U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS G. GREEN and U.S. POSTAL SERVICE,
POST OFFICE, Midland, MI

Docket No. 00-676; Submitted on the Record;
Issued January 8, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant sustained an injury in the performance of duty on April 19, 1999; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On August 9, 1999 appellant, then a 51-year-old letter carrier, filed a notice of traumatic injury and claim for compensation alleging that on April 19, 1999, while "loading a private vehicle," a box fell and knocked him to the ground pinning his right shoulder to the black top. Appellant further alleged that he sustained a torn right rotator cuff. The employing establishment indicated that on the reverse side of the CA-1 claim form, it was controverting continuation of pay because the injury was not work related. Appellant stopped work on April 19, 1999 and has not returned.

In a statement attached to his CA-1 claim form, appellant indicated that he had purchased some excess P.O. boxes from the employing establishment for $300.00 and had been requested to remove them from the property by April 26, 1999.[1] He stated that he and another employee decided to move the boxes on appellant's coffee break on April 19, 1999 and described how one of the boxes fell out of the back of appellant's vehicle and pinned his right shoulder to the black top.

In an undated statement, appellant's supervisor stated that appellant injured himself on April 19, 1999 loading P.O. boxes into his private vehicle and that appellant had been warned that he could get into trouble performing none job-related work while he was still on the clock. He indicated that appellant complained of shoulder pain and was given the remainder of the day off to seek medical care.

[1] The record contains a copy of the notice of sale of government property on April 13, 1999 and a copy of appellant's written bid for the property.

By letter dated September 2, 1999, the Office informed appellant of the nature of the factual and medical evidence required to establish his claim.

Appellant submitted intermittent medical records from Dr. John C. Eckhold, Jr., dating from April 29, 1996 to August 24, 1999, who noted that appellant fell on his right shoulder on April 19, 1999 and sustained a rotator cuff tear, confirmed by a magnetic resonance imaging (MRI) scan taken on May 26, 1999. Dr. Eckhold subsequently performed arthroscopic surgery to repair the rotator cuff and approved appellant for light-duty work with restrictions effective July 31, 1999.

In a decision dated October 1, 1999, the Office denied compensation because the evidence of record failed to establish that appellant sustained an injury on April 19, 1999 while in the performance of duty.

By letter dated October 25, 1999, appellant requested reconsideration but did not submit any additional evidence. He stated in his request for reconsideration that when he purchased the excess P.O. boxes at the government auction he had believed he was investing in his job and benefiting the employing establishment. Appellant argued that he had been treated unfairly with respect to his claim, noting that he had to wait 26 days in order to have an MRI and find out that he needed surgery.

In a decision dated December 6, 1999, the Office denied appellant's request for reconsideration on the grounds that his evidence was immaterial and irrelevant in nature and not sufficient to warrant a merit review of the record.

The Board finds that the Office properly denied compensation because the evidence of record failed to establish that appellant sustained an injury on April 19, 1999, while in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his employment; liability does not attach merely upon the existence of an employee/employer relationship.[2] Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[4]

"In the course of employment" deals with the work setting, the locale and the time of injury whereas "arising out of the employment" encompasses not only the work setting but also a

[2] *Margaret Gonzalez*, 41 ECAB 748 (199); *Christine Lawrence*, 36 ECB 422 (1985).

[3] *See* 5 U.S.C. § 8102(a).

[4] *Timothy K. Burns*, 44 ECAB 125 (1992); *Jerry L. Sweeden*, 42 ECAB 721 (1990).

causal concept, the requirement being that an employment factor caused the injury.[5] In addressing the issue, the Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto."[6]

The injury in this case, occurred on the premises of the employing establishment.[7] However, this factor alone is not sufficient to establish entitlement to benefits for compensability, as the concomitant requirement of an injury "arising out of the employment" must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[8] In order for an injury to be considered as "arising out of the employment," the facts of the case must show some "substantial employer benefit or requirement" which gave rise to the injury.[9] It is incumbent upon appellant to establish that it arose out of his employment. In other words, some contributing or causal employment factor must be established.[10]

In this case, it cannot be said that appellant's injury arose out of his employment as there was no employer requirement or substantial employer benefit that gave rise to the April 19, 1999 injury. The Board does not consider appellant's actions in moving P.O. boxes he purchased at a government auction during his coffee break to be for the substantial benefit of the employing establishment. While the employing establishment may recieve a positive monetary return from the proceeds of the auction, appellant received the substantial benefit since he was able to obtain government property for his personal use and he had the opportunity to purchase that property based on his employment status. Furthermore, the employing establishment did not require appellant to participate in the auction or to move his property during work hours. Statements by appellant's supervisor indicate that appellant was even warned against performing non job-related work while on the clock and that he certainly could have moved the boxes on his own time. The employing establishment also did not encourage or force appellant to use his coffee break to move the property off the premises.

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[5] *Timothy K. Burns*, *supra* note 4 at 128.

[6] *Id*.

[7] As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or coming from work, before or after working hours, or at lunch time or other such breaks are compensable. *See Timothy K. Burns*, *supra* note 4.

[8] *Narbik A. Karamian*, 40 ECAB 617 (1989).

[9] *Id*.

[10] *See Margaret Gonzalez*, *supra* note 2.

Upon his departure from his work duties on a coffee break, appellant was no longer engaged in his master's business, but on a personal mission that was not related to the fulfillment of his employment duties or responsibilities. Whether a particular case is or is not within the scope of the Federal Employees' Compensation Act depends upon the general test of whether the particular risk may be said to be reasonably incidental to the employment, having in mind all relevant circumstances and the conditions under which the work is required to be performed.[11] The Board finds under the circumstances of this case, appellant was not engaged "in the course of his employment" at the time of his injury on April 19, 1999 and, therefore, his right shoulder injury was not sustained while in the performance of duty.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[12] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[13] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[14] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[15] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[16]

The Board finds that appellant failed to show that the Office erroneously applied or interpreted a point of law. He did not advance on reconsideration a relevant legal argument not previously considered by the Office; and he did not submit relevant and pertinent new evidence to warrant a merit review. Because appellant did not satisfy the requirements of section 8128 of the Act, the Office properly denied his request for reconsideration.

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[11] *Id*.

[12] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[13] 20 C.F.R. § 10.606(b) (1999).

[14] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

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

[16] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Workers' Compensation Programs dated and October 1, 1999 are hereby affirmed.

Dated, Washington, DC
January 8, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member