U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FERNANDO DEL ROSARIO and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

Docket No. 98-837; Submitted on the Record;
Issued October 25, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on July 3, 1997 as alleged.

On July 7, 1997 appellant, then a 46-year-old mail carrier, filed a notice of traumatic injury, Form CA-1, alleging that while he was delivering the mail on July 3, 1997 at 1:00 p.m., he twisted his right ankle on an uneven sidewalk. On the reverse of the claim form, appellant's supervisor controverted the claim stating that appellant "completed his tour after returning from the street and went home without mentioning that he had injured himself." Appellant's supervisor further added that when appellant called in sick on July 5, 1997 he again did not mention his injury.

Appellant's employing establishment submitted statements from the Director of customer service and from appellant's two supervisors. The Office of Workers' Compensation Programs received these statements on July 14, 1997. In a statement dated July 7, 1997, the manager of customer service, whose last name is illegible, stated that appellant told her that he had sustained an injury on July 3, 1997. She noted that appellant did not fill out any paperwork and she wanted to controvert the claim.

In a statement dated July 7, 1997, V. Gwaltney, one of appellant's supervisors, said that, even though there were two supervisors at the station on July 3, 1997, appellant failed to notify either of them of the alleged incident. When Mr. Gwaltney spoke with appellant on July 5, 1997 appellant again failed to mention the alleged incident. Appellant told him only that his leg was hurting and that the "doctor said that he went back to work too soon." A. Meza, the other supervisor, stated that when appellant came back from his route on July 3, 1997 he failed to mention any leg injury. Appellant stated only that "he overdid it." On July 7, 1997 appellant telephoned him and told him that he could not work that day. Mr. Meza stated that appellant then "walked or limped in ten minutes later." Appellant was sent home because he was not needed.

By letter dated July 28, 1997, the Office requested detailed medical evidence from appellant. In response, appellant submitted medical reports from Dr. Pushpa Bhansali, a Board-certified orthopedist. Appellant submitted a July 3, 1997 medical opinion from Dr. Bhansali, which was received by the Office on August 9, 1997.[1] In the duty status report, he reported that appellant told him that he twisted his right ankle on an uneven sidewalk. Dr. Bhansali concluded that appellant was unable to work. In an authorization for medical treatment, Form CA-16, dated July 7, 1997 and also received by the Office on August 9, 1997 Dr. Bhansali again reported appellant's statement that he twisted his right ankle on the sidewalk while he was delivering mail. In this report, Dr. Bhansali, did not provide a specific diagnosis, noting only fracture care, cast and x-rays. Additionally, Dr. Bhansali found no evidence of concurrent or preexisting injury, checked "yes" that the condition was caused or aggravated by an employment activity and opined that appellant was totally disabled from July 7, 1997, until an unknown date.

In an attending physician's report, Form CA-20, which was received by the Office on August 18, 1987, Dr. Bhansali examined appellant on July 28, 1997 and opined that appellant was totally disabled from July 3, 1997 until August 11, 1997. He further indicated that appellant's "condition was caused or aggravated by an employment activity." On that day, the Office also received a duty status report dated July 28, 1997. Dr. Bhansali indicated that appellant could resume work on August 11, 1997.

In addition to the medical evidence, appellant submitted a statement dated July 14, 1997, received by the Office on August 18, 1997, in which he explained why he did not immediately notify his supervisors that he had injured his right ankle on July 3, 1997. Appellant stated that he had been too embarrassed to tell his supervisors that he sustained another injury on July 3, 1997 since that had been his first day of work since February 28, 1997. At the time of the injury, he thought it was only a minor twisted muscle but ultimately sought medical care when the pain became unbearable.

An accident report dated August 21, 1997, noted appellant's statement that on July 3, 1997 "while walking down a sidewalk to deliver mail, he stepped on an uneven block and twisted his right ankle."

Appellant's employing establishment also submitted a statement containing an investigator's findings regarding the condition of the sidewalk, where the alleged incident took place. In the statement dated August 29, 1997, Curtis Johnson stated: "ICS Juanita Davis states that safety report shows sidewalk which caused alleged injury was intact."

By decision dated October 3, 1997, the Office denied appellant's claim for failure to establish fact of injury, as alleged. In support, the Office found that there was no evidence to support the fact that the alleged injury occurred in the time, place and in the manner alleged. Additionally, the Office found that appellant failed to present a comprehensive medical report.

[1] The Office finds that appellant did not seek medical care until July 6, 1997. The record contains two conflicting dates of care from Dr. Bhansali. In a duty status report dated July 3, 1997, Dr. Bhansali stated that he examined appellant on that date. In an attending physician's report (CA-20) dated July 28, 1997, Dr. Bhansali indicates that July 7, 1997 was the date of his first examination.

The Board finds that the case is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation 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 period 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 the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another.

The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred. An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action. A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident. 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 cast doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantive evidence.[5] An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[6]

In the present case, the Office found that delayed notification and the fact that appellant did not seek immediate medical treatment, but instead returned to work following the incident, together with a lack of rationalized medical opinion evidence, raised sufficient doubt to find that appellant had not established that the injury occurred in the performance of duty, as alleged. The Board, however, finds that appellant presented sufficient evidence to establish that the incident occurred in the time, place and in the manner alleged.[7] While appellant did not immediately

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton,* 40 ECAB 1143, 1145 (1989).

