U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERMOGENS C. MARQUEZ, JR. and U.S. POSTAL SERVICE, POST OFFICE, Lynnwood, Wash.

Docket No. 97-1304; Submitted on the Record;
Issued February 1, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant carried his burden to establish that he sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely filed pursuant to section 8124(b)(1) of the Federal Employees' Compensation Act.

On August 15, 1996 appellant, then a 38-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that in July 1996 he felt a snap in the left side of his neck when he tried to lift and unhook a mailbag from a collection box. Appellant complained of continuing neck pain, but the employing establishment indicated that he did not miss any work.

In an attending physician's report dated August 15, 1996, Dr. Stacy Ivan Globerman, a Board-certified family practitioner, noted appellant's date of injury as July 17, 1996. In describing the history of the injury, however, Dr. Globerman noted that on July 9, 1996 appellant was lifting a 100-pound bag when he heard a "pop" and felt left neck pain and tingling in the left arm. According to Dr. Globerman, appellant previously experienced less severe left neck pain in March 1996 but nothing in the arm. He diagnosed left cervical radiculopathy and a likely herniated disc. Dr. Globerman check marked a box indicating that the injury was caused or contributed to by appellant lifting his mailbag. Physical therapy was prescribed. Dr. Globerman approved appellant for light duty with restrictions.

Appellant submitted an August 8, 1996 x-ray of the cervical spine showing some straightening of the cervical lordosis, which a technician opined "may be related to muscle spasm" and mild degenerative changes at C5-6.

Physical therapy treatment notes dated from July 24 through August 21, 1996 list a date of injury as July 17, 1996 and include a diagnosis of [left] "trap spasm" and left neck radiculopathy. A July 24, 1996 physical therapy note indicated that appellant felt a "pop" when

kneeling and bending two weeks ago. A July 31, 1996 physical therapy note indicated that appellant, a mail carrier, had been receiving treatment and strengthening exercises since "last March" and that he was improving until two weeks ago when he "pulled something" and experienced a spasm in the left side of his neck.

Chart notes from Dr. Globerman dated August 15 and 23, 1996 are largely illegible but indicate treatment for upper back pain and a neck injury. The date of injury is listed as July 17, 1996.

In a September 19, 1996 letter, the Office requested that appellant provide a more detailed description of his work injury.

In an October 22, 1996 decision, the Office denied compensation on the grounds that appellant failed to establish fact of injury.

Appellant subsequently requested a hearing in a letter dated and postmarked December 2, 1996.

In a January 21, 1997 decision, the Office informed appellant that his hearing request was untimely because it was not filed within 30 days of the October 22, 1996 decision. The Office, however, advised that appellant's request for further review could be equally well addressed through the reconsideration process.

The Board finds that appellant failed to carry his burden to establish that he sustained an injury in the performance of duty.[1]

An employee seeking benefits under the Act[2] 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.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In the instant case, the Office properly treated appellant's claim as one for traumatic injury and not an occupational disease. The primary difference between a traumatic injury and an occupational disease is that a traumatic injury must occur within a single work shift while an occupational disease occurs over more than one work shift.[5] On the form CA-2, appellant

[1] The Board notes that pages 30 to 34 of the record pertain to a different claimant.

[2] 5 U.S.C. §§ 8101-8193.

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

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

[5] *See* 20 C.F.R. § 10.5(a)(14-16); 20 C.F.R. § 10.20.

described a specific work incident whereby he felt a snap in the left side of his neck when he tried to lift and unhook a mailbag from a collection box. Appellant apparently can not remember the exact date of that incident, but his treating physician, Dr. Globerman, essentially described the same work incident as occurring on July 9, 1996. Because appellant has described a work incident that occurred within a single work shift his claim is considered to be a claim for traumatic injury.

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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[7]

The Office in the present case determined that appellant failed to submit sufficient evidence to establish that he experienced the employment incident at the time, place and in the manner manner alleged. The Office found no incident, stressing that the record is inconsistent as to when appellant's alleged injury occurred. The Office specifically noted that appellant listed July 1, 1996 as the date he first became aware of his neck injury, that Dr. Globerman's report described appellant's injury as occurring on July 9, 1996 when he lifted a 10-pound mailbag, while physical therapy treatment notes listed a date of injury as July 17, 1996.

The Board finds, however, that there is sufficient evidence of record from which to conclude that an employment incident occurred as appellant alleged. In the present case, appellant described the employment incident as occurring during July and not specifically on July 1, 1996 on his claim form. Furthermore, although Dr. Globerman's August 15 and 23, 1996 reports list a date of injury as July 17, 1996, the August 15, 1996 report specifically describes the history of injury as appellant having lifted a mailbag weighing over 100 pounds on July 9, 1996 which is consistent with appellant's CA-2 form. A treatment note dated July 24, 1996 also references that about "2 weeks ago [appellant] was kneeling and lifted something when he felt a pop in the left side of the neck, consistent with appellant's alleged July 9, 1996 incident. Since appellant's statement regarding an incident is given great weight[8] and in the absence of probative

[6] *Elaine Pendleton, supra* note 3.

[7] *Id.*

[8] *Thelma Rogers*, 42 ECAB 866 (1991).

evidence refuting the incident as alleged, the Board finds that appellant has established an employment incident on July 9, 1996.[9]

In order to meet his burden of proof to establish his claim, appellant must also submit probative medical evidence that establishes an injury resulting from the employment incident. In order to establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified by appellant as causing his injury and, taking these into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his opinion.[10]

Although Dr. Globerman check marked a box indicating that appellant's left cervical radiculopathy and likely herniated disc was caused or aggravated by the employment incident, she did not provide any rationale for her opinion on causal relationship.[11] In the absence of rationalized evidence to establish a causal relationship between appellant's diagnosed condition and the employment incident, the Board accordingly finds that appellant has not met his burden of proof in this case.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12]

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[13] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[14] In such a

[9] It is unclear why July 17, 1996 was listed as the date of injury on the August 15 and 23, 1996 chart notes, but the record indicates that appellant has been treated for several conditions and given that the notes are illegible, they do not directly refute appellant's account of the employment incident. This is also true of an August 19, 1996 physical therapy note which noted treatment for an injury described has having occurred when appellant stood on an overturned tray at an unspecified time. The fact that appellant had several conditions and the medical records suggest more than one incident allegedly causing injury does not necessarily mean that appellant did not lift his mailbag on July 9, 1996.

[10] *Id.*

[11] The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causal relationship. *Ruth S. Johnson*, 46 ECAB 237 (1994).

[12] 5 U.S.C. § 8124(b)(1).

[13] 20 C.F.R. § 10.131(a)-(b).

[14] *Herbert C. Holley*, 33 ECAB 140 (1981).

case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[15]

Appellant's request for an oral hearing was postmarked December 2, 1996, more than 30 days after the Office's October 22, 1996 decision. For this reason, appellant is not entitled to a hearing as a matter of right. The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved and correctly advised appellant that he could pursue the issue involved through the reconsideration process. As appellant may in fact pursue his claim by submitting to the appropriate regional Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[16]

The decision of the Office of Workers' Compensation Programs dated October 22, 1996 is affirmed as modified and the January 21, 1997 decision is affirmed.

Dated, Washington, D.C.
February 1, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[15] *Rudolph Bermann*, 26 ECAB 354 (1975).

[16] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).