U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY V. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, Va.

Docket No. 97-1899; Submitted on the Record;
Issued March 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an injury in the performance of duty on October 23, 1996 and; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on February 21 and March 11, 1997.

On November 12, 1996 appellant, then a 57-year-old clerk, filed a notice of traumatic injury alleging that he injured the lower right side of his back when he picked up a letter tray on October 23, 1996 in the course of his federal employment. Appellant stopped working on November 5, 1996 and returned on November 9, 1996.

In a letter dated November 15, 1996, appellant's supervisor, Don Richards, stated that appellant informed him on October 23, 1996 that his back hurt from a nonemployment-related condition. The supervisor stated that appellant decided the condition was job related on November 5, 1996. The supervisor also indicated that appellant was unhappy with his job assignment. Finally, the supervisor submitted a statement from appellant's coworker, Karen Zeigler, which indicated that appellant asked for a nurse slip on November 5, 1996 for kidney pains.

On October 25, 1996 Dr. Eric T. Schwartz, a Board-certified orthopedic surgeon, cleared appellant for light-duty work. In an undated letter, Dr. Schwartz indicated that he had treated appellant for about a year for bilateral degenerative joint disease.

A medical report dated November 6, 1996 from Access of Fairfax indicated that appellant was injured on November 5, 1996 while lifting a full letter tray. A physician or nurse, signing illegibly, diagnosed lumbar strain/radiculopathy.

A nurse at the employing establishment's health unit indicated that appellant was treated with an ice pack on November 5, 1996 for an injury sustained while lifting a full letter tray of mail.

The employing establishment records indicated that appellant told her supervisor on November 5, 1996 about an injury occurring on October 23, 1996.

On December 13, 1996 the Office requested additional information from appellant. The Office requested additional factual information concerning the employment incident and requested an opinion from appellant's treating physician. Appellant was given 30 days to respond.

Appellant subsequently submitted a report dated December 12, 1996 from Dr. William J. Carr, a Board-certified family practitioner and Dr. John K. Wall, a specialist in emergency medicine, diagnosing a low back strain. They recorded a history that appellant lifted a tray and experienced progressively worsening back pain.

On December 16, 1996 Dr. Wall diagnosed right sciatica. He stated that appellant initially injured his back when lifting a tray on December 10, 1996.

On January 7, 1997 Dr. Michael Rosner diagnosed a herniated nucleus pulposus.

In an undated statement, appellant indicated that he injured himself on October 23, 1996 while lifting a letter tray. He stated that he continued to work and performed the same tasks. Nevertheless, appellant stated that the pain worsened until it became unbearable and he went to the emergency room.

By decision dated February 4, 1997, the Office denied appellant's claim because the evidence failed to establish that he sustained an injury as alleged. In an accompanying memorandum, the Office noted that there was conflicting evidence regarding whether the claimed event, incident, or exposure occurred at the time, place and in the manner alleged. In this regard, the Office noted that appellant's supervisor reported that appellant initially informed him that his back pain on October 23, 1995 was not job related, but that appellant later changed his mind and reported that it was job related. The Office also noted that appellant complained to Karen Zeigler, a coworker, of having kidney pain on November 5, 1996 prior to seeking medical treatment. The Office further indicated that appellant reported that he injured himself on November 5, 1996 when he initially sought medical treatment. Finally, the Office noted that Dr. Schwartz cleared appellant for light duty on October 25, 1996. The Office further determined that the evidence failed to support a medical condition resulting from the alleged work incident or exposure. The Office noted none of the medical evidence described how the injury occurred. On February 14, 1997 appellant requested reconsideration. Appellant stated that he was injured on October 23, 1997 and went to the emergency room on November 5, 1996. He indicated that the pain had worsened. Appellant stated that the injury he told Supervisor Don Richards about on October 23, 1997 was a different injury from the one he experienced on that same date. He stated that he waited a week to 10 days before telling anybody of his back injury. He stated that Dr. Schwartz's October 25, 1996 light-duty letter involved a separate injury to his knees. Appellant further stated that he did not tell Karen Zeigler that he injured his kidney and

that this fact is supported by contemporaneous medical records indicating that he sought back treatment. Appellant stated that he only gave one date of injury, October 23, 1996. Finally, appellant stated that he tried to use rest to overcome the injury.

In support of his request for reconsideration, appellant submitted a report from Dr. Romney C. Anderson indicating that appellant was hospitalized for a discectomy due to a herniated nucleus pulposus.

Appellant also resubmitted Dr. Schwartz's October 25, 1996 letter indicating that appellant was eligible for light duty.

He also submitted a December 16, 1996 magnetic resonance imaging scan interpreted by Dr. Philip D. Shelton, a diagnostic radiologist, as showing a large disc herniation at the L5-S1 level.

Appellant also submitted December 19, 1996 and a January 2, 1997 reports from Dr. Robert C. Henry diagnosing a herniated nucleus pulposus.

Appellant also submitted a February 3, 1997 report from Dr. Michael Rosner diagnosing a herniated nucleus pulposus.

Appellant also submitted a December 5, 1996 report, indicating he was treated for lower back pain.

