U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE ROSSI and U.S. POSTAL SERVICE,
POST OFFICE, Bronx, N.Y.

Docket No. 96-288; Submitted on the Record;
Issued July 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty, as alleged.

On September 23, 1991 appellant's mother filed a claim for a traumatic injury on behalf of appellant, then a 54-year-old distribution clerk, occurring on August 2, 1991 at work. She listed the stairwell at the employing establishment as the place where the injury occurred. When asked to describe the cause of injury, appellant's mother stated "unable to do so at the time," and stated that after leaving work on the morning of August 2, 1991, appellant was "admitted to the North General Hospital some hours later through the emergency room." She stated that appellant subsequently became comatose and underwent emergency brain surgery for a subdural hematoma but remained comatose. Appellant's mother stated that she subsequently learned that appellant had fallen on the job.

Appellant's supervisor checked the "no" box to the question whether employee was injured in the performance of duty and stated that appellant was off the clock when he ran down the stairs and fell, hitting his head. Appellant's supervisor stated that by appellant's "own admission, he was running downstairs."

The incident of appellant's falling down stairs occurred at approximately 7:25 a.m. according to the notes by the employing establishment dated January 3, 1992. Appellant was taken to the medical unit where a superficial laceration of the parietal region was noted. The medical unit also stated that when appellant was found his head was moderately bleeding. Appellant requested to be released. He did not return to work.

The discharge summary from the North General Hospital dated August 7, 1991, stated that appellant was admitted at approximately 10:00 a.m. on August 2, 1991 with the principle diagnosis a drug overdose and the secondary diagnosis was subdural hematoma. The report stated that appellant was admitted because of the intake of 200 milligrams of methadone and 50 milligrams of valium and he fell down from the stairs at the job and was brought by his

colleague at work. Other progress notes at North General Hospital dated August 2, 1991, stated that appellant took methadone and valium after he had a fight on the job at about 7:00 a.m. In a report dated December 30, 1991, Dr. Ronald B. Ponn, a Board-certified thoracic surgeon, affiliated with the Thoracic & Cardiovascular Associates of New Haven, stated that appellant was a 51-year-old man who was assaulted and beaten in October of this year. Appellant was subsequently transferred on August 7, 1991 from North General Hospital to Mount Sinai Hospital. Progress notes dated August 7, 1991, from Mount Sinai Hospital stated that appellant was assaulted on Friday and a computerized axial tomography (CAT) scan revealed an acute subdural hematoma. A discharge summary from the hospital of Saint Raphael dated January 8, 1992 stated that appellant was admitted to the Mount Sinai Hospital on August 7, 1991 with a subdural hematoma secondary to assault. A report by a nurse from Woodmere Health Center dated January 20, 1992 stated that appellant was admitted to the center on December 17, 1991 with a diagnosis of traumatic brain injury secondary to a fall.

On February 21, 1992 the Office of Workers' Compensation Programs accepted appellant's claim for a superficial laceration of the scalp but stated it was not accepting time lost due to the compensable injury or payment for medical expenses appellant incurred once he left the employing establishment. The Office advised that more evidence was needed to resolve inconsistencies in the evidence regarding what caused his disability.

By decision dated May 1, 1992, the Office reiterated its acceptance that appellant sustained a scalp laceration on August 2, 1991, as alleged, but denied the claim for a left frontal temporal subdural hematoma.

By letter dated May 13, 1992, appellant, through his attorney, requested an oral hearing before an Office hearing representative. The hearing was held on September 17, 1992. Appellant's attorney stated that appellant had a head wound at the employing establishment, went to the Methadone Clinic and then to North General Hospital. Appellant's mother received a call from appellant's friends saying that they had found appellant in a restaurant and that he looked like he had been mugged. Appellant's mother went to North General Hospital to visit appellant the day he was admitted but he was in a coma. The next day appellant called her and told her he fell at work.

Appellant's mother testified that appellant called her Saturday morning and when she asked him what had happened and whether he got mugged, he said, "No, I fell down the stairs." She said that he said that "they all" saw him lying on the landing at the employing establishment and that he did not know how it happened, he "just fell." Appellant testified that the next day she got a call from someone named "Doc" who told her appellant had been mugged and was at North General Hospital. Appellant went to the hospital and retrieved appellant's bracelet, wrist watch and money.

