U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA SECTION and DEPARTMENT OF JUSTICE
IMMIGRATION COURT, Los Angeles, CA

Docket No. 00-234; Submitted on the Record;
Issued March 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury in the performance of duty, as alleged; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration constituted an abuse of discretion.

On September 11, 1997 appellant, then a 44-year-old legal technician, filed a claim alleging that, on August 22, 1997, she sustained a herniated disc and back pain which extended into her right leg as a result of carrying boxes to and from the work area. By letter dated October 8, 1997, the employing establishment controverted the claim.

In support of her claim, appellant alleged that on August 22, 1997 she carried 2 boxes of mail weighing about 25 pounds for 3 blocks, talked to her supervisor and then picked up xerox papers weighing about 40 pounds. One box slipped out of her arms and, in attempting to catch it, she fell and sustained shooting sharp pain in her right leg. She alleged that the judge with whom she was working that day came over and saw her in pain, and told her supervisor. Appellant stated that she delayed reporting the injury because she had just received a promotion. She first sought medical treatment on August 24, 1997 and submitted emergency room records from Santa Monica Medical Center.

Appellant submitted a letter dated October 17, 1997 from an anonymous witness who observed appellant on August 22, 1997 carrying supplies from the office on Olive street to the Immigration Court. She appeared to be having "great difficulty moving the supplies."

The employing establishment submitted statements that contradicted appellant's allegations as to what occurred on August 22, 1997. In a statement dated September 19, 1997, the court administrator noted that appellant had a poor attendance record; that all of her sick leave had been utilized; that she had a negative balance of 46.5 hours of sick leave; and that she did not report the alleged injury until September 11, 1997, several days after she was denied a request for advanced sick leave. The court administrator noted that, at 8:00 a.m., the time appellant alleged the incident occurred, appellant was directed to report to the hearing location in

the morning and receive the schedule of detained cases. Only after the cases were entered and the data entry in court was finished, appellant was asked to retrieve the mail from the employing establishment's post office box at the federal building. The court administrator indicated that appellant did not promptly report this injury to her immediate supervisor or the court administrator.

The employing establishment submitted statements from appellant's prior supervisor and current supervisor. Appellant's current supervisor stated that appellant was provided a luggage carrier to carry files and mail to the federal building, that she did not recall talking to appellant on August 22, 1997 and that she did not recall her reporting that she was hurt on the job. Her prior supervisor confirmed that appellant was asked to check the mailbox, but stated that she was told to give a call if there was a lot of mail and she needed help bringing it back.

In response to questions posed to the employing establishment by the Office, on November 14, 1997, the court administrator stated that she never observed appellant carrying boxes weighing 20 to 40 pounds. The court administrator further noted that appellant was not the only employee who picked up mail and that, when she did, appellant was provided a luggage carrier and the average weight of the mail was 5 to 10 pounds.

In a letter dated November 14, 1997, the court administrator explained that, on July 21, 1997, the employing establishment moved from the federal building in Los Angeles to a new location on Olive Street. The employing establishment retained two courtrooms in the federal building for the purpose of conducting deportation and removal proceedings, which were held daily at 1:00 p.m. Appellant was selected to perform clerical duties because they were the lightest duties possible and she had been complaining of stress-related illness. The court administrator explained that appellant was to be at the federal building at 8:00 a.m. every day and receive the charging documents. Appellant had a parking space in both the new building and the old and often finished her duties early and was asked to bring the mail from the federal office location. Appellant was provided with a luggage cart when bringing cases from the federal building. The court administrator stated, that it was very doubtful that appellant brought 2 boxes of mail weighing about 25 pounds as the mail was being picked up regularly by a member of the intake unit and only occasionally picked up at the post office box by claimant. She further said that appellant's allegation that she picked up 2 boxes of xerox paper weighing approximately 40 pounds was disputed by the court administrator. She further noted that two boxes would involve carrying more xerox paper than would be needed for business purposes.

By decision dated December 29, 1997, the Office rejected appellant's claim, finding that the evidence failed to establish that the alleged August 22, 1997 injury occurred at the time, place and in the manner alleged.

On November 1, 1998 appellant requested reconsideration and submitted a statement by Robert Massington, who alleged that he would carpool with appellant and that on August 22, 1997 he observed appellant carrying xerox boxes and supplies that "had to weigh about 30 [pound]s for each box."

On November 28, 1998 the Office reviewed the case on the merits and denied modification finding the evidence submitted in support of the application was not sufficient to warrant modification of the decision.

By letter dated April 9, 1999, appellant again requested reconsideration and submitted a February 19, 1999 medical report from Dr. T. Michael Lain, a Board-certified orthopedic surgeon.

By decision dated July 19, 1999, the Office denied appellant's request for reconsideration, finding that the evidence was not sufficient to warrant modification.

