 pallets when I attempted to take off and started hollering. I told her I was going to tell her supervisor."

In David Brownlee's statement dated June 6, 1997 and received by the Office on June 25, 1997, Mr. Brownlee stated:

> "On or about June 6, 1997 around 5:25 a.m., Janice was pushing a float of pallets out of the isle by SRI. [Appellant] was to side of them after they were moved. Janice told her she was going to tell her supervisor on her for leaving the IHC in the [a]isle. I did not see anything hit [appellant] at that time from where I was standing."

In a July 24, 1997 statement, appellant explained that she hit her head on Ms. Lyles' forklift and float because Ms. Lyles "would not wait the 30 seconds that it would take me to put the float into the loop." Appellant further disputed the allegation that she had told a physician that she fell down and hit her head on the floor. Appellant further contended that her failure to report a head injury at the employing establishment on June 6, 1997 was not uncommon as some patients may not be aware of a head injury initially and that head injuries often cause a confused state and memory loss.

Appellant also provided a June 25, 1997 report from Dr. Lance J. Wright, a Board-certified neurologist and psychiatrist, who indicated that appellant suffered a blow to the head on June 6, 1997. He reported that appellant was struck by a forklift on her arm, and fell down and hit her head and was knocked unconscious for just a few minutes. A computerized tomography (CT) scan performed of the head was negative and a nerve conduction study did not show any carpal tunnel syndrome. The physician diagnosed post-traumatic clinical depression and further believed that appellant was not ready to return to work due to weakness, irritability and lack of initiative.

By decision dated August 28, 1997, the Office denied the claim on the grounds that fact of injury was not established. The Office determined that the evidence of record was insufficient

to establish that a specific event occurred on June 6, 1997 giving rise to appellant's claim for compensation.

Results of a CT scan and a nerve conduction study performed on June 12, 1997 were subsequently received by the Office on September 12, 1997. Dr. Michael Deshazo indicated that the CT scan was normal. Dr. Carro indicated that the nerve conduction study was also normal.

By letter dated December 12, 1997, appellant requested reconsideration.

By decision dated December 24, 1997, the Office considered the evidence received by the Office on September 12, 1997 and determined that the evidence was insufficient to warrant modification of the prior decision. Specifically, the Office found that there was no clear statement in the record detailing how the June 6, 1997 incident occurred as the statements of appellant and the witnesses were inconsistent. The Office noted that two witnesses, Ms. Lyles, the forklift driver and Mr. Brownlee, reported that they did not observe appellant falling immediately following the alleged forklift accident.

On January 30, 1998 appellant, again requested reconsideration. In support, appellant provided a January 16, 1998 letter from Dr. Wright, who elaborated on his June 25, 1997 notes regarding her accident. He indicated that the only injury appellant mentioned to him was a blow to the head. While Dr. Wright noted that some people with head injuries might not remember all of the events surrounding the accident, this might not apply to appellant's situation. He explained that, when a blow to the head causes amnesia, the period of time that is forgotten is usually never recalled in the future. Dr. Wright then noted that, in contrast, appellant seemed to recall all the events surrounding being knocked on the floor and hitting her head when she was examined at his office.

By merit decision dated May 1, 1998, the Office again determined that the evidence was insufficient to warrant modification of the prior decisions.

On May 6, 1998 appellant requested reconsideration. In support, she submitted a list of questions to the Office.

By decision dated June 1, 1998, the Office denied a merit review, finding that the evidence was insufficient to warrant review of the prior decision. The Office addressed each of appellant's 19 questions and found that they failed to provide new legal arguments or new information pertinent to the case.

On June 6, 1998 appellant again requested reconsideration by submitting another list of questions.

By decision dated June 16, 1998, the Office found that appellant's list of questions was not new and relevant evidence sufficient to warrant review of the prior decision. Consequently, the Office denied appellant's request for a merit review.

The Board finds that the forklift struck appellant's hand at the time, place and in the manner alleged, causing a strain that has since resolved.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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/or specific condition, for which compensation is claimed are causally related to the employment injury."[2] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee actually sustained an injury in the performance of her 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. 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 her subsequent course of action. 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. 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 she has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantive evidence.[4] An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[5] However, an employee's statement alleging that an injury occurred at a

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton,* 40 ECAB 1143, 1145 (1989).

[3] *Daniel J. Overfield,* 42 ECAB 718, 721 (1991).

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

[5] *Louise F. Garnett,* 47 ECAB 639, 643-44 (1996).

given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[6]

In the present case, the Office found that the record contained conflicting evidence regarding whether the claimed event occurred at the time, place and in the manner alleged. Specifically, the Office determined that the witness accounts failed to substantiate that appellant fell to the ground following the alleged forklift incident and that the physicians reported differing accounts of her injuries. The Board, however, finds that appellant presented sufficient evidence to establish that the forklift struck her hand at the time, place and in the manner alleged.[7] The evidence indicates that appellant was struck by a forklift while in the performance of duty on June 6, 1997. This is not disputed by Ms. Lyles, the forklift driver, who stated that appellant put her hand in front of her two pallets while she attempted to take off and that appellant "started hollering" when she drove off in the forklift. This is not inconsistent with appellant's hand being struck. Another witness, Mr. Brownlee, only indicated that he did not see appellant get struck by the forklift from his vantage point. In addition, appellant immediately reported the incident to her supervisor, who noted in an accident report that appellant "struck the pallet willfully." Moreover, the record reveals that appellant sought immediate medical care at the Methodist Central Hospital and told the emergency room physician that she was struck by a forklift on her right hand. Finally, appellant's assertion that she was struck by a forklift is also consistent with the employing establishment's June 7, 1997 accident report. The record contains no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.[8] Under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence. The Board finds that the evidence of record is sufficient to establish that the incident with regard to the forklift striking her hand occurred at the time, place and in the manner alleged.