The employing establishment's notes dated September 3, 1991 stated that appellant's mother had visited the timekeeper and said that appellant had been mugged.

By decision dated February 9, 1993, the Office hearing representative affirmed the Office's May 1, 1992 decision.

On February 4, 1994 appellant, through his attorney, requested reconsideration and submitted additional evidence. By affidavit dated January 25, 1994, Leo Barta, appellant's cousin, stated that sometime in August or September 1991 his mother (who passed away in 1992) told him "something to the effect" that he should be careful because his cousin [*i.e.*, appellant] got mugged. He denied that he ever made a statement to the employing establishment that his cousin was mugged on August 2, 1991.

By affidavit dated January 27, 1994, appellant's mother stated that on August 2, 1991 she received a phone call from a man named "Doc," who said he knew appellant and that appellant had been brought to North General Hospital because he had been mugged. Appellant went to the hospital to retrieve appellant's belongings and obtained his silver identification bracelet, his watch and $620.00 in cash. She denied that she ever told anyone that appellant was mugged, although she told several people, including her sister and a woman from the employing establishment, that "Doc" said that appellant had been mugged.

By affidavit dated January 28, 1994, Dr. Irving Friedman, a Board-certified psychiatrist and neurologist, stated that there was "no question about the fact" that appellant was injured when he fell down some stairs at his workplace on August 2, 1991. He stated that an incident report dated August 2, 1991, prepared by Sargeant Mogenis stated that at about 7:25 a.m., upon arrival at the stairway, appellant was found "lying on the floor bleeding from the head." Dr. Friedman noted that the health unit record stated "laceration right parietal area." He stated that when appellant was admitted to North General Hospital later in the morning on August 2, 1991, "he appeared at the emergency department in a stuporous condition, having been brought to [the] hospital by some friends" and that "upon physical examination, the only sign of trauma found was a laceration to the right parietal area of his skull." Dr. Friedman stated that a history of ingestion of methadone and valium led to a diagnosis of drug overdose and appellant was given a narcotic antagonist, to which he responded, becoming conscious and alert. Further, Dr. Friedman stated that at 7:00 p.m. on August 2, 1991, when asked to state in the nursing admission interview why he was in the hospital, appellant responded, "Because I fell in a place and cut my head." Appellant subsequently became comatose on or around August 4, 1991.

Dr. Friedman stated that numerous facts proved to a medical certainty that appellant's stupor was not related to a drug overdose, stating, *inter alia*, that (1): the appearance of sleepiness leading to stupor within two days after head trauma, *i.e.*, a significant blow to the head, was consistent with the formation of a subdural hematoma, or blood clot, which formed from a slow bleed; (2) an intracranial bleed often follows significant head trauma but is not one of the expected side effects of methadone; (3) if appellant had ingested an overdose of methadone, he would likely have responded to the narcotic antagonistic drugs, which were administered after August 4 but he did not; (4) the findings on the electroencephalogram (EEG) dated August 6, 1991, which suggested "toxic/aritalolic encephalopathy" did not document a drug overdose because it is a nonspecific, nondiagnostic test and the findings were consistent with those found in chronic drug abuse, regardless of the state of consciousness; and (5) an August 7, 1991 nuclear scan suggested a subdural hematoma and a left subdural hematoma was surgically removed on that date. Dr. Friedman noted that there was a report that appellant had been mugged, but he stated that the only history appellant ever gave him was of trauma to his head from falling on stairs at work and he gave that history consistently several times.

Dr. Friedman concluded that the slow intracranial bleed which occurred in appellant was solely the result of the head trauma he sustained when he fell at work on August 2, 1991.

The Mount Sinai Hospital operative report dated August 7, 1991 written by Dr. Rose Gennuso stated that appellant was a 51-year-old male who was transferred to the Mount Sinai Hospital from North General Hospital where he had been admitted several days earlier following an altercation. Dr. Gennuso stated:

> "[Appellant] a known drug abuser who is currently on methadone maintenance, was in coma on presentation to North General Hospital. This was thought to be due to drug overdose and he was maintained on narcan drip."

She noted that a CAT scan showed a large fronto-temporo-parietal acute subdural hematoma with a significant left to right shift.