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on August 22, 1997.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 timely filed within the applicable time limitation period 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.[2] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

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 that must be considered in connection with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place and in the manner alleged.[4] 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.[5] An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that her disability and/or specific condition for which compensation is claimed was causally related to the injury.[6]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendelton*, 40 ECAB 1143 (1989).

[3] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[5] *Id.*

[6] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier v. Nichol*, 37 ECAB 528 (1986).

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.[7] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[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 cast doubt on an employee's statements in determining whether she has established her claim.[9]

In the instant case, the employing establishment and appellant noted that her duties required her to travel between the federal building, the former location of the employing establishment to the present offices on Olive Street. As part of her duties, she was occasionally required to supply the courtroom with xerox paper and supplies and to deliver mail from the federal building back to the offices on Olive Street.

However, with regard to her allegation of injury on August 22, 1997 there are numerous inconsistencies in the evidence. While appellant alleged that her injury occurred on August 22, 1997 at approximately 8:00 a.m., she failed to file a claim for benefits until September 11, 1997. With regard to why she did not timely report the injury, appellant alleged that she did not do so for fear that she would lose a promotion. This statement is refuted by the court administrator, who noted that appellant's former supervisor was not aware of appellant's promotion and by denying that she threatened with losing her promotion. The employing establishment noted that appellant did not report the August 22, 1997 injury until September 11, 1997, which was only days after the court administrator denied appellant's request for advanced sick leave the day after the Labor Day holiday. These leave requests were disapproved by this court administrator on September 5, 1997 and appellant was advised verbally that advanced sick leave would no longer be approved. Appellant's delay in filing her claim and the surrounding circumstances tend to cast doubt on the fact that she sustained an injury in the manner alleged.

Furthermore, the employing establishment refuted appellant's statements about the alleged incident on August 22, 1997. Appellant alleged that the injury occurred at 8:00 a.m. The court administrator contended that appellant would not have been carrying mail or supplies at that hour of the morning, as she was directed to report to the hearing location that morning and receive the schedule of detained cases. Only after the cases were entered and the data entry for the court was finished, was appellant asked to retrieve the mail from the employing establishment's post office box at the federal building. The employing establishment also questioned appellant's allegation that she was carrying 2 boxes of mail weighing about 25 pounds for 3 blocks or that she carried 2 boxes of xerox papers weighing about 40 pounds.

[7] *Elaine Pendelton, supra* note 2.

[8] *See Gene A. McCracken*, 46 ECAB 593, 596 (1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[9] *See Constance G. Patterson*, 42 ECAB 206 (1989).

The court administrator noted that appellant was provided with a luggage cart for her use. Although appellant contended that the judge with whom she was working knew that she was injured. However, her supervisor noted that Judge Hrycenko, the detainee judge on the date in question, had no recollection of appellant reporting an injury to her. The court administrator inquired of Judge Hrycenko whether appellant exhibited pain or incapacity due to an injury at work on that date, and Judge Hrycekno responded that she did not.

The Board is not persuaded by the statements of appellant's anonymous witnesses. Appellant submitted several anonymous statements in support of her claim. These anonymous statements are entitled to little weight and do not link appellant's employment to her injury. Neither anonymous witness reported seeing the injury itself. Appellant also submitted a statement by Robert Massington. While this statement corroborated that appellant carried boxes, Mr. Massington also failed to witness the injury. This statement is insufficient to show that appellant sustained an injury on that date. The Board also notes that Mr. Massington's statement was submitted over one year after the alleged incident reducing its probative value.

Because of these numerous inconsistencies in the record, the Board finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on August 22, 1997.

The Board further finds that the refusal of the Office to reopen appellant's claim for further reconsideration on the merits did not constitute an abuse of discretion.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[10] Section 10.608 provides that, where the request is timely but fails to meet at least one of the criteria of 10.606(b)(2), the Office will deny the application for consideration without reopening a case for review on the merits. Material which is repetitious or duplicative does not constitute a basis for reopening a case.[11] Furthermore,

[10] 20 C.F.R. § 10.606(b)(2).

[11] *James A. England*, 47 ECAB 115 (1995).

evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[12]

In this case, appellant did not contend that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or fact not previously considered by the Office, as required by section 10.606(b)(2) of the regulations. Furthermore, appellant has also failed to meet the third criteria of section 10.606(b)(2), *i.e.*, she has submitted no relevant and pertinent evidence in support of his April 9, 1999 request for reconsideration. The only evidence submitted was the February 19, 1999 medical report by Dr. Lain. However, as appellant has failed to provide sufficient evidence of fact of injury, the medical evidence of record is not relevant to the issue on appeal, whether appellant sustained the August 22, 1997 incident, as alleged. The Office properly denied appellant's request for review on the merits.

The decisions of the Office of Workers' Compensation Programs dated July 19, 1999 and November 28, 1998 are affirmed.

Dated, Washington, DC
March 5, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *Barbara A. Weber*, 47 ECAB 163 (1995).