U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES H. DOROUGH and DEPARTMENT OF THE ARMY, MATERIAL COMMAND, ARMY DEPOT, Anniston, AL

Docket No. 99-2089; Submitted on the Record;
Issued March 13, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that he sustained a back injury in the performance of duty on August 19, 1998; (2) whether appellant established that he sustained a recurrence of disability; and (3) 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 19, 1998 appellant, then a 54-year-old equipment cleaner, filed a notice of traumatic injury and claim for compensation alleging that he injured his back on that date when a forklift bumped over a basket, which in turn hit another basket that knocked him into a chair. Appellant was off work for two days from August 19 to August 22, 1998. He subsequently claimed intermittent days of disability.

The record indicates that appellant was receiving treatment for chronic back condition prior to his alleged work injury on August 19, 1998. Appellant was diagnosed with a T12 compression on July 17, 1996 and degenerative disc disease at L4-5, L5-S1, confirmed by magnetic resonance imaging on September 9, 1996.[1] He has been receiving treatment from Dr. Horace C. Clayton, a general practitioner, and Dr. Bradley S. Goodman, an orthopedic specialist. Medical records from the Orthopedic and Spine Clinic indicate that appellant underwent intermittent courses of physical therapy beginning in 1996. He also had a series of lumbar epidural and facet blocks performed on April 3, April 27, May 22 and August 12, 1998.

In a certificate to return to work signed by Dr. Clayton on August 19, 1998, it was noted that appellant was off work from August 19 to August 22, 1998 for bed rest.

[1] The Office accepted that appellant sustained a lumbar back strain on July 15, 1996 when he picked up a basket of parts at work and had an onset of severe low back pain. On April 21, 1998 appellant also filed a claim alleging that when he bent over at work to help with a generator on April 1, 1998 he suffered low back pain and could not straighten up. It does not appear that appellant missed any work due to the April 1, 1998 injury.

On a prescription form dated August 20, 1998, Dr. Goodman noted that appellant presented with complaints of back pain after a forklift operator bumped into an object that was near appellant and caused him to fall into a chair. Dr. Goodman indicated that appellant was suffering from an acute exacerbation "from one to two days ago" and that he was being referred to Dr. Sandra L. Durham, an internist, for pain management. Appellant was approved for work the next day, August 21, 1998, with instructions that he stay active.

In a treatment note dated August 21, 1998, an occupational health nurse reported that appellant was off work for two days for bed rest. She related that appellant received a muscle relaxant for back pain from Dr. Clayton on August 19, 1998 and was then seen by Dr. Goodman on August 20, 1998. The occupational health nurse noted that appellant could return to work with restrictions of limited repetitive bending and stooping. She further noted that appellant could "lift from the waist up, but not floor to waist."

In an August 26, 1998 report, Dr. Durham indicated that appellant's profile under a Minnesota Multiphasic Personality Inventory (MMPI) interpretation proved to be invalid due either to malingering, deliberate or nondeliberate symptom exaggeration, random response on the part of a defensive or noncompliant patient, psychosis or illiteracy.

In a September 4, 1998 report, Dr. Goodman noted that appellant underwent a lumbar epidural block. He stated:

> "[Appellant] comes in today with complaints of upper back pain. He says that a forklift operator bumped into an object that he was standing near and he fell into a chair. Dr. Clayton gave him two days off work and told him to follow-up with me. [Appellant] complains of some numbness and tingling in his upper back area. ...
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> * * *
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> "[He] has chronic pain with frequent acute exacerbations. [Appellant] comes in today requesting that we do a thoracic epidural block for his pain.
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> "I am reluctant to do a thoracic block as he recently had radiofrequency and post injection cortisone was administered intradiscally. From an injection standpoint, I think he needs to spread this out. [Appellant] is quite functionally limited due to his pain symptomatology and today I am less optimistic regarding surgery. I have referred him to Dr. Durham for medical pain management. Consideration for rereferral back to Dr. Savage is an option with regard to his upper thoracic pain, but I think since this is only on two days old from an acute exacerbation standpoint he should give this more time. [Appellant] was given a work slip for today and is encouraged to return to work tomorrow and stay active."

In a report dated September 28, 1998, Dr. Clayton noted that appellant was injured on the job on August 19, 1998 "when a forklift hit a basket, which in turn hit another basket and hit [appellant] with the basket, pushing him into a chair." He advised that appellant was injected on September 16, 1998 at the T11-12 levels "where the injury occurred." Dr. Clayton reported that

appellant received daily ultrasound treatment since September 16, 1998 and that his treatment was scheduled to continue until October 5, 1998.

