U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND P. LEWANDOWSKI and U.S. POSTAL SERVICE, POST OFFICE, Buffalo, N.Y.

Docket No. 97-1667; Submitted on the Record;
Issued February 11, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a back injury in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a back injury in the performance of duty.

An employee who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[2] 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[3] An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[4] 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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining

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[1] 5 U.S.C. §§ 8101-8193.

[2] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[3] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[4] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

whether a *prima facie* case has been established.[5] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[6]

In the present case, appellant alleged, in a traumatic injury claim (Form CA-1) dated October 24, 1996, that he sustained a back injury at work "on or about September 27, 1996" when he jumped from a porch in order to avoid a dog. Appellant stopped work on October 8, 1996. By decision dated December 30, 1996, the Office denied appellant's claim on the grounds that he did not meet his burden of proof to establish the fact of injury and, by decision dated March 5, 1997, the Office denied merit review of its December 30, 1996 decision.

The Board notes that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that he sustained an employment-related back injury. Although appellant initially claimed, in a Form CA-1 dated October 24, 1996 and a letter dated November 15, 1996, that he had sustained a back injury "on or about September 27, 1996," he later claimed, in a letter dated November 29, 1996, that he sustained the injury "most likely on or about September 18, 1996."[7] The record contains several medical reports, dated between October and December 1996, in which appellant reported to physicians that he injured his back at work on various dates including September 21, 26, 27 and 1996 and "September 1996." The record also contains medical reports, dated October 7, 1996, which indicate that appellant reported he sustained a nonwork-related back injury on October 6, 1996 when he jumped from a playground apparatus.[8] These reports provide no indication, however, that appellant reported sustaining a work-related back injury in September 1996.

Appellant did not adequately explain why he reported several different dates for his alleged back injury. Nor did he sufficiently explain why he delayed a month in filing his claim and several weeks before he sought medical treatment.[9] Appellant also did not explain why he failed to mention his claimed September 1996 work injury to his physician when he sought treatment on October 7, 1996 for back complaints related to his jump from a playground apparatus on October 6, 1996. Moreover, he did not explain how he was able to work for several weeks after the claimed injury without apparent difficulty and how he was able to engage in activities such as hanging from him armpits with his children hanging onto his legs. For these

[5] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[6] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[7] Appellant stated, "I was in my chiropractor's office on September 26, 1996 seeking relief from back pain. Therefore my injury was much earlier than I believed."

[8] In a letter dated November 15, 1996, appellant indicated that on October 6, 1996 he decided to "exercise" his back by hanging from a playground apparatus by his armpits and having his two children hang onto his legs. Appellant stated that he aggravated his prior work-related back injury when he jumped four or five feet from this apparatus.

[9] Appellant indicated that he sought chiropractic treatment for his claimed work-related back injury on September 26, 1996, but the record does not contain evidence supporting this claim. The first evidence of record that appellant sought treatment for back problems is an October 7, 1996 report indicating that he sought treatment for a nonwork-related incident, his jump from a playground apparatus on October 6, 1996.

reasons, the Board notes that there is sufficient persuasive evidence to refute appellant's claim that he sustained a work-related injury in September 1996 as alleged. Therefore, the Office properly found that appellant did not meet his burden of proof to establish that he sustained a back injury in the performance of duty.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[13]

In support of his reconsideration, appellant submitted a letter in which he further discussed the details of the October 6, 1996 incident when he jumped from a playground apparatus. This matter does not, however, directly relate to the relevant issue of the present case, *i.e.*, whether appellant established the occurrence of an employment incident in September 1996. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[14] Appellant also submitted evidence which had been previously considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[15]

In the present case, appellant has not established that the Office abused its discretion in its March 5, 1997 decision by denying his request for a review on the merits of its December 30, 1996 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

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[10] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[12] 20 C.F.R. § 10.138(b)(2).

[13] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[14] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[15] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decisions of the Office of Workers' Compensation Programs dated December 30, 1996 and March 5, 1997 are affirmed.

Dated, Washington, D.C.
February 11, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member