U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET M. BROWN and DEPARTMENT OF COMMERCE, WORKERS' COMPENSATION BRANCH, Washington, D.C.

Docket No. 97-2107; Submitted on the Record;
Issued May 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an employment-related injury sometime in December 1995; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On September 30, 1996 appellant, then a 62-year-old program assistant filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained an employment-related torn cartilage in her right knee sometime in December 1995. In a subsequent letter dated September 30, 1996, appellant states that in December 1995 she went into the fourth floor bathroom of her employing establishment where she slipped on some water that was on the floor and fell on both of her knees. She explains that she did not report this incident to her health unit because she felt fine and there were no bruises, scratches, pain or soreness until she started experiencing severe pain in her right knee the last week of April 1996, approximately five months later. Appellant stated that she then sought medical treatment from Dr. Delbert L. Perkins, a practicing internist who diagnosed her with tendinitis. She noted that her condition had gotten progressively worse, and on June 25, 1996, while working in her yard kneeling down on both knees, she tried to get up and her knee popped, locked and she could not straighten it. She had severe pain and returned to her physician who prescribed medication for tendinitis and she was on sick leave for two days. Appellant also stated that she continued to have pain and locking of the knee so she sought additional treatment from Dr. Mark Harlen Pillor, a practicing family practitioner, who took x-rays and referred her to Dr. Mehrdad Malek, a Board-certified orthopedic surgeon, who performed a magnetic resonance imaging (MRI) scan which showed a torn cartilage. Appellant was referred to a Dr. Alvaro Sanchez on August 2, 1996 who advised surgery.

By letter dated September 16, 1996, Dr. Perkins requested that the Office provide authorization for appellant to have surgery. The record shows that appellant lost no time from work following the alleged incident of December 1995.

The employing establishment has controverted appellant's claim for continuation of pay because appellant neither submitted her notice of traumatic injury claim, Form CA-1, within the 30-day time period allowed, nor presented the exact date and time of the alleged incident.

In a letter dated October 23, 1996, the Office advised appellant of the type of factual and medical evidence needed to establish her claim including, dates of examination and treatment, history of injury given by the physician, a detailed description of findings, results of x-rays and laboratory tests, a diagnosis, and a clinical course of treatment. In particular, appellant was advised to provide the Office with a physician's opinion supported by medical rationale explaining the causal relationship between appellant's diagnosed condition or disability and the incident as reported. Appellant was then advised that her physician's discussion of the issue of causal relationship was crucial to this claim. Appellant was allotted 30 days within which to submit the requested evidence. No further additional evidence was received.

Appellant responded to the Office's October 23, 1996 informational letter by submitting practically illegible/unreadable progress notes from Dr. Sanchez which range in various dates from March 5 through August 27, 1996. In a April 29, 1996 progress note, Dr. Sanchez presented the history of injury as "[appellant] fell at work in the bath room Dec[ember] 1995 has experienced swelling and pain since." However, in progress notes dated July 30 and August 27, 1996, Dr. Sanchez presented the history of injury as "[appellant] was shopping at the Safeway [at] Addison [Road] Plaza on Saturday July 27, 1996 when [appellant] slipped and fell on the wet floor, landing on L [left] knee and rolling on to the R [right] knee." Appellant states that her right knee was painful and swollen and at times the right knee gave away. Dr. Sanchez then indicated that appellant had sprained her left knee and aggravated the previous injury to her right knee. Dr. Sanchez also noted that appellant's sprain of the left knee and her aggravation of the right knee which was generated by the fall of July 27, 1996 had been resolved. Dr. Sanchez went on to diagnose appellant with a continued right knee medial meniscus tear and encouraged her to have surgery on her right knee, and also presented a diagnosis of sprain to left knee and aggravation of previous injury to the right knee.

Thereafter, in a letter dated November 19, 1996, the Office again advised appellant to submit further additional evidence as requested in the Office's October 23, 1996 informational letter within five working days. However, appellant failed to submit the requested information.

In a December 10, 1996 decision, the Office denied appellant's claim for compensation for the reason that appellant failed to establish fact of an injury as alleged. In an accompanying memorandum, the Office stated that appellant was advised of the deficiencies in her claim on October 23 and November 19, 1996, and afforded an opportunity to provide the requested factual and medical evidence; however, the requested documentation was not submitted.

By correspondence dated December 24, 1996, appellant requested reconsideration of the Office's December 10, 1996 decision and submitted additional evidence, including her response to the Office's November 19, 1996 informational letter. This evidence includes an operations

procedural report from Dr. Sanchez dated October 9, 1996, which describes appellant's right knee operation and presents appellant's preoperative and postoperative diagnosis of torn right medial meniscus, and copies of previously received progress notes ranging in dates from April 2, to June 25, 1996.

The employing establishment responded on behalf of appellant, in a letter dated December 24, 1996 and explained that appellant was still awaiting medical documentation from the doctor's community hospital. However, no further evidence was received.

In a decision on reconsideration dated March 14, 1997, the Office denied appellant's application for review because she "neither raised substantive legal questions nor included new and relevant evidence."

