U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARA CHERRY-STRONG and U.S. POSTAL SERVICE,
POST OFFICE, Decatur, Ga.

Docket No. 97-2162; Submitted on the Record;
Issued April 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an injury in the performance of duty on October 28, 1996; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for a merit review on April 2, 1997.

On November 4, 1996 appellant, then a 41-year-old letter carrier, filed a notice of traumatic injury alleging that on October 28, 1996 she tried to lift a tray in the performance of her federal employment and she injured her neck, shoulder, back and legs. Appellant stopped working on October 28, 1996 and returned on November 4, 1996.

On October 30, 1996 Dr. Thomas A. D'Anjou, a Board-certified surgeon, indicated that appellant was totally incapacitated from October 30 through November 3, 1996. He stated appellant could begin light work on November 4, 1996. On November 13, 1996 Dr. D'Anjou stated appellant was making slow progress and he advised that she continue with light duty.

On November 15, 1996 the employing establishment controverted appellant's claim. The employing establishment stated that appellant informed her supervisor on October 28, 1996 that she may have injured her shoulder trying to lift a cardboard mail tray off another tray. The employing establishment also reported that appellant told her supervisor that this may have been a recurrence of a previous work injury which occurred on September 5, 1995. The employing establishment indicated that appellant informed her supervisor that she could complete her route following the alleged October 28, 1996 incident and that appellant worked on October 29, 1996. The employing establishment noted that it received appellant's notice of traumatic injury six days after the alleged injury. It stated that the mail trays weighed six to seven pounds and could not have caused the degree of injuries alleged by appellant. Finally, it reported that appellant sought treatment at a different medical facility than the one she went to following her September 1995 injury.

On November 20, 1996 Dr. D'Anjou completed a duty status report, Form CA-17, diagnosing a cervical and lumbar strain. He also indicated appellant suffered from weakness in the right upper extremity. He stated appellant could only perform limited duties. Dr. D'Anjou recorded a history that the injury occurred when appellant's vehicle was struck by another vehicle. In a prescription pad note also dated November 20, 1996, Dr. D'Anjou noted that appellant's medication interfered with her ability to drive, but that appellant could perform intermittent seated work. On December 4, 1996 Dr. D'Anjou completed a second duty status report, which again diagnosed a cervical and lumbar strain and recommended limited duties. On January 8, 1997 Dr. D'Anjou diagnosed cervical and lumbar strain and again indicated that appellant could only resume limited duties.

On January 10, 1997 the Office issued a "Memorandum of Conference" in which a phone call discussion with appellant was memorialized. The Office reported that appellant stated that on October 28, 1996 she was removing the top tray from a six foot high rack of trays when she felt a pull in her neck and shoulders. Appellant stated that her supervisor, Greg Studdard, assisted her in taking down the mail upon being informed that she felt a pull in her neck. Appellant indicated that a coworker helped her load her truck day upon being told about her injury and that she completed her route that day with some pain. Appellant stated that the pain continued into the next day, but that she tried to work through it. Appellant stated that the following day she had off and she scheduled an appointment with her physician. The Office reported that appellant stated that she underestimated the weight of the tray she lifted. She stated that she dropped the tray immediately upon feeling her neck pull. Appellant further stated that she was involved in an automobile accident in September 1995 when her postal vehicle was rear ended. She stated that she injured her neck at that time, but that the current injury was more down her right shoulder and right side of the neck. She also reported back pain. Appellant stated that she delayed in filing the present claim because her supervisor told her they would fill out her forms when she returned from the doctor. Finally, appellant noted that Dr. D'Anjou had been her treating physician for some time.

The Office also sent appellant a letter dated January 10, 1997, asking her to review the "Memorandum of Conference" and informing appellant of the evidence needed to establish her claim.

