U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PRAVIN M. PATEL and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

Docket No. 00-228; Submitted on the Record;
Issued December 6, 2000

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on March 31, 1999, as alleged; and (2) whether the Office of Workers' Compensation Programs, by its July 13, 1999 decision, abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On April 30, 1999 appellant, then a 52-year-old, former casual worker, filed a notice of traumatic injury (Form CA-1) alleging that on March 31, 1999 he suffered neck pain from pulling down a bag from a cage. On the reverse side of the form, appellant's supervisor stated, "I did not witness the incident nor was I made aware of it when it happened." She also stated that appellant stopped work on April 2, 1999.[1]

Accompanying the claim, the employing establishment submitted an April 2, 1999 employing establishment letter revealing that appellant was terminated because he was physically unable to perform the duties of a mailhandler due to lifting restrictions; a May 5, 1999 statement from appellant's supervisor in which she stated that on April 1, 1999 she was informed that appellant had requested assistance in "lifting bags out of the cage" and that he told her he had had back surgery and weight restrictions of no more than 40 pounds; an April 13, 1999 x-ray of the cervical spine by Dr. John N. Bode, who specializes in diagnostic radiology, who interpreted it as showing paravertebral muscle spasm; an April 12, 1999 report by Dr. Jose Pallares, who specializes in occupational medicine, and stated, "[Appellant] claims that some time ago, he worked just for one week and went off. He was working again for three days when he started to develop pain in his neck and lower back. The pain has no radiation to the upper extremities or lower extremities and he has no numbness or tingling sensation." Dr. Pallares diagnosed cervical strain and lower back strain which was treated with medicine, and restricted duty of no lifting over 10 pounds, and physical therapy. April 22, 1999 office notes by

[1] Appellant was terminated effective April 2, 1999.

Dr. Pallares indicated that appellant was asymptomatic for neck and lumbar pain and discharged him to return to duty. An April 22, 1999 activity status report by Dr. Pallares also indicated that appellant was released from care and could return to regular duty on that day.

By letter dated May 17, 1999, the Office requested detailed factual information from appellant. Specifically, to explain the delay in reporting the incident, explain discrepancies in the history of the injury on his claim form and that given to Dr. Pallares, explain the delay in seeking medical care and describe his condition between the date of injury and when he first received medical treatment. By another letter dated May 17, 1999, the Office requested factual information from the employing establishment.

By decision dated June 18, 1999, after receiving no response from appellant, the Office denied appellant's claim on the grounds that fact of injury was not established.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on March 31, 1999, as alleged.

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, and that the claim was filed within the applicable time limitations of the Act.[3] An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,[4] that the injury was sustained while in the performance of duty,[5] and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[7]

In a traumatic injury case, the employee must establish by the weight of reliable, probative and substantial evidence that the occurrence of an injury is in the performance of duty at the time, place and in the manner alleged and that the injury resulted from a specific event or incident.[8] The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9]

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[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Robert A. Gregory*, 40 ECAB 478 (1989).

[5] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *Steven R. Piper*, 39 ECAB 312 (1987).

[7] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] *See Joshua Fink*, 35 ECAB 822, 823-24 (1984).

[9] *Mary Joan Cappolino*, 43 ECAB 988 (1992); *Eric J. Koke*, 43 ECAB 638 (1992).

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 whether a *prima facie* case has been established.[10] 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.[11]

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Appellant did not notify his supervisor of the alleged injury until he filed his claim, approximately five weeks after the alleged incident. Even though on April 1, 1999, just one day after the alleged incident, appellant told his supervisor that he needed help in lifting bags of mail from a cage because he had a weight lifting restriction of no more than 40 pounds, appellant never mentioned a March 31, 1999 incident to her. He never mentioned the incident to anyone and he continued to work on March 31, 1999 without apparent difficulty following the alleged incident. He failed to obtained medical treatment until April 12, 1999, approximately two weeks after the alleged incident and at that time provided the doctor with a different history of injury from that stated on his claim form. Appellant was terminated from his mailhandler position effective April 2, 1999.

It is appellant's responsibility to establish how, when and where he sustained an injury. By letter dated May 17, 1999, appellant was given the opportunity to clarify the discrepancies in the details of the alleged injury, but failed to do so. In addition, none of the medical evidence submitted provided an accurate history of injury, or related a medical condition to an alleged employment-related incident on March 31, 1999.

In view of the inconsistencies in appellant's statements regarding how, where and when he sustained his injury and the lack of contemporaneous medical evidence, the Board finds that there is insufficient evidence to establish that appellant sustained an injury to his neck in the performance of duty on March 31, 1999, as alleged.

The Board further finds that the Office, by its July 13, 1999 decision, did not abuse its discretion by refusing to reopen appellant's case for further review of the merits of the claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[12] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of these three

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

[11] *Robert A. Gregory*, *supra* note 4; *Thelma S. Buffington*, 34 ECAB 104, 109 (1982)

[12] 20 C.F.R. § 10.606(b)(2); *see also* 5 U.S.C. § 8128.

requirements, the Office will deny the application for review without reviewing the merits of the claim.[13]

In his June 29, 1999 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, advance a relevant legal argument not previously considered by the Office, or submit new and relevant evidence. Appellant stated that he was injured on March 31, 1999 while lifting, thought he would get better and when he did not sought medical treatment, and filed a claim when he received the form from his supervisor. As appellant's June 29, 1999 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

The decisions of the Office of Workers' Compensation Programs dated July 13 and June 18, 1999 are affirmed.

Dated, Washington, DC
December 6, 2000

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[13] 20 C.F.R. § 10.138(b)(2).