Appellant also resubmitted a January 7, 1997 opinion from Dr. Rosner indicating that appellant had a herniated nucleus pulposus.

Finally, appellant submitted a January 28, 1997 statement indicating that he injured his back while lifting a letter tray. Appellant stated that he told the person he was working with and later someone named Ken. He stated that he felt the lower back muscle pull, that the muscle became stiff, but that he continued his normal routine. He indicated that he felt he could work out the muscle strain. He stated that the pain worsened and that he went to the emergency room. Appellant stated that Dr. Schwartz's October 25, 1995 report involved a different problem and that, therefore, he felt no need to describe to him his back injury.

By decision dated February 21, 1997, the Office found that the evidence was not sufficient to vacate or warrant review of its previous decision. The Office informed appellant that he must submit a comprehensive medical opinion addressing the causal relationship of the alleged work injury.

On February 27, 1997 appellant again requested reconsideration.

In support, appellant submitted a February 4, 1997 surgical report signed by Dr. Rosner and Dr. William T. Monacci. The physicians performed surgery and diagnosed a right L5-S1 herniated nucleus pulposus.

Appellant also submitted his March 19, 1997 light-duty request.

Appellant also submitted a March 18, 1997 report from Dr. Rosner diagnosing a herniated nucleus pulposus. Appellant also resubmitted Dr. Rosner's January 7 and February 3, 1997 reports diagnosing a herniated nucleus pulposus.

Appellant also resubmitted Dr. Henry's January 2, 1997 report diagnosing a herniated nucleus pulposus.

By decision dated April 11, 1997, the Office considered appellant's request for reconsideration and found that since appellant neither raised substantive legal questions nor submitted new and relevant evidence, it was insufficient to warrant a review of the previous decision.

The Board initially finds that appellant failed to sustain an injury in the performance of duty on October 23, 1996.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his 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.[2]

In this case, appellant failed to submit rationalized medical evidence establishing that his back injury related to the alleged employment incident on October 23, 1996. In support of his claim, appellant submitted a October 25, 1996 report from Dr. Schwartz, a Board-certified orthopedic surgeon, addressing an unrelated knee injury. This opinion is not relevant to issue of whether appellant's alleged employment injury resulted in a back injury. Appellant also submitted a December 12, 1996 report from Dr. Carr, a Board-certified family practitioner and Dr. Wall, a specialist in emergency medicine, diagnosing low back strain. Although the physicians noted appellant's alleged employment incident, they failed to explain how the incident caused the injury. Their opinions are, therefore, entitled to little weight.[3] Dr. Wall's December 16, 1996 opinion diagnosing right sciatica is also not relevant to the issue because it failed to address the cause of the diagnosed condition. Finally, the January 7, 1997 opinion of Dr. Rosner, also diagnosed a herniated nucleus pulposus without relating it to the alleged employment incident. Accordingly, because appellant failed to submit sufficient reliable, probative and rationalized medical evidence to establish that his back injury related to the alleged employment incident, the Office properly denied appellant's claim in its February 4, 1997 decision.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on February 21 and April 11, 1997.

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[1] 5 U.S.C. §§ 8101-8193.

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

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

Under section 8128(a) of the Act,[4] 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,[5] 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

"(ii) Advancing a point of law or a 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.[6]

In support of his February 14, 1997 request for reconsideration, appellant again submitted medical evidence which did not address how his back condition related to the alleged employment incident. Appellant submitted an undated report from Dr. Anderson which merely diagnosed a herniated nucleus pulposus. Since this opinion failed to address the issue of the cause of appellant's condition, it is not relevant to this claim. Similarly, the report of Dr. Shelton, a diagnostic radiologist, lacks relevance as it fails to address the cause of the back injury. Moreover, appellant previously submitted the October 25, 1996 report of Dr. Schwartz. This report is, therefore, cumulative and irrelevant. The December 19, 1996 and January 2, 1997 reports of Dr. Henry also failed to address whether appellant's injury was related to the alleged employment incident. Finally, Dr. Rosner again diagnosed a herniated nucleus pulposus, but failed to address whether it was related to the alleged employment incident in his February 3, 1997 report. Since all the reports submitted in support of appellant's February 14, 1997 request for reconsideration failed to address whether appellant's injury resulted from the alleged employment incident, the Office properly denied reconsideration in its February 21, 1997 decision.

In support of his February 27, 1997 request for reconsideration, appellant submitted February 4, 1997 reports from Dr. Rosner and Dr. Monacci, a neurological surgeon and a March 18, 1997 report form Dr. Rosner. Because these reports only diagnosed a herniated nucleus pulposus, without further explanation, they are not relevant to appellant's claim. Appellant also resubmitted Dr. Henry's January 2, 1997 report and Dr. Rosner's January 7 and February 3, 1997 reports. This cumulative evidence is not sufficient to reopen appellant's claim. The Office, therefore, properly denied reconsideration in its April 11, 1997 decision.

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated April 11, February 21 and February 4, 1997 are affirmed.

Dated, Washington, D.C.
March 16, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member