U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN A. SKWIERALSKI and U.S. POSTAL SERVICE, POST OFFICE, Buffalo, N.Y.

Docket No. 96-1066; Submitted on the Record;
Issued January 23, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a left lower extremity injury in the performance of duty on May 19, 1995; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that appellant did not meet his burden of proof to establish that he sustained a left lower extremity injury in the performance of duty on May 19, 1995.

An employee who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[2] An injury does not have to be confirmed by eyewitnesses, in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[3] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[4] 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, if otherwise unexplained, cast sufficient doubt on an employee's

---

[1] 5 U.S.C. §§ 8101-8193.

[2] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[3] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[4] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

statements in determining whether a *prima facie* case has been established.[5] 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.[6]

In the present case, appellant alleged that he sustained injury to his left ankle and heel when stepped off a jitney at work on May 19, 1995. By decisions dated August 2 and December 11, 1995, the Office denied appellant's claim on the grounds that he did not establish the fact of injury. By decision dated February 3, 1996, the Office denied appellant's request for merit review of his claim.

The Board notes that there are sufficient inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that he sustained a left lower extremity injury in the performance of duty on May 19, 1995. Appellant claimed that he sustained an employment injury on May 19, 1995 but he did not explain why on June 10, 1995 he advised Dr. Anthony Sorge, an attending internist, that he sustained an injury on "approximately May 23, 1995." The record indicates that appellant first sought treatment for his left lower extremity on May 25, 1995, when he visited Dr. Samarendra Banerjee, an internist for the Veterans Administration. Appellant did not advise Dr. Banerjee on May 25, 1995 that he sustained an injury on May 19, 1995 and he did not explain why he delayed in seeking medical treatment. Appellant did not stop work until May 31, 1995, but did not explain how he was able to work without apparent difficulty between May 19 and 31, 1995. Nor did appellant explain why he waited until June 12, 1995 in order to file a traumatic injury claim (Form CA-1). Appellant's supervisor indicated that appellant advised him on June 7, 1995 that he had foot pain, but did not indicate at the time that he sustained an injury on May 19, 1995. The supervisor noted that, after he advised appellant he might have to borrow sick leave, appellant informed him on June 12, 1995 that he sustained an injury "approximately two weeks prior." Appellant did not explain why he delayed in advising his supervisor of his injury and why he provided a date of duty which was more than a week after May 19, 1995. The Office requested that appellant answer questions regarding these inconsistencies in the factual evidence, but he did not respond to this request prior to the issuance of the Office's August 2 and December 11, 1995 decisions. For these reasons, appellant did not establish that he sustained an employment-related left lower extremity injury on May 19, 1995.

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

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

[6] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[9] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[10]

By letter dated January 9, 1996, appellant requested reconsideration of the Office's August 2 and December 11, 1995 decisions. Appellant's reconsideration request does not require reopening of his case for merit review, in that it does not provide support for his claim that he sustained an employment-related injury on May 19, 1995 and, therefore, does not relate to the main issue of the present case. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[11]

Instead of supporting his claim, appellant's reconsideration request actually provides further factual inconsistencies. For example appellant indicated in his January 9, 1996 letter, that he first sought medical treatment on May 19, 1995 for his injury and immediately stopped work, but the record reveals he first sought treatment on May 25, 1995 and stopped work on May 31, 1995. He indicated that he first saw Dr. Sorge on May 19, 1995, but Dr. Sorge noted in a November 21, 1995 report that he first saw appellant on June 10, 1995. Appellant also indicated that he saw Dr. Banerjee "around May 17, 1995," but did not explain how this assertion comported with his claim that he sustained an injury on May 19, 1995. As previously noted, the record reveals that appellant first visited Dr. Banerjee on May 25, 1995. The record was supplemented to include a December 8, 1995 letter, in which Dr. Sorge indicated appellant advised him that his injury occurred on May 19, 1995, rather than on "approximately May 23, 1995," but the letter did not contain an explanation for this change in the date of injury.

In the present case, appellant has not established that the Office abused its discretion in its February 3, 1996 decision by denying his request for a review on the merits of its August 2 and December 11, 1995 decisions under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

---

[7] Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[9] 20 C.F.R. § 10.138(b)(2).

[10] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[11] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decisions of the Office of Workers' Compensation Programs dated February 3, 1996, December 11 and August 2, 1995 are affirmed.

Dated, Washington, D.C.
January 23, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member