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained an employment-related injury sometime in December 1995.

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 the 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 the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances of his or her subsequent course of action.[3] An employee has not met his or her burden of proof 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 the failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[5]

Appellant asserts that she sustained an employment-related torn cartilage in her right knee sometime in December 1995. Appellant stated in a letter dated September 30, 1996, and accompanying notice of traumatic injury claim, Form CA-1, that she went into the fourth floor bathroom of her employing establishment, where she slipped on some water on the floor and fell on both knees back in December 1995. Appellant then explained that she did not report the December 1995 incident to her health unit because she felt fine and there were no bruises, scratches, pain or soreness until the last week in April 1996 (approximately five months after the alleged incident) when she started experiencing severe pain in her right knee.

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[1] 5 U.S.C. §§ 8101-8193.

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

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

[4] *Karen E. Humphrey*, 44 ECAB 908 (1993); *George V. Lambert*, 44 ECAB 870 (1993)

[5] *Rex A. Lenk*, 35 ECAB 253 (1983).

In addition, appellant's claim is a letter dated September 30, 1996, when appellant filed notice of traumatic claim and mentioned an off-duty incident that occurred on June 25, 1996 while she was working in her yard kneeling down on both knees. Appellant recalls that she was trying to get up when her knee popped and locked, placing her in severe pain and unable to straighten her knee.

Appellant then claims in a July 30, 1996 progress note from Dr. Sanchez, that a second off-duty incident occurred on July 27, 1996. Dr. Sanchez stated that "[appellant] was shopping at Safeway at the Addison [Road] Plaza on Saturday July 27 1996 when [appellant] slipped [and] fell on wet floor. Landing on L [left] knee rolling on to R [right] knee. Dr. Sanchez indicated that appellant has sprained her left knee and aggravated her previous injury to the right knee.

Further in weakening appellant's claim, the Office instructed appellant to provide the actual date and time of the original injury, and the record does not contain appellant's actual date or time of injury. There is no suggestion that appellant's superior had any knowledge of the alleged bathroom fall, she stated that she received no bruises, scratches, pain or soreness directly following the December 1995 incident until she started experiencing severe pain in her right knee the last week in April 1996, approximately five months later. In addition, according to a unsigned and virtually illegible progress note dated April 29, 1996, appellant first sought medical treatment for her alleged December 1995 incident (approximately six months after the alleged incident and one month after appellant started experiencing severe pain in her right knee). Appellant then waited until September 30, 1996, and/or until she had allegedly been involved in three separate incidents occurring in December 1995, June 25 and July 30, 1996, before filing her notice of traumatic injury claim, Form CA-1. Appellant also continued to work following the alleged December 1995 incident without apparent difficulty. These inconsistencies, which neither appellant nor her physicians of record have explained, cast serious doubt on the validity of appellant's claim. For these reasons, appellant has failed to meet her burden of proof in establishing that the employment incident of December 1995 occurred as alleged, and has failed to establish fact of injury. The Office properly denied appellant's claim for benefits.[6]

The Board further finds that the refusal of the Office in its March 14, 1997 decision to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a) of the Act did not constitute an abuse of discretion.[7]

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wished the Office to reconsider and the reasons why the decision should be changed by:

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

[6] As appellant has failed to establish the original December 1995 injury, she cannot establish that she sustained an aggravation of that incident.

[7] Section 8128(a) provides in relevant part: "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

"(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." [8]

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.[9] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[10]

Appellant has neither shown that the Office erroneously applied or interpreted a point of law, nor has she advanced a point of law or fact not previously considered by the Office, nor has she submitted relevant and pertinent evidence not previously considered by the Office. Appellant's submission of duplicated progress notes dated April 29 and June 25, 1996 and Dr. Alvaro Sanchez's operation report of October 9, 1996, failed to provide a history of injury, a date of injury, or an opinion on causal relationship between the claimed condition and the alleged employment-related incident. Therefore, these documents were not relevant or pertinent to the main issue presented on appeal, *i.e.*, whether appellant sustained an employment-related injury in the performance of duty sometime in December 1995. Evidence which is not relevant to the pertinent issue of a case does not require reopening a case for a merit review.[11] There was no new and relevant evidence to warrant a merit review of the Office's decision.

Appellant failed to raise substantive legal questions, and/or provide new and relevant evidence to warrant a merit review of the Office's decision. Therefore, although the evidence submitted by appellant on reconsideration, was evidence not previously considered by the Office, they essentially repeat evidence which was already considered by the Office. As appellant's requests for reconsideration failed to meet at least one of the three requirements for obtaining a merit review of this case, the Board finds that the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

[8] 20 C.F.R. § 10.138(b)(1)

[9] 20 C.F.R. § 10.138(b)(2)

[10] *Eugene F. Butler*, 36 ECAB 393 (1984).

[11] *James E. Salvatore*, 43 ECAB 309 (1991); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The decisions of the Office of Workers' Compensation Programs dated March 14, 1997 and December 10, 1996 are affirmed.

Dated, Washington, D.C.
May 21, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member