The Board further finds that the contemporaneous medical evidence supports that the incident caused a sore right hand which Dr. Sills, on the date of injury, diagnosed as a muscle strain. She supported that this condition was work related and opined that appellant had no disability or work restrictions due to the injury. As there is no other medical evidence contemporaneous with the injury to the contrary, the Board finds that Dr. Sills' report is sufficient to establish a right hand muscle strain for which appellant had no disability or work restrictions.[9] The medical evidence indicates that this condition resolved as later medical reports did not indicate that the right hand muscle strain continued. While Dr. Carro, in his June 12, 1997 report, noted appellant's complaints of numbness and tingling in her right index and middle fingers, he did not explain how or why this was a residual of a muscle strain nor did he otherwise provide medical rationale explaining why such numbness and tingling were symptoms of another

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

[7] *Id.*

[8] *See Thelma Rogers*, 42 ECAB 866 (1991).

[9] As such, appellant would be entitled to reimbursement of initial medical expenses incurred on the date of injury; *see Elaine Pendleton*, 40 ECAB 1143, 1153-54 (1989).

condition causally related to the June 6, 1997 work injury.[10] Furthermore, Dr. Wright, in his January 16, 1998 report, indicated that he was only aware of appellant's claimed head injury.[11] Consequently, appellant failed to establish that she had any disability causally related to the June 6, 1997 incident.

The Board further finds, however, that appellant has not established that her contact with the forklift caused her to strike her head.

The Board notes that the first specific mention of appellant striking her head did not occur until her June 12, 1997 medical evaluation with Dr. Carro. While appellant's June 9, 1997 CA-1 form notes a variety of claimed conditions, including head injury, she gave no history of a specific blow to the head on this form. Initial emergency room records from June 6, 1997, noted above, made no mention of any head injury or trauma. Witness statements also made no mention of any head injury or trauma. The June 7, 1997 accident report only mentioned a strain from a sore right hand. Appellant has offered no credible explanation regarding why head trauma, which as she recounted to Dr. Wright left her unconscious for several minutes, would not have been noticed by any witnesses or reported to hospital personnel on the same date that she reported being struck on the hand and forearm. Appellant has attributed her failure to report head trauma on the date of injury to a possible memory loss caused by the trauma. Dr. Wright, in his January 16, 1998 report, seemed to dispute this. He noted that when a blow to the head causes amnesia, the period of time which is forgotten is usually never recalled in the future. However, Dr. Wright indicated that appellant seemed to remember "all the events" surrounding her being knocked to the floor and hitting her head. Because there are such inconsistencies regarding whether appellant sustained a blow to the head on June 6, 1997, the Board finds that appellant has not established that this aspect of the claimed incident occurred as alleged.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for a merit review.

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.[12] 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 reviewing the merits of the claim.[13]

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[10] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value); *see also Jean Culliton*, 47 ECAB 728, 736 (1996).

[11] *See Arthur N. Meyers*, 23 ECAB 111, 113 (1971) (where the Board found a physician's opinion to be of diminished probative value where the physician's opinion in support of causal relationship was based on a history of injury that was not corroborated by the contemporaneous medical history contained in the case record); *cf. Talmadge Miller*, 47 ECAB 673, 680 (1996).

[12] 20 C.F.R. § 10.138(b)(1).

[13] 20 C.F.R. § 10.138(b)(2).

In appellant's May 6, 1998 request for reconsideration, appellant submitted only a list of 19 questions.[14] On June 6, 1998 appellant, filed another request for reconsideration and again submitted a list of questions. She did not submit any new or relevant evidence. The Office properly addressed appellant's concerns and found that none of them provided new evidence, new legal argument, or new information pertinent to the case. Inasmuch as appellant failed to submit any new and relevant medical evidence or advance substantive legal contentions in support of her request for reconsideration, appellant's reconsideration requests were insufficient to require the Office to reopen the claim for further consideration of the merits.[15] Consequently, the decisions dated June 1 and 16, 1998 are affirmed.[16]

The Office of Workers' Compensation Programs' decisions dated May 1, 1998, December 24 and August 28, 1997 are reversed in part and affirmed in part. The decisions dated June 16 and 1, 1998 are hereby affirmed.

Dated, Washington, D.C.
April 6, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[14] On reconsideration, appellant asserted that the Office failed to evaluate all of the evidence of record and that the Office and employing establishment made up evidence.

[15] *Barbara A. Weber*, 47 ECAB 163, 165 (1995).

[16] On appeal appellant has submitted an October 5, 1998 arbitration decision. The Board, however, may not consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c).