U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ENRIQUE V. MOLINA and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, Wash.

Docket No. 96-2451; Submitted on the Record;
Issued November 25, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on May 30, 1995, as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

On June 23, 1995 appellant, then a 24-year-old mail carrier, filed a notice of traumatic injury (Form CA-1) alleging that on May 30, 1995 he sustained an injury to his back when he was carrying a heavy volume of mail. On the reverse of the claim form, appellant's supervisor controverted the claim stating that as there was approximately a three-week delay in reporting the injury, it was unknown whether appellant was injured in the performance of his duties.

Accompanying the claim was a Form CA-17, duty status report, from a general practitioner who examined appellant on June 23, 1995 and diagnosed lumbar strain. The physician indicated that appellant could resume regular work the same day with some restrictions. Progress reports from June 29, 1995 onward indicated a "nicely healing lumbar sprain" and a gradual decline in the amount of restrictions imposed.

By letter dated July 13, 1995, the Office advised appellant that his claim was deficient and requested appellant to explain the delay in the filing of his claim and in seeking medical treatment.

By letter dated July 24, 1995, appellant responded to the Office's request by stating that he had hoped it was a muscle strain and that it would soon go away. When it did not resolve, he decided to notify his supervisor who directed him to see a doctor.

Appellant additionally submitted medical progress notes which documented his diagnosed condition of lumbar strain.

By decision dated August 15, 1995, the Office denied appellant's claim because fact of injury was not established. In the accompanying memorandum, the Office noted that appellant did not seek medical attention or file a claim until three weeks after the injury. During this time, appellant apparently was able to continue working without difficulty. Thus, the Office found that there was insufficient or conflicting evidence regarding whether the claimed event, incident or exposure occurred at the time, place and in the manner alleged.

By letter dated January 31, 1996, appellant requested reconsideration and submitted previously submitted medical records and notes. The only new medical evidence submitted which was not previously of record was a chec medical work status report dated August 18, 1995 which stated that the lumbar strain was healing well. There is no history of the injury listed on the report.

By decision dated July 15, 1996, the Office denied appellant's reconsideration request finding that the evidence submitted was cumulative in nature and not sufficient to warrant review of the August 15, 1995 decision.

The Board finds that appellant has failed to establish that he sustained an employment injury on May 30, 1995, as alleged.

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 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 his 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.[4] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[5] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Elaine Pendleton*, *supra* note 2.

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

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.[6] 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.[7] Such circumstances as late notification of injury, confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case.[8] The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

The second requirement to establish fact of injury is that the employee must submit sufficient evidence, usually in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

There is insufficient evidence in the file regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged. Although appellant indicated on the application form that he injured himself on May 30, 1995, he did not file his claim or seek medical treatment until more than three weeks later. It further appears that between the time of the alleged injury and reporting the incident to his supervisor, appellant apparently was able to continue working without difficulty. Moreover, the Office provided appellant with the opportunity to cure the deficiencies in the claim, but he failed to submit any evidence establishing that the claimed event, incident, or exposure occurred at the time, place and in the manner alleged. Appellant, therefore, has failed to meet his burden of proof in establishing fact of injury.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[10] Section 10.138(b)(2) provides that when an application for review of the merits of a

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

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

[8] *Karen E. Humphrey*, 44 ECAB 908 (1993).

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

[10] 20 C.F.R. § 10.138(b)(1).

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.[11]

In this case, the only new evidence submitted was a chec medical work status report dated August 18, 1995. Although this report contains the diagnosis of lumbar strain, it is not relevant to the factual issue in appellant's claim as the report does not contain a history of the injury. As the other evidence submitted repeats or duplicates evidence already in the case record, it has no evidentiary value and does not constitute a basis for reopening a case.[12]

Inasmuch as appellant failed to submit any new and relevant medical evidence or advance substantive legal contentions in support of his request for reconsideration, appellant's reconsideration request is insufficient to require the Office to reopen the claim for further consideration of the merits. Moreover, appellant was previously advised of what was needed to require the Office to reopen his case in the list of appeal rights which were enclosed with the Office's decision of August 15, 1995.

The decisions of the Office of Worker's Compensation Programs dated July 15, 1996 and August 15, 1995 are hereby affirmed.

Dated, Washington, D.C.
November 25, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] 20 C.F.R. § 10.138(b)(2); *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

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