[4] *Daniel J. Overfield,* 42 ECAB 718, 721 (1991).

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

[6] *Louise F. Garnett,* 47 ECAB 639, 643-44 (1996).

[7] *Id.*

notify his supervisors that he injured himself on July 3, 1997 he did notify them four days later. In his narrative statement, appellant provided a rational explanation for his failure to immediately notify his supervisors, stating that he first thought it was only a minor twisted muscle. Moreover, it was not unreasonable for appellant to wait until July 7, 1997 to report the injury to his supervisors, in view of the July 4th Holiday and his sick day on July 5, 1997. Furthermore, Supervisor Meza's recollection that appellant reported on July 3, 1997 that he "overdid it" is not inconsistent with the occurrence of the July 3, 1997 incident. In addition, appellant's assertion that he broke his ankle while delivering mail is also corroborated by the histories contained in all of the medical reports of record, with appellant's statement on his claim form, his statement dated July 14, 1997, the accident report and with his supervisors' statements.

The Office further discounted appellant's testimony that he fell on uneven sidewalk because it was inconsistent with the photographs presented by appellant's employing establishment which "do not show any irregularity in the sidewalk" but "show the smoothness of the sidewalk." The Board notes that the copies of the photographs in the record are of such quality that it cannot be determined whether the sidewalk in question had an irregularity. Contrary to the Office's determination, the important factor is whether the claimed walking and twisting occurred as alleged not whether the sidewalk's irregularities were particularly unusual.[8] Furthermore, appellant's statement that he twisted his right ankle while delivering the mail is consistent with all of the other evidence of record. The Board finds that the evidence of record is sufficient to establish that the incident occurred at the time, place and in the manner alleged.

The question, therefore, becomes whether appellant injured himself in the performance of duty on July 3, 1997, as alleged.

The second requirement to establish fact of injury is that the employee must submit sufficient evidence, usually in the form of medical evidence, to establish that the employment incident caused a personal injury. As part of this burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition.[9]

In the instant case, the record contains several medical opinions from Dr. Bhansali, who opined that appellant's fracture of the fifth metatarsal of the right foot was caused by the incident on July 3, 1997. In the duty status report dated July 3, 1997, he recited appellant's account of the July 3, 1997 incident and concluded that the diagnosis was due to the specific injury. In the authorization for treatment, Form CA-16, dated July 7, 1997, Dr. Bhansali made no specific diagnosis but indicated with a checkmark "yes" that appellant's condition was caused by his employment activity. Form CA-16 required that the physician explain his rationale only if there were any doubt. In the Form CA-20 dated July 28, 1997, Dr. Bhansali provided a diagnosis and

[8] *See Anna Strehl (William Strehl)*, 2 ECAB 74, 79 (1948) (where the Board held that there is no necessity for a showing of unusualness or extraordinariness in the factors producing disability since ordinary or normal working conditions can, in some situations, be competent producers of disease).

[9] *Gary R. Sieber*, 46 ECAB 215, 224 (1994); *Melvina Jackson*, 38 ECAB 449-50 (1987); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

indicated with a checkmark "yes" that appellant's condition was caused by his employment activity. He failed to elaborate on the causal relationship, as required. On the duty status report form dated July 28, 1997, Dr. Bhansali diagnosed fracture of the fifth metatarsal of the right foot and indicated that the history given to him by appellant was consistent with the injury. As Dr. Bhansali did not more fully explain the relationship between appellant's fracture of the fifth metatarsal of the right foot, his opinion is not sufficiently rationalized to establish that appellant's diagnosed condition is causally related to the July 3, 1997 employment incident. Nonetheless, the Board finds that the medical reports submitted by appellant, taken as a whole, raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[10] Additionally, the Board notes that in this case the record contains no medical opinion contrary to appellant's position. The Board will remand the case for further development of the medical evidence.

The Board further notes that, regardless of the outcome of the further medical development directed by this decision, appellant is entitled to reimbursement for or payment of expenses incurred for medical treatment by Dr. Bhansali for the period beginning July 7, 1997, the date the employing establishment official signed the Form CA-16, authorization for examination and/or treatment, until 60 days, thereafter, (as such authorization was not terminated before that period). By Form CA-16, authorization for examination and/or treatment, signed by an employing establishment official on July 7, 1997 the employing establishment authorized Dr. Bhansali to provide medical care for a period of up to 60 days from that date. The employing establishment's authorization for appellant to obtain medical examination and/or treatment created a contractual obligation to pay for the cost of necessary medical treatment and emergency surgery regardless of the action taken on the claim.[11]

[10] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820-21 (1978).

[11] *Robert F. Hamilton*, 41 ECAB 431 (1990); *Frederick J. Williams*, 35 ECAB 805 (1984); 20 C.F.R. § 10.403.

The October 3, 1997 decision of the Office of Workers' Compensation Program is set aside and the case is remanded for further action consistent with this opinion.[12]

Dated, Washington, D.C.
October 25, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[12] On appeal, appellant submitted additional evidence which was not before the Office at the time it issued its October 3, 1997 decision. Inasmuch as the Board cannot consider evidence that was not previously considered by the Office, we cannot consider this evidence on appeal; *see* 20 C.F.R. § 501.2(c).