U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS J. BROWN and DEPARTMENT OF COMMERCE, NATIONAL BUREAU OF STANDARDS, Boulder, Colorado

Docket No. 97-378; Submitted on the Record;
Issued October 7, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on December 8, 1995.

On January 18, 1995 appellant, then a 45-year-old carpenter/painter, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on December 8, 1995 he was "putting away a drill, bending over and my lower back went out." The employing establishment stated that appellant did not stop work.

In a letter dated January 23, 1996, an employing establishment official described appellant's statements to her regarding the alleged injury. She noted that appellant told her that he went to the on site health unit on December 8, 1995 where it was decided that he should wait a few days to see how his back felt. She stated that appellant "then went to a chiropractor on the next Monday. He did not go to his family doctor until December 12, 1995." She noted that appellant informed his supervisor about his injury on the day it happened.

A Form CA-20, attending physician's report, signed by Dr. Julie Carpenter, a Board-certified family practitioner, on December 18, 1995 diagnosed probable minor disc herniation. Dr. Carpenter noted the history of injury on December 8, 1995 and also noted that on December 7, 1995, appellant was moving bookcases and that his back tightened. In a corresponding December 18, 1995 report, Dr. Carpenter concluded that appellant needed to be on light duty for the next two weeks due to a minor disc herniation in his lower back stemming from his December 8, 1995 injury.[1] Additionally, an undated note from Dr. Carpenter also diagnosed that appellant had a "mild lumbar disc/nerve irritation secondary to lifting injury."

[1] A December 18, 1995 treatment note by Dr. Carpenter repeated essentially the same history of injury and also noted that the moving of bookcases on December 7, 1995 occurred at work.

There are also treatment notes from Dr. Carpenter dating from March 19 to December 26, 1995.[2] The December 26, 1995 treatment note diagnosed a lumbar strain.

By decision dated April 30, 1996, the Office of Workers' Compensation Programs advised appellant that he was not entitled to continuation of pay.[3]

In a letter dated April 30, 1996, the Office further requested that appellant submit detailed medical evidence in support of his claim for traumatic injury within 30 days.[4]

By decision dated June 6, 1996, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office specifically found that the medical evidence was not sufficient to establish the claim.

The Board finds that the case is not in posture for a decision.

An employee seeking benefits under the Act[5] 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 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.[6] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[8] Second, the

[2] Appellant also submitted a series of treatment notes from physical therapists. As a physical therapist is not a physician for the purposes of the Federal Employees' Compensation Act, these notes do not constitute medical evidence and are insufficient to establish appellant's claim; *see Jane A. White*, 34 ECAB 515 (1983). The treatment notes from Dr. Carpenter and her associates document that appellant had previous upper and lower back problems.

[3] Appellant is not appealing this decision. In any event, it is premature for the Board to consider the denial of continuation of pay as it is not yet established that appellant sustained a traumatic job-related injury. 20 C.F.R. § 10.201(a)(2).

[4] Appellant submitted medical records after the issuance of the Office's final decision. The Board has no jurisdiction to review these documents for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[5] 5 U.S.C. §§ 8101-8193.

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

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

[8] *Elaine Pendleton*, *supra* note 6.

employee must submit sufficient evidence, generally in the form of medical evidence, to establish that the employment incident caused personal injury.[9]

In this case, the Office has accepted that appellant sustained the employment incident on December 8, 1995 as alleged. The Office, however, denied appellant's claim on the grounds that the medical evidence is insufficient to establish that the employment incident caused personal injury. In this regard, the Office specifically noted that Dr. Carpenter has not issued a concrete diagnosis supported by objective evidence. The Office further stressed Dr. Carpenter's notation that appellant also moved bookcases on December 7, 1995. However, the Board notes that Dr. Carpenter provided consistent opinions that appellant's condition is employment-related and her reports are based on a history of injury that is essentially consistent with that provided by appellant and a witness. Furthermore, the fact that appellant may have also had back symptoms on December 7, 1995 after moving bookcases does not preclude him from having an injury at work on December 8, 1995. It may indicate that any injury sustained by appellant might be in the nature of an occupational disease instead of a traumatic injury.[10]

The Board also notes that appellant and the employing establishment have indicated that appellant sought treatment at the employing establishment's health unit on the date of injury. The record before the Board, however, does not contain such health records, nor is there any indication that the Office requested the same from the employing establishment. Office procedures and Board precedent contemplate that, while appellant has the burden of establishing a claim, the Office should aid in the development of a claim and assist in obtaining relevant evidence from government sources.[11]

While the reports of Dr. Carpenter offer differing diagnoses and are not sufficiently rationalized[12] to establish appellant's claim, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[13] The medical evidence submitted by appellant is not contradicted by any other medical evidence of record.

On remand, the Office should request relevant medical records from the employing establishment. The Office should also request that appellant submit records regarding his chiropractic treatment for the claimed injury. Thereafter, the Offices should further develop the evidence by providing Dr. Carpenter with a statement of accepted facts and request that she submit a rationalized medical opinion on whether appellant sustained a specific low back

[9] *Id.*

[10] *See* 20 C.F.R. § 10.5(a)(15)-(16) (defines the terms "traumatic injury" and "occupational disease").

[11] *See Richard Kendall*, 43 ECAB 790 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.7(b) (when it appears that relevant medical records are in the possession of the employing establishment, the claims examiners should request copies of such records).

[12] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[13] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

condition causally related to factors of his federal employment. After such further development as the Office deems necessary, a *de novo* decision shall be issued.

Accordingly, the June 6, 1996 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
October 7, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member