In an October 6, 1998 report, Dr. Clayton noted that appellant had been unable to work since September 16, 1998.

In a letter dated November 16, 1998, the Office advised appellant of the factual and medical evidence required to establish his claim for a traumatic injury on August 19, 1998.

The employing establishment contested appellant's entitlement to compensation and submitted an investigative memorandum with several witness statements.

In a sworn statement dated September 24, 1998, Allen Moore indicated that he was present at the time of the alleged August 19, 1998 work injury. He stated:

> "We were standing in front of a work table which had a couple of baskets sitting beside it. The baskets were placed one behind the other in relation to the table and to the side of it. [Appellant's] job is to remove small items from the basket, put them on the table and tape them in preparation for painting. When he finishes taping the parts, they are put back into the basket and it is removed by forklift to the painting area. I was standing in front of the front basket and [appellant] was to my left and slightly to the rear with the table on his left side. I do not recall him being right up against the table. A forklift arrived to remove the back basket which contained taped parts. The forklift operator approached the basket from a slight angle and when he attempted to slide the forks under the basket it caused the back basket to shift to the right two or three inches toward the table and it may have caused the front basket, o[n] the table, to move forward toward me because after it was over the table and front basket were even when the front basket had previously been a couple of inches toward the back side of the table. When the basket shifted I instinctively jumped to my right and out of the way. When I turned back to face [appellant] he was sitting in a chair that he uses in his daily routine. I do not recall [appellant] indicating that he had been struck by anything, but he did say several times that he was nervous."

In a September 24, 1998 sworn statement, Kenneth N. Jones noted that he was operating the forklift on August 19, 1998. He stated that, while the basket apparently struck and moved the table two inches, he did not see whether or not appellant was struck by the basket or the table. Mr. Jones noted that he heard appellant yell something, but that appellant was standing at that time looking up at the forklift. According to Mr. Jones, appellant often yelled and joked like he was going to be hit by the forklift so he did not give it much thought. Mr. Jones stated that appellant did not make any comments at the time of the alleged incident about being hit by anything, nor did he say that he was injured.

In an undated witness statement, Bret Saxon indicated that he was a team leader for the safety action team. He stated that on August 19, 1998 he had been notified that "something" happened in appellant's work area. Mr. Jones stated that, when appellant was questioned about the incident, he never mentioned being hit by anything and never complained of an injury. He

acknowledged, however, that appellant complained of being "shook up" and that appellant made a comment about needing nerve pills.

On November 24, 1998 appellant filed a claim alleging that he sustained a recurrence of disability on the following dates: July 15, 1996, April 1 and August 19, 1998. The date of the original injury was listed as December 21, 1992. Appellant alleged that each injury had changed his condition for the worse, noting "I've had 15 steroid blocks this year just to keep m[e] going."

In a November 30, 1998 prescription form, Dr. Goodman opined that appellant was capable of performing light-duty work with no heavy lifting of objects greater than 25 to 30 pounds.

In a December 8, 1998 report, Dr. Goodman noted that appellant continued to have chronic back pain. Appellant was discharged from Dr. Goodman's clinic and referred to Dr. Durham for pain management.

Appellant underwent a functional capacity evaluation on December 10, 1998. A rehabilitation specialist noted that appellant qualified for the physical demand category of light to medium work based on his ability to lift 25 pounds, carry 50 pounds and lift overhead 55 pounds. It was suggested that appellant exaggerated his symptoms and complaints of pain.

In a December 21, 1998 decision, the Office denied appellant's claim for compensation on the grounds that he failed to establish fact of injury. The Office specifically found that the evidence was insufficient to show that appellant was injured on August 19, 1998 at the time, place and in the manner alleged. The Office also noted that the evidence was insufficient to establish a causal relationship between appellant's back condition and the alleged August 19, 1998 employment injury.

On January 18, 1999 appellant filed a request for reconsideration. As grounds for the reconsideration request, appellant argued that certain witness statements offered by the employing establishment contained factual errors.

In a February 1, 1999 letter, the Office advised appellant of the factual and medical evidence required to establish a recurrence of disability.

In a February 19, 1999 decision, the Office denied appellant's request for a merit review.[2]

In a decision dated March 15, 1999, the Office denied appellant's claim for a recurrence of disability. The Office stated as follows:

> "It is noted that on the [F]orm CA-2a, you indicated that you sustained a recurrence on July 15, 1996, April 1 and August 19, 1998. Our records indicate that you claimed new injuries on all three of these dates. In addition, you indicated that the original injury occurred on December 21, 1992. We do not

[2] The Office noted that appellant submitted no witness statements of his own to refute the three witness statements he challenged on reconsideration.

have a record of this injury. Please note that a recurrence is a spontaneous return without intervening factors or injuries. In addition, it is noted that this Office denied your claim of an injury of August 19, 1998. Filing a recurrence under another injury for a denied claim will not circumvent the fact that the denied injury was denied and will not get the denied injury accepted…."