On January 22, 1997 appellant's supervisor, Greg Studdard, responded to the "Memorandum of Conference." He stated that appellant told him on October 28, 1996 that she may have injured her shoulder getting trays off a rack. He stated that, upon appellant's request, he easily removed her the tray for her. He further stated that appellant told him she could complete her route. He stated that appellant told him on October 29, 1996 that she was going to visit a physician and that she said she might have had a recurrence of her September 5, 1995 injury. He reported that appellant stated that she could perform her duties on that day. He indicated that October 30, 1996 was appellant's day off and that she saw a physician who issued a disability note for October 30 through November 3, 1996. The physician recommended limited-duty thereafter. Appellant's supervisor stated that appellant did not remove the tray from the rack and that she should not have had a difficult time doing so. He also indicated that appellant's injury did not slow her down on the days she worked. Finally, he indicated that appellant worked without any undue strain on her should upon her return to light duty.

In a January 23, 1997 letter, the employing establishment indicated that appellant only had to extend her arm twelve inches above her shoulder to remove the mail tray and that a full tray weighed only five to six pounds. The employing establishment submitted a picture of a mail tray to support its assertion.

By decision dated February 13, 1997, the Office denied appellant's claim because the evidence of record failed to establish that appellant sustained an injury as alleged.

On February 26, 1997 appellant requested reconsideration. In support, appellant submitted a report from Dr. Dwight E. Jones, a neurologist, stating that appellant needed a magnetic resonance imaging of her cervical and lumbosacral areas. Dr. Jones stated that appellant's history and physical findings were consistent with entrapment of nerves in the cervical oral lumbosacral spine.

By decision dated April 2, 1997, the Office found appellant's request for reconsideration was insufficient to warrant review of its prior decision because appellant neither raised substantial legal questions nor included new and relevant evidence.

The Board finds that appellant failed to meet her burden to establish that she sustained an injury in the performance of duty on October 28, 1996.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim[2] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[3] that the claim was timely filed within the applicable time limitation period of the Act,[4] 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.[5] These are 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 an employee has sustained a traumatic injury in the performance of duty, it must first 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

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[4] 5 U.S.C. § 8122.

[5] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

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

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

submit sufficient evidence to establish that the employment incident caused a personal injury.[8] An employee may establish that an injury occurred in the performance of duty as alleged, but failed to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.[9]

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an "injury." The term "injury" as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[10] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[11]

In this case, appellant has not submitted sufficient medical evidence to establish that she incurred an employment-related injury. Dr. D'Anjou, a Board-certified surgeon, supplied reports addressing appellant's neck, shoulder and back conditions. Nevertheless, none of these reports explained how and why the employment incident caused or aggravated appellant's knee condition. In fact, Dr. D'anjou indicated in his November 20, 1996 report, that appellant's injuries were due to an earlier vehicular accident in 1995 rather than the alleged October 28, 1996 work incident. Consequently, appellant has not submitted rationalized medical evidence, based upon a complete history, explaining how and why her conditions are employment related. As noted above, the question of whether an employment incident caused a personal injury generally can only be established by medical evidence. Such evidence was requested by the Office, but was not submitted by appellant.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on April 2, 1997.

Under Section 8128(a) of the Act,[12] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[13] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

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[8] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

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

[10] *See Elaine Pendleton*, 40 ECAB 1143 (1989).

[11] *See Carlone*, *supra* note 7.

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.138(b)(1).

"(ii) Advancing a point of law or fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[14]

In the instant case, appellant submitted medical reports from Dr. Jones, a neurosurgeon, to support his claim that she had an employment-related condition. In his report dated February 7, 1997, Dr. Jones failed to address whether appellant had any employment-related condition causally related to the alleged October 28, 1996 work incident. Because Dr. Jones' report failed to attribute appellant's condition to his alleged employment incident, it is not relevant to the issue of whether appellant sustained a compensable injury on October 28, 1996. Appellant, therefore, failed to submit new and relevant evidence sufficient to warrant a review of the merits pursuant to section 10.138(b)(1)(iii) of the implementing federal regulations.[15]

The decisions of the Office of Workers' Compensation Programs dated April 2 and February 13, 1997 are affirmed.

Dated, Washington, D.C.
April 28, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member

[14] 20 C.F.R. § 10.138(b)(2).

[15] 20 C.F.R. § 10.138(b)(1)(iii).