U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUDOLPH B. EVANS and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 98-2089; Submitted on the Record;
Issued August 10, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on July 2, 1996, as alleged.

On August 5, 1996 appellant, then a 49-year-old vehicle driver/clerk, filed a notice of recurrence of disability claim, Form CA2-a, alleging that on July 2, 1996 he sustained a recurrence of disability causally related to an accepted April 30, 1990 employment injury.[1] Appellant stopped work on July 2, 1996 and did not return. Appellant's supervisor stated:

> "This employee was offered a limited-duty job assignment that did not require him to lift anything above his head. He has failed to notify anyone at the VMF of an injury concerning lifting boxes over his head. We have mailed a request for medical documentation to his address and also mailed a continuous absence letter to him with no response to either. To my knowledge he has not lifted any boxes containing accident kits over his head at anytime. His attendance has been poor during the complete assignment to the VMF. He is currently out of annual leave and sick leave. His accident history is well beyond poor."

By letter dated September 16, 1996, the Office of Workers' Compensation Programs requested additional factual and medical information from appellant.

On September 20, 1996 the Office received appellant's response to its September 16, 1996 request for additional information. Appellant stated: "My job is to drive vehicle[s] and to do clerk work as well. The filing cabinets are about 5'9" or more. I have to bend over to put the [accident] kits in a plastic bucket. About 75 to 100. Then pick them up out of the way in the file room and key room. The room is very small and it would [be] dangerous to leave them on the

[1] On the reverse side of the form, the employing establishment gave the date of injury as October 25, 1995.

floor, so the only place to put them is on the filing cabinets." Appellant noted: "I am not … to lift over fifty pounds repeatedly and not to lift anything over my head."

By letter dated September 27, 1996, the employing establishment stated that the filing cabinets which appellant referred to were only four feet high and that the accident kits weighed less than one pound each. The employing establishment enclosed an accident kit.

By letter dated January 10, 1997, the Office requested detailed factual information from the employing establishment.

By decision dated February 26, 1997, the Office denied appellant's claim. The Office found that the evidence of record supported that the work incidents occurred as alleged.[2] However, the evidence failed to establish a medical condition resulted from his employment.[3]

By letter received April 17, 1997, appellant requested reconsideration of the February 26, 1997 decision. In support of the request, appellant submitted a January 2, 1997 letter from Dr. Laurence H. Bilfield, a Board-certified orthopedic surgeon, who stated: "[Appellant] has had, as many patients do, multiple studies to evaluate the problem at hand. He not only had a number of MRI's [magnetic resonance imaging] that showed evidence of problems at C2-3, but also an EMG [electromyography] which showed definite abnormalities at C6-7." Dr. Bilfield went on to say "There is no doubt that [appellant] has ongoing complaints of neck pain and discomfort in part related to his job description. The findings on MRI are suggestive of a C2-3 problem and on the EMG a C6-7 problem. The only other follow-up study that could possibly delineate whether both of these or either one of them were absolutely causing his problem would be a myelogram/CT [computerized tomography] scan. I do not believe that this patient is [a] surgical candidate, however, and would not advise this. I do believe, however, that his findings are consistent with his complaint of ongoing neck difficulties."

By decision dated July 7, 1997, the Office denied modification of the February 26, 1997 decision.

By letter received on July 14, 1997, appellant requested reconsideration of the July 7, 1997 decision. No evidence was submitted with his request.

By decision dated August 13, 1997, the Office denied appellant's request for reconsideration finding that his letter was insufficient to warrant review of the prior decision.

By letter received August 19, 1997, appellant requested reconsideration. In support appellant submitted an August 12, 1997 letter from Dr. Bilfield, who stated that appellant has

[2] The Office adjudicated this claim as a new traumatic injury claim, noting that the incident occurred on one specific date, *i.e.*, July 2, 1996.

[3] The record supports that appellant has filed multiple claims dating back to 1974.

been his patient since November 9, 1995. He stated that appellant's lumbar and cervical spine were tender and there was a decreased range of motion. Dr. Bilfield also stated that "I believe [appellant] cannot return to a type of position that would be rigorous, that would involve significant driving and that would require him to be jolted up and down in a track or van."

By decision dated October 15, 1997, the Office denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of the prior decision.