By decision dated April 14, 1994, the Office denied appellant's reconsideration request.

By letter dated June 16, 1994, appellant's attorney appealed to the Board. By order dated April 6, 1995, the Board directed that the case be remanded to the Office for proper reconstruction of the record and an appropriate decision to fully protect appellant's appeal rights. By decision dated July 17, 1995, the Office issued a decision which reaffirmed the April 14, 1994 decision, denying appellant's reconsideration request and incorporated the memorandum to the Director dated April 14, 1994.

The Board finds that the case is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act 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 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.[1] 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.[2]

To determine whether a federal 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, place and in the manner alleged.[3] Second, the

[1] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[2] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[3] *Robert J. Krstyen*, 44 ECAB 227, 229 (1992); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[4]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a prima facie case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on a claimant's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[5] However, an employee's statement 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]

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct. As is noted by Larson in his treatise on workers' compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances. A different question is presented, of course, when the triggering activity is itself rash in light of the claimant's knowledge of his condition.[7]

In the present case, the Office accepted that appellant's claim for a superficial laceration of the scalp resulting from appellant's fall downstairs at the employing establishment. Despite the evidence in the record from secondary sources that appellant had been mugged, assaulted and beaten or in a fight on August 2, 1991, none of the medical evidence supports that appellant was in fact mugged or sustained any injury other than the laceration to his head. In his affidavit dated January 28, 1994, Dr. Friedman specifically noted that the employing establishment's health unit recorded a laceration of the right parietal area on August 2, 1991 and that when appellant was brought to North General Hospital later that morning, the only sign of trauma was a laceration to the right parietal area of his forehead. Dr. Friedman stated that while appellant was in the hospital, prior to losing consciousness, he gave a history of having cut his head when he fell down the stairs. No evidence of record support the allegations of a fight or mugging after appellant's fall downstairs at work on August 2, 1991. The medical records note that appellant did not have any physical signs on his body of having been beaten or in a fight and the fact that

[4] *Id*.

[5] *Linda S. Christian*, 46 ECAB 598, 600-01 (1995); *George V. Lambert*, 44 ECAB 870, 875-76 (1993).

[6] *Linda S. Christian*, *supra* note 5 at 601; *Virgil F. Clark*, 40 ECAB 575, 584-86 (1989).

[7] *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994).

appellant had $620.00 in his possession when he arrived at the hospital is suggestive that he was not mugged.

Dr. Friedman also stated that while appellant initially responded to narcan, once he became comatose on August 4, 1991, he did not respond to subsequent administrations of the drug. Dr. Friedman stated that the appearance of sleepiness leading to stupor within two days after a head trauma is consistent with the formation of a subdural hematoma, or blood clot, which formed from a slow bleed. Dr. Friedman stated that an intracranial bleed often follows significant head trauma but is not one of the expected side effects of ingestion of methadone. Dr. Friedman credited appellant's gradual deterioration and lapse into unconsciousness from an intracranial bleed on the side opposite the trauma which, he noted, conforms to the classic medical picture of subdural hematoma. He also found that the August 6, 1991 readings of the EEG which suggested toxic aritalolic encephalopathy did not document a drug overdose because the EEG is a specific, non-diagnostic test and its findings were consistent with those found in chronic drug abuse, regardless of the state of consciousness. Dr. Friedman opined that appellant's slow intracranial bleed and resulting hematoma was the result of the head trauma appellant sustained when he fell at work on the morning of August 2, 1991.

While Dr. Friedman's January 28, 1994 report is insufficient to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that his subdural hematoma is causally related to the August 2, 1991 employment injury, it constitutes sufficient probative evidence in support of appellant's claim to require further development of the record by the Office.[8] The Office should send the case record to a second opinion physician with a statement of accepted facts and a request to evaluate the evidence and provide a rationalized opinion on the issue of whether appellant's subdural hepatoma is causally related to the August 2, 1991 employment injury. The Office should then issue a merit decision based on the augmented record and any further development it deems appropriate.

[8] *See Horace Langhorne*, 29 ECAB 820 (1978).

The Office of Workers' Compensation Programs decision dated July 17, 1995 is hereby set aside and the case remanded for the Office for further proceedings consistent with this decision of the Board, to be followed by a merit decision.

Dated, Washington, D.C.
July 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member