U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL HALL and U.S. POSTAL SERVICE,
POST OFFICE, Southeastern, PA

Docket No. 98-153; Submitted on the Record;
Issued September 2, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained a traumatic injury in the performance of duty on September 11, 1995.

In the present case, appellant, a mail handler, sustained back injuries in the performance of his federal employment on May 14, 1992 and January 31, 1995, which were accepted for lumbar strains. Appellant returned to light-duty work. On September 21, 1995 appellant filed a notice of recurrence of disability alleging that on September 11, 1995 he had sustained a recurrence of disability causally related to his January 31, 1995 injury. On his claim form appellant explained "I try to do my job the best of ability. [sic] But after a period of time my back gives out on me. And my doctor has informed me this problem will always come back…." The Office of Workers' Compensation Programs denied appellant's recurrence claim on November 28, 1995 on the grounds that the medical evidence of record did not demonstrate that the recurrence was causally related to the accepted January 31, 1995 injury.[1] Appellant filed a notice of traumatic injury on January 22, 1996 alleging that he had sustained a traumatic injury to his back on September 11, 1995 when he felt sharp pain in his low back with radiation to his legs, while bending over to pick up trash at work. The Office denied appellant's traumatic injury claim on February 28, 1996, on the grounds that fact of injury was not established. An Office hearing representative affirmed the denial of appellant's traumatic injury claim by decision dated November 26, 1996. The Office denied modification of its prior decision, after merit review on March 31, May 8 and July 14, 1997.

The Board finds that appellant has not established that he sustained a traumatic injury on September 11, 1995.

In a traumatic injury case, in order to determine whether an employee actually sustained an injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he

[1] As the decision denying appellant's notice of recurrence of disability was issued more than one year prior to the filing of appellant's appeal, the Board lacks jurisdiction to review this decision. 20 C.F.R. § 501.3(d).

actually experienced the employment incident at the time, place and in the manner alleged. 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.[2]

An employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the 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 subsequent course of action. An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[3] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[4] However, an employee's statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.[5]

In the present case, the Office clarified in its March 31, 1997 decision that appellant had not established fact of injury, that is appellant had not established that he sustained a new injury at work on September 11, 1995 due to the occurrence of any specific event. While appellant alleged on his Form CA-1 dated January 5, 1996 that he felt sharp back pain and pain radiating into his legs while bending over to pick up trash at work on September 11, 1995, this allegation is not corroborated by the medical evidence or other evidence of record.

The Board notes that in his initial notice of recurrence, appellant did not relate his back condition to any specific incident or event occurring on September 11, 1995. Appellant waited until after his notice of recurrence of disability had been denied by the Office to allege that he sustained a "new" injury while bending over to pick up trash on September 11, 1995. The Board also notes that while appellant explained that he had reported the details of this injury to his supervisor, appellant did not submit a corroborating statement from his supervisor and the employing establishment did choose to controvert appellant's injury claim. The Board also notes that there is no medical evidence of record which describes an incident occurring at work on September 11, 1995 wherein appellant bent over to pick up trash. Appellant was seen at the Paoli Memorial Hospital on September 11, 1995 for a complaint of low back pain, onset at 5:40 p.m. The hospital record notes appellant's history of injury as "patient states he developed severe low back pain at work today. Denies lifting or any other activity at onset. Complains of pain with radiation and numbness down both legs." Appellant submitted medical reports to the record from Drs. David P. Friedman, Zohar Stark, Gregory A. Nelson, John Aaron and Harris A. Ross, none of these physicians, however, reported any incident occurring on September 11, 1995 when appellant bent over at work to pick up trash.

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

[3] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

[4] *Dorothy Kelsey*, 32 ECAB 998 (1981).

[5] *Ruth M. Jackson*, 30 ECAB 917 (1979); *Bennie W. Butler*, 13 ECAB 156 (1961) and cases cited therein.

The medical evidence submitted by these treating physicians does relate a history that appellant had an onset of back pain while at work on September 11, 1995. The medical evidence of record also indicates that appellant was diagnosed with acute lumbosacral strain superimposed upon chronic lumbosacral strain and herniated nucleus pulposus at L4-5, after September 11, 1995. The Board has previously explained that "where a claim is based upon a specific accidental injury, the employee claiming compensation benefits has the burden of establishing the fact of injury by proof of an accident or fortuitous event having relative definiteness with respect to time, place and circumstances and of an impairment causally related to such injury. The mere concurrence of an episode of pain during the workday is not proof of an injury having occurred at work, nor does it warrant an inference of causal relationship.[6]

The circumstances of this case, primarily appellant's late description of the alleged incident of injury and the lack of any medical description of the alleged incident of injury, cast sufficient doubt on the requisite proof of an accident or fortuitous event and therefore whether a *prima facie* case has been established. The Board thus finds that appellant had not met his burden of proof to establish that he sustained an injury in the performance of duty on September 11, 1995.

The decisions of the Office of Workers' Compensation Programs dated July 14, May 8 and March 31, 1997 and November 26, 1996 are hereby affirmed.

Dated, Washington, D.C.
September 2, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[6] *Max Haber*, 19 ECAB 243 (1967).