U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE M. SZUMSKI and DEPARTMENT OF THE ARMY, U.S. ARMY RESERVE, Wilkes-Barre, PA

Docket No. 00-1925; Submitted on the Record;
Issued April 19, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a back injury while in the performance of duty August 24, 1998.

On January 28, 2000 appellant then a 40-year-old equipment repair inspector, filed a traumatic injury claim alleging that he strained his lower back on August 24, 1998 when he was inspecting equipment. Appellant stopped work on August 24, 1998 and returned on August 30, 1998.[1]

Accompanying his claim appellant submitted medical evidence from Dr. Anthony Aquilina, an osteopath, a magnetic resonance imaging (MRI) scan dated May 5, 1999, a May 21, 1999 request for surgery prepared by Dr. Carson J. Thompson, a Board-certified neurologist and a discogram dated July 8, 1999. Dr. Aquilina's office notes from August 25, 1998 indicated that appellant was experiencing right knee and lower back pain for one week. He diagnosed lumbar disc displacement and noted that appellant sustained "no acute injury." The May 5, 1999 MRI of the lumbar spine indicated a disc bulge at L3-4. Dr. Thompson requested authorization for a lumbar laminectomy, discectomy and interdisc fusion at L3-4 and indicated that appellant sustained a work injury on January 22, 1997 as a result of a motor vehicle accident. The discogram indicated an acute annular tear at L3-4, with degenerative changes at L4-5 and L5-S1.

By letter dated February 17, 2000, the Office requested additional factual and medical information from appellant, stating that the evidence submitted was insufficient to establish an injury on August 24, 1998. The Office provided appellant 30 days to submit information.

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[1] Appellant filed a notice of traumatic injury after an automobile accident while in the performance of duty on January 22, 1997. The Office of Workers' Compensation Programs accepted the claim for a lumbosacral strain. On December 15, 1998 appellant filed a notice alleging that he sustained a recurrence of his previously accepted work-related injury on August 24, 1998. In a decision dated December 21, 1999, the Office denied appellant's claim on the grounds that appellant's injury was not a recurrence of a previously accepted condition but rather a new injury with a new work factor. Thereafter, appellant filed this claim.

In a decision dated March 27, 2000, the Office denied appellant's claim on the grounds that appellant failed to establish fact of injury on August 24, 1998, as required by the Federal Employees' Compensation Act.[2]

The Board finds that appellant has failed to establish that he sustained an injury on August 24, 1998 while in the performance of duty.

An employee seeking benefits under the 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."[3] 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.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another.

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.[6] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[7] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[8]

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 statements in determining whether a *prima facie* case has been established.[9] Although an

[2] 5 U.S.C. §§ 8101-8193.

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

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

[5] *Elaine Pendleton, supra* note 3.

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

[7] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[8] *Id.* at 255-56.

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

employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative valued and will stand unless refuted by strong or persuasive evidence,[10] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[11]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[12]

In this case, appellant alleged that he was injured while inspecting equipment. However, the initial treatment notes from Dr. Aquilina dated August 25 to November 10, 1998, make no mention of any employment-related condition. The August 25, 1998 treatment note indicated that appellant sustained "no acute injury." The medical records submitted most contemporaneously with the date of the alleged injury, including Dr. Aquilina's notes from August 25 to November 10, 1998, indicated that appellant was being evaluated for back pain but did not mention a work-related injury. The first mention of an injury related to appellant's federal employment was in a progress note dated June 4, 1999, nearly 10 months after the alleged injury. Furthermore, the note was written by a physician's assistant and merely states on August 24, 1998 appellant "[b]ent over at work-had back pain." The omission of any work incident in August 1998 in the most contemporaneous medical evidence is not overcome by subsequent nonspecific statements regarding the claimed incident.[13]

For these reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. Consequently, appellant has not met his burden of proof in establishing his claim.[14]

[10] *Robert A. Gregory*, 40 ECAB 478 (1989).

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

[12] *See Richard A. Weiss*, 47 ECAB 182 (1995); *John M. Tornello*, 35 ECAB 234 (1983).

[13] The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence. *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

[14] With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated March 27, 2000 is hereby affirmed.

Dated, Washington, DC
April 19, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member