In an April 1, 1999 letter, the Office advised appellant that it had combined his August 19, 1998 traumatic injury claim (060710762) with the recurrence of disability claim (060656597) under file number 060656597.

The Board has duly reviewed the case and finds that the Office properly determined that appellant failed to establish that he sustained a back injury in the performance of duty on August 19, 1998.[3]

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his or her claim, including the fact 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 is causally related to the employment injury.[5] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must 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.[7] 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.[8]

In the instant case, the Office stated in its December 21, 1998 decision that appellant failed to show that the work incident occurred at the time, place and in the manner suggested on his CA-1 claim form. The Office acknowledged that it was undisputed in the record that a forklift did bump into baskets causing a 2-to 3-inch movement of a table that was near appellant on August 19, 1998. The Office, however, was not convinced that appellant was knocked into his chair as an end result of the chain of events. The Office credited the witness statement by the forklift driver, indicating that appellant was standing immediately after the incident. It was

[3] Appellant submitted new evidence on appeal; however, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. §§ 8101-8193.

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

[6] *Ruthie M. Evans*, 41 ECAB 416 (1990).

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

[8] *Id*.

suggested by the Office that appellant merely chose to sit down in the chair after the incident as opposed to being knocked into the chair.

Contrary to the Office's analysis, however, the Board concludes that the witness statement from Mr. Moore, the coworker present on the ground beside appellant at the time of the incident, taken in conjunction with the physician's reports, corroborate that appellant was knocked into his chair. Mr. Moore was at a better advantage than the forklift driver to witness the basket bump into the table. He specifically stated that when he turned around appellant had gone from a standing position to sitting in the chair. Although the forklift driver witnessed appellant standing "immediately after the incident," he cannot say that appellant did not first fall into the chair and then rise to a standing position. Moreover, since Mr. Moore stated that he had to jump out of the way to avoid being hit by the boxes, it stands to reason that appellant would have been equally startled by the incident such that he was knocked out of the way by the basket and landed in the chair. The forklift driver conceded that he did not see appellant at the actual time of the incident. It is not clear whether the forklift driver looked up and saw appellant before Mr. Moore, or whether the forklift driver simply looked up at the conclusion of the incident, after appellant rose from the chair.

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. 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.[9] However, an employee's statement alleging 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.[10] The Board concludes that the witness statements of record are insufficient to refute appellant's allegation that he was bumped into a chair on August 19, 1998.

Notwithstanding, the Board finds the medical evidence to be insufficient to establish that appellant sustained a back condition causally related to the August 19, 1998 employment incident. Appellant has submitted medical records from Drs. Goodman and Clayton indicating that he was treated for back pain around the time of the work incident but neither physician offered a reasoned medical opinion addressing the exact nature of appellant's back condition in relation to the August 19, 1998 work injury. This is particularly important since appellant was receiving treatment for back pain related to degenerative disc disease only one week prior to the date of the work incident. In the absence of reasoned medical opinion evidence, appellant has not carried his burden of proof with regard to the medical evidence and the issue of causal relationship. Accordingly, the Board finds that the Office properly denied his claim for compensation.

The Board further concludes that the Office properly denied appellant's claim for a recurrence of disability.[11] Because the Board has affirmed the Office's finding that appellant

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

[10] *Doyle W. Ricketts*, 48 ECAB 167 (1996).

[11] A recurrence of disability is defined as the inability to work due the natural, progressive worsening of an

failed to sustain an employment injury on August 19, 1998, appellant cannot allege a recurrence of disability due to the August 19, 1998 work injury." Furthermore, appellant cannot file a recurrence of disability claim in an attempt to circumvent the Office's denial of his prior claims.

Lastly, the Board 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 previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[13] When 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.[14] 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.[15] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[16] 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.[17]

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 point of law or a fact not previously considered by the Office; and he did not submit relevant and pertinent evidence to warrant a merit review. Because appellant did not satisfy the requirements of section 8128, the Office properly denied his request for reconsideration.

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accepted employment injury. *See Mary A. Wright*, 48 ECAB 240 (1996).

[12] 5 U.S.C. § 8128; *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] 20 C.F.R. § 10.610 (1999).

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

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

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

The decisions of the Office of Workers' Compensation Programs dated March 15 and February 19, 1999 and December 21, 1998 are hereby affirmed as modified.

Dated, Washington, DC
March 13, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member