U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE KIRSCHNEK and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Coatesville, PA

Docket No. 99-249; Submitted on the Record;
Issued May 8, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty on October 3, 1996; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review under 5 U.S.C. § 8128(a).

In the present case, appellant, a nurse, filed a claim alleging that, on October 3, 1996, she sustained right knee, neck and right shoulder injuries while attempting to transfer a patient from chair to bed. By decision dated June 3, 1997, the Office denied the claim on the grounds that appellant had not established fact of injury. In a decision dated June 30, 1998, an Office hearing representative affirmed the denial of the claim. By decision dated August 26, 1998, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that appellant has not established an injury in the performance of duty on October 3, 1996.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that he or she sustained an injury while in the performance of duty.[2] In order to determine whether an employee actually sustained an injury in the performance of 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. The second component is whether the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

employment incident caused a personal injury, and generally this can be established only by medical evidence.[3]

With respect to the employment incident, the June 3, 1997 Office decision apparently found that an incident had not been established; the hearing representative based his determination on the medical evidence, without discussing the employment incident. There are no inconsistencies in the record with respect to whether an October 3, 1996 employment incident occurred as alleged. Appellant reported that she sustained injury while transferring a patient, and a witness confirmed that she helped appellant transfer a patient from chair to a bed. The Board finds that appellant has established a employment incident as alleged.

The deficiency in the claim, however, rests with the medical evidence. Appellant has not submitted probative medical evidence establishing an injury causally related to the employment incident. In a report dated October 16, 1996, Dr. Ivan M. Filner, an osteopath, noted in his history that appellant reportedly was doing a two person transfer when "somehow her knee gave out," and the next day appellant felt shoulder and neck pain. He diagnosed cervical strain and right anterior cruciate ligament (ACL) strain, with questionable internal derangement of the knee, but he does not make any affirmative statement on causal relationship between any diagnosed condition and the employment incident. With respect to the knee, Dr. Filner noted that appellant had prior reconstructive surgery, but he does not opine whether he believed the employment incident had aggravated the knee or otherwise discuss causal relationship. With respect to shoulder and neck pain, Dr. Filner noted only that she had reported pain, without providing an opinion as to causal relationship with the employment incident.

In a report dated June 19, 1997, Dr. Raymond A. Koch, an orthopedic surgeon, noted in his history that appellant had knee surgery in 1993 and had been doing well until her right knee buckled while transferring a patient. Dr. Koch did not provide further details on the employment incident or provide an opinion relating the diagnosis of right knee instability and pain to the employment incident. In a report dated January 9, 1998, Dr. Ronald Bernstein, a neurosurgeon, noted that appellant attributed the onset of neck and shoulder symptoms to a work-related accident while transferring a patient, without providing further description of the employment incident or providing an opinion on causal relationship with a diagnosed condition. In a report dated January 30, 1998, Dr. Laurence M. Susini, an orthopedic surgeon, reported in his history that appellant had apparently reinjured her knee in October 1996 while moving a patient. He diagnosed right knee ACL tear and cervical herniated nucleus pulposus, without providing an opinion as to causal relationship with the employment incident.

The Board finds that the record does not contain a reasoned medical opinion, based on an accurate factual and medical history, that establishes either a knee, neck or shoulder injury as causally related to the October 3, 1996 incident. It is not enough to note an incident in the medical history; there must be an affirmative opinion, with supporting explanation, on causal relationship between a diagnosed condition and the employment incident.[4] For the above reasons, the Board finds appellant has not met her burden of proof in this case.

The Board further finds that the Office properly denied merit review in this case.

[3] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[4] *Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[5] the Office's 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 fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[6] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[7]

As noted above, the issue in the case is a medical issue. Appellant submitted a brief form report regarding a tibia fracture, which does not discuss the relevant issues.[8] The Board finds that her request for reconsideration did not meet any of the requirements of section 10.138(b)(1). Accordingly, the Office properly denied merit review under section 8128(a) in this case.

The decisions of the Office of Workers' Compensation Programs dated August 26 and June 30, 1998 are affirmed.

Dated, Washington, D.C.
May 8, 2000

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[8] On appeal, appellant submitted new medical evidence that was not before the Office at the time of its August 26, 1998 decision. The Board is limited to review of evidence that was before the Office at the time of the final decision under appeal. 20 C.F.R. § 501.2(c).