U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE GMINDER and U.S. POSTAL SERVICE,
FORDS POST OFFICE, Fords, NJ

Docket No. 00-1122; Submitted on the Record;
Issued February 27, 2001

DECISION and ORDER

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

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty on September 25, 1997; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On February 25, 1998 appellant, then a 45-year-old postal worker, filed a notice of traumatic injury (Form CA-1) alleging that on September 25, 1997 she pulled a groin muscle at work when lifting a heavy bucket of mail. Appellant submitted a note from Dr. Mary T. O'Donnell, a Board-certified internist, diagnosing appellant with "possible hernia." Appellant eventually underwent surgery to repair the condition.

By letter dated March 11, 1998, the Office wrote to appellant requesting more factual and medical information.

By decision dated April 15, 1998, the Office denied appellant's claim since additional evidence was not received and the evidence of record was insufficient to establish that she sustained a job-related injury.[1]

By letter dated April 7, 1999, appellant requested reconsideration. In support of her request she submitted two affidavits from fellow employees, which stated that they heard appellant say that she pulled a muscle in her groin area after lifting a heavy bucket of mail on September 25, 1997.[2] Appellant also submitted medical evidence, including a report from Dr. Richard E. Constable dated March 23, 1999, diagnosing appellant with "right groin hernia,"

[1] Appellant's response was received on April 12, 1999.

[2] Appellant's claim form contains written statements from both witnesses, where they stated that appellant's injury occurred on September 26, 1997, not September 25, 1997 as stated in the affidavits. The statements are dated February 26, 1998 and their affidavits are dated April 7, 1999.

and two statements from Dr. O'Donnell dated April 10, 1998 and March 19, 1999. The April 10, 1998 report diagnosed appellant with right groin hernia and the March 19, 1999 report stated: "the patient informed me that this injury occurred at work and I take her word for this date." Dr. O'Donnell explained that appellant was first examined on November 26, 1997 at which time there was no mass or hernia noted. At that time the impression was of a contractual muscle rather than a hernia. Appellant returned to Dr. O'Donnell in April 1998 with a recurrence of symptoms that she had initially presented with in November 1997. On an April 10, 1998 examination, appellant had right groin swelling with an impression of hernia. Dr. O'Donnell concluded: "It is my medical opinion that the patient sustained this initial injury at work in September 1997 leading to a right groin hernia."

By decision dated May 10, 1999, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant modification of the April 15, 1998 decision.

By letter dated August 10, 1999, appellant's attorney requested reconsideration and resubmitted evidence already on file with the Office.

By decision dated September 2, 1999, the Office denied appellant's request for reconsideration.

To determine whether an 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 and place and in the manner alleged.[3] 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.[4] An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.[5]

The Board finds the incident did occur at the time, place and in the manner alleged. Appellant filed the claim some five months after the incident, but the employing establishment stated that it does not deny that the "accident" occurred on the alleged date. Appellant also provided witness statements consistent with her allegations that she reported pain while lifting a bucket of mail. Although the witness statements relate an injury date of September 26, 1997 instead of September 25, 1997 a one-day inconsistency is not critical.

However, the medical evidence is insufficient to establish that appellant's employment was the cause of her injury. Dr. O'Donnell's March 19, 1999 report is the only report that addressed causal relationship yet failed to explain why appellant was diagnosed with a hernia.

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

[4] *Id*. for a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

[5] As used in the Federal Employees' Compensation Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. *Frazier V. Nichol*, 37 ECAB 528 (1986).

Dr. O'Donnell stated: "On examination that day, April 10, 1998, the patient had right groin swelling that was reducible to palpation and my impression was a hernia." She also did not provide a rationalized medical opinion as to the causal connection of appellant's hernia and her work. Dr. O'Donnell stated: "It is my medical opinion that the patient sustained this initial injury at work in September 1997 leading to a right groin hernia and that the treatment and care and disability should be carried out under worker's compensation as the injury occurred at work." The Board notes that a conclusory statement without supporting rationale is of little probative value.[6] It should also be noted that appellant waited over two months after the employment incident to see a physician.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion, yet modifies the Office's reasons for denying reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[7] Section 10.607 of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of the three requirements of 20 C.F.R. § 10.608, the Office will deny the application for review without reviewing the merits of the claim.[8]

In appellant's request for reconsideration dated August 10, 1999, she submitted medical evidence from Dr. Constable, a report already on file with the Office. Appellant also requested that the previously submitted witness statements be afforded more weight by the Office. No new evidence was submitted.

Appellant has not established that the Office abused its discretion in its September 2, 1999 decision, by denying her request for a review on the merits of its April 15, 1998 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

The Board affirms the Office's September 2, 1999 decision as the submission of evidence or legal argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[9]

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[6] *Marilyn D. Polk*, 44 ECAB 673 (1993).

[7] 20 C.F.R. § 10.606(b)(2).

[8] *Alton L. Vann*, 48 ECAB 259 (1996).

[9] *Alton L. Vann*, 48 ECAB 259 (1996).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 2 and May 10, 1999 are hereby affirmed.

Dated, Washington, DC
February 27, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member