By letter received November 13, 1997, appellant requested reconsideration. In support of the request, appellant submitted a November 6, 1997 letter by Dr. Bilfield, who stated that he saw appellant on July 11, 1996. He stated: "[Appellant] does claim that from July 2, 1996 he has had problems in an ongoing way with neck and back difficulties. He had apparently been lifting plastic boxes of a significant weight over his head. This lifting surely could contribute and aggravate a preexisting neck and back condition which the patient has. The patient's condition, which at one time did document a cervical disc herniation or disc bulge, very definitely can be ill effected by strenuous and strainful work overhead." Dr. Bilfield also noted: "There is no doubt in my mind that this patient's preexisting injury dating back to 1990 and ongoing problems would have been exacerbated by such strenuous work on July 2, 1996."

By decision dated December 4, 1997, after a merit review, the Office denied modification of its prior decisions. The Office found that in its February 26, 1997 merit decision it incorrectly found that an incident was sustained on July 2, 1996. The Office stated that appellant had not met the first element of fact of injury, *i.e.*, that the claimed incident occurred as alleged. The Office stated that, "although your claim is still denied because you have failed to establish 'fact of injury,' your claim has been modified because you have failed to establish the factual element of fact of injury."

By an undated letter, appellant requested reconsideration of the December 4, 1997 decision. In support appellant submitted his statement, a February 5, 1998 report by Dr. Bilfield which was identical to his November 6, 1997 report and a statement from a union steward indicating that cabinets similar to the ones referred to by appellant were measured at five feet.

By decision dated March 2, 1998, the Office, after a merit review, denied modification of the prior decisions.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on July 2, 1996 as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act[4] 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, and that the claim was filed within the applicable time limitations of the Act.[5] An individual seeking

[4] 5 U.S.C. §§ 8101-8193.

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

disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,[6] that the injury was sustained while in the performance of duty,[7] and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.[8] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[9]

In a traumatic injury case, the employee must establish by the weight of reliable, probative and substantial evidence that the occurrence of an injury is in the performance of duty at the time, place and in the manner alleged and that the injury resulted from a specific event or incident.[10] The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[11]

Such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[12] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[13]

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Appellant did not notify his supervisor until filing a claim on August 5, 1996, approximately one month after the alleged incident, he never mentioned the incident to anyone and he failed to obtain medical treatment until nine days after the alleged incident. Appellant stated that he was not to lift over 50 pounds and nothing over his head. The employing establishment stated that appellant was on limited duty, not required to lift above his head, received assistance whenever he had to move the accident kits and that the file cabinets were only four feet tall. The Office determined that the accident kits weighed only 5.2 ounces each and a full box would not exceed 50 pounds. Consequently, the Board finds that there are such inconsistencies in the evidence as to cast serious doubt on appellant's allegation that he sustained the July 2, 1996 incident.

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[6] *Robert A. Gregory*, 40 ECAB 478 (1989).

[7] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *Steven R. Piper*, 39 ECAB 312 (1987).

[9] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[10] *See Joshua Fink*, 35 ECAB 822, 823-24 (1984).

[11] *Eric J. Koke*, 43 ECAB 638 (1992); *Mary Joan Cappolino*, 43 ECAB 988 (1992).

[12] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[13] *Robert A. Gregory*, *supra* note 6; *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

In addition, none of the medical evidence submitted provided a rationalized medical opinion based on an accurate factual history causally related a diagnosed condition to the alleged July 2, 1996 incident. In his November 6, 1997 report, Dr. Bilfield, a Board-certified orthopedic surgeon, stated that lifting substantial weight over his head would have aggravated appellant's preexisting conditions. However, the factual evidence does not support that appellant lifted substantial weight over his head.[14]

In view of the inconsistencies in appellant's statements regarding how he sustained his injury and the lack of medical evidence which causally related a diagnosed condition to the alleged incident of July 2, 1996, the Board finds that there is insufficient evidence to establish that appellant sustained an injury to his back in the performance of duty on July 2, 1996, as alleged.

The decisions of the Office of Workers' Compensation Programs dated March 2, 1998, December 4, October 15 and August 13, 1997 are affirmed.

Dated, Washington, D.C.
August 10, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] The Board notes that the Office did not address an aggravation of a preexisting condition.