U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NEIL E. BURGESS and U.S. POSTAL SERVICE,
POST OFFICE, Wakefield, MA

Docket No. 03-675; Submitted on the Record;
Issued July 21, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant established that he sustained a neck injury in the performance of duty on August 30, 2002.

On October 10, 2002 appellant, then a 41-year-old letter carrier, filed a notice of traumatic injury alleging that on August 30, 2002 at 3:00 p.m. he was taking his mailbag from the back of the van when he heard and felt a snap in his back. Appellant stopped work on October 2, 2002 and has not returned.

In support of his claim, appellant submitted an "O.S.I. [Orthopedic Surgery Incorporated] disability report" signed by Dr. Denis Byrne, a Board-certified orthopedic surgeon, on October 3, 2002 he noted that appellant was having a magnetic resonance imaging (MRI) scan due to neck pain. In a subsequent report dated October 10, 2002, the physician stated that appellant had been out of work due to a herniated disc in his neck. He noted that appellant was to follow up with "Dr. Roth."

The record includes an MRI scan report of the cervical spine dated October 7, 2002, which showed muscle spasm and a large right paracentral disc herniation at the C6-7 level causing compression of the spinal cord and a disc herniation at C5-6 with possible adjacent spurs. There was also evidence of moderately severe spinal stenosis at C6-7 due to the disc herniation.

In a letter dated October 18, 2002, the employing establishment related that appellant was not in the performance of duty on August 30, 2002 as alleged on his CA-1 form. It was noted that appellant had requested and received a change of schedule for the day of August 30, 2002 and that time records showed that he worked from 6:00 a.m. to 2:20 p.m. on August 30, 2002. The employing establishment maintained that since appellant alleged that his injury occurred at 3:00 p.m. on August 30, 2002 he could not have been in the performance of duty. It was further noted that, when appellant first requested sick leave on October 1, 2002, he replied "no" to questions posed by the postmaster as to whether the sick leave was for a work-related injury or

condition. Appellant's supervisor also stated that she asked appellant on September 20, 2002 whether his neck condition was work related and he stated that it was not. Appellant is noted as later claiming on October 10, 2002 that he hurt his neck at work on August 30, 2002.

In an October 29, 2002 letter, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish his claim for compensation.

In a November 21, 2002 progress note, Dr. Peter K. Dempsey, a Board-certified orthopedic surgeon, stated that appellant "apparently had a work-related injury in which he began to notice pain in his left arm. In addition, he also had several episodes of Lhermitte's phenomenon. Dr. Dempsey stated that appellant was unable to resume his occupation as a mail carrier. He opined that appellant suffered from significant spinal canal narrowing at C5-6 and C6-7 based on the results of his MRI scan. Dr. Dempsey recommended to appellant that he undergo a posterior cervical disc decompression.

In an attending physician's report dated November 26, 2002, Dr. Wojciech Bulczynski, a Board-certified orthopedic surgeon, diagnosed that appellant suffered from a herniated cervical disc. The date of injury is listed as August 30, 2002. The date of first examination was further listed as September 20, 2002. Appellant was noted as being totally disabled since August 30, 2002.

In a CA-17 duty status report dated November 26, 2002, Dr. Dempsey noted that appellant was totally disabled due a herniated central cervical disc. The date of injury was listed as August 30, 2002.

The Office received a copy of a questionnaire on November 27, 2002 that was completed by appellant with regard to his alleged work injury. Appellant described that he injured his back on August 30, 2002 when he attempted to lift a bag of parcels from the floor of his mail delivery van while he was also carrying a bag of parcels over his shoulder. He contends that by moving the parcels in this manner he caused a strain on the right side of his body and back. He stated that he was unsure of the exact time of the injury but estimated that the incident occurred about one hour before he finished work. Appellant explained that he was off work for the next two days so he did not make an attempt to report the injury, he stated that he assumed it was a pulled muscle and would just get better. When his pain did not go away, he went to the doctor who took x-rays and found bone spurs, and then cervical disc herniations based on MRI scan testing.

In a decision dated December 3, 2002, the Office denied compensation on the grounds that appellant failed to establish fact of injury. By separate letter dated December 3, 2002, the Office also denied appellant's request for authorization for surgery based on the denial of his claim for compensation.

The Board finds that this case is not in posture for a decision.[1]

[1] Although appellant submitted additional evidence subsequent to the Office's December 3, 2002 decision, the jurisdiction of the Board is limited to reviewing the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 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.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[6]

In this case, the Office determined that appellant failed to submit sufficient evidence to establish that he experienced the employment incident at the time, place and in the manner alleged. The Office found that the record disputed whether appellant was actually still on his work shift at the time of the alleged injury at 3:00 p.m. The Office stated that it was relying on evidence submitted by the employing establishment as establishing that appellant's work shift ended at 2:30 p.m. on August 30, 2002; therefore, he could not have been injured while taking out a mailbag from his van to deliver mail as alleged on his CA-1 claim form.

The Board disagrees with the Office's analysis. The Board finds that there are no such inconsistencies in the evidence to question from which to conclude that the incident did not occur. Appellant had a logical reason or explanation for the time of injury he listed on the CA-1 claim form as 3:00 p.m.. Appellant's regular work schedule was from approximately 8:00 a.m. to 4:00 p.m. He specifically stated on the questionnaire that he was uncertain of the exact time of the injury but knew he was lifting the parcels about one hour before the end of his shift. If the end of his shift was 4:00 p.m. then he guessed the injury happened around 3:00 p.m. What appellant failed to remember, however, and what the employing establishment has stressed is that appellant was scheduled to leave work early on the date of the alleged injury. He apparently left work at 2:20 p.m. on August 30, 2002. The Board notes that, since appellant apparently forgot he had been scheduled to leave early from work on August 30, 2002 at the time he completed the CA-1 claim form, this explains why he wrote down an incorrect time. Moreover,

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Ruth Seuell*, 48 ECAB 188 (1996); *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Robert G. Morris*, 48 ECAB 238 (1996); *Elaine Pendleton, supra* note 3.

[6] *Id*.

the fact that appellant completed his CA-1 form almost one month after the injury and the fact that he worked a nonstandard day on the date of the incident explains the listing of 3:00 p.m.

Furthermore, the Board concludes that appellant gave a plausible explanation for not immediately seeking medical attention as he assumed that he had only pulled a muscle on August 30, 2002. He only sought medical attention when the pain would not go away. He promptly filed his claim for compensation once he found out the extent of his injury.

Based on appellant's statements and description of injury in the record, the Board finds that appellant has established that an incident occurred at the time, place and in the manner alleged.[7] Because appellant established a work incident on August 30, 2002, the Office must further consideration the issue of causal relationship to determined appellant's entitlement to compensation. The Office must also address whether appellant is entitled to medical benefits, specifically surgery for any employment-related injury arising out of the employment incident. On remand, after such further development of the record as is deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated December 3, 2002 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
July 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[7] *See Linda S. Christian*, 46 ECAB 598 (1995) (a claimant's account of injury is entitled to great probative weight where it is not refuted by strong or persuasive evidence).