U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL L. DUNCAN and U.S. POSTAL SERVICE,
POST OFFICE, Selma, Ala.

Docket No. 96-875; Submitted on the Record;
Issued February 11, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained a back and left leg injury while in the performance of duty.

On October 1, 1992 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim, alleging that he injured his back and left leg when he stepped into a hole that was covered by overgrown grass. Appellant stopped work on October 5, 1992 and returned to work on October 7, 1992. By decision dated December 30, 1992, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that fact of injury was not established. In a decision dated August 18, 1993 and finalized on August 20, 1993, an Office hearing representative affirmed the Office's December 30, 1992 decision. By decision dated February 4, 1994, the Office denied merit review of appellant's claim. By merit decisions dated February 22, September 30, 1994 and October 23, 1995, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification.

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury to his back and left leg in the performance of duty.[1]

A person who claims benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim, including that he sustained an injury while in the performance of duty and that he had disability as a result.[3] In accordance with the

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on January 19, 1996, the only decision before the Board is the Office's October 23, 1995 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Daniel R. Hickman*, 34 ECAB 1220 (1983); *see* 20 C.F.R. § 10.110(a)

Federal (FECA) Procedure Manual, in order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered one in conjunction with the other. The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.[4] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[5] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[6] The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.[7]

In the present case, appellant has not established that he sustained an injury to his back and left leg that arose in the performance of duty. The Office initially denied appellant's claim on the grounds that there was conflicting evidence concerning whether appellant sustained an injury at the time, place and in the manner alleged. Although appellant alleged that he stepped into a hole on October 1, 1992, a statement from the employing establishment in the record indicates that appellant worked on October 2, 1992 and went to the chiropractor without notice; he worked on October 3, 1992, but was off on October 4, 1992. He did not notify his supervisor that he was going to a doctor for back pain allegedly related to the October 1, 1992 incident until October 5, 1992. Appellant worked his full schedule on October 2 and 3, 1992 without any indication of back or leg pain according to the statement provided. In another statement dated August 11, 1992 from appellant's former supervisor, he reported that on June 26, 1992, appellant complained of back pain related to "dismounting some of his route." In addition, a medical report dated October 2, 1992 by Dr. William Lightfoot, a chiropractor, who diagnosed a thoracic vertebra, indicates that appellant's symptoms first appeared on August 19, 1992.[8] Although in his October 5, 1992 form report and a report dated June 18, 1993, Dr. Lightfoot recanted this statement and indicated that appellant had advised him that he stepped in a hole when he was examined on October 2, 1992, the initial report that appellant exhibited back and leg pain

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 3.803.2a (September 1980).

[5] *John C. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

[6] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[7] *Manuel Garcia*, 37 ECAB 767 (1986).

[8] Pursuant to section 8101(2) of the Act, "[t]he term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." 5 U.S.C. § 8101(2). Thus, Dr. Lightfoot is not considered a physician within the meaning of the Act since he did not diagnose a subluxation of the spine as demonstrated by x-ray. *Linda L. Mendenhall*, 41 ECAB 532 (1990). Nonetheless, his report is relevant with respect to what appellant provided as a history of injury while seeking medical treatment immediately following the alleged incident.

symptoms in August 1992 is consistent with office treatment notes provided by Dr. Lightfoot. In the record of appellant's treatment, Dr. Lightfoot noted that appellant complained of left buttock and leg pain on August 25 and September 8, 1992, he complained of hip pain on September 18, 1992 and he complained of "BAD" hip pain and foot numbness on September 29, 1992. The notes also indicate that appellant intermittently complained of such pain beginning in 1988.

While 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, the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action.[9] 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 he has established a *prima facie* case.[10] 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.[11] In this case serious doubt is cast on the validity of appellant's claim by the fact that appellant continued with his normal work duties after the alleged incident, the inconsistent histories noted by his medical provider and the factual evidence which indicates that he was injured prior to the alleged October 1, 1992 incident. Thus, appellant has not met the first component of his burden of proof to establish fact of injury.

In addition, appellant has not provided probative medical evidence establishing that a personal injury arose out of the alleged employment injury. The only physician of record who addressed the issue of whether appellant sustained a personal injury causally related to stepping in a hole on October 1, 1992 is Dr. H. Evan Zeiger, a Board-certified neurosurgeon. In reports dated March 30 and June 29, 1993, Dr. Zeiger diagnosed a large/massive herniated nucleus pulposus at L4-5 which necessitated a secondary microsurgical lumbar discetomy at the L4-5 on April 1, 1993. He indicated that he believed that this diagnosis was due to appellant's stepping in a hole on October 1, 1992. In his March 30, 1993 report, Dr. Zeiger reported that appellant's alleged incident had occurred in September 1992. Thus, he did not have an accurate history of injury. He also did not fully explain his conclusion in light of appellant's prior history of a back condition. Therefore, these reports are of limited probative value.[12] Moreover, although Dr. Zeiger provided a more complete explanation for his conclusions in a deposition dated August 11, 1994, his opinion is nonetheless of limited probative value as it is predicated on a faulty underlying premise. Dr. Zeiger stated that there was "no question" that the cause of the disc herniation was appellant stepping in a hole because, appellant had no nerve root impingement and no prior sciatica prior to that time, but did have this problem after the incident. However, as previously noted, appellant reported leg and hip pain in August 1992 and reported left foot numbness in September 1992. Moreover, a review of appellant's medical record from the Veterans Hospital reveals that appellant was diagnosed with low back pain with left sciatica

[9] *Charles B. Ward*, 38 ECAB 667 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175 (1984).

[10] *Morton J. Sills*, 39 ECAB 572 (1988).

[11] *Tia L. Love*, 40 ECAB 586 (1989).

[12] *James A. Wyrich*, 31 ECAB 1805 (1980).

in November 1972. Therefore, appellant did have a history of a sciatica condition as well as evidence of nerve root impingement symptomology prior to the alleged October 1, 1992 incident. Since Dr. Zeiger's opinion is based on an inaccurate medical history, it is not sufficient to establish the second component of fact of injury. Appellant has not met his burden of proof.

The decision of the Office of Workers' Compensation Programs dated October 23, 1995 is hereby affirmed.

Dated, Washington, D.C.
February 11, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member