U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY TUGGERSON and U.S. POSTAL SERVICE,
POST OFFICE, Torrance, CA

Docket No. 98-1045; Submitted on the Record;
Issued January 21, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant established that she sustained a back injury in the performance of duty.

Appellant, a 56-year-old maintenance custodial laborer, filed a notice of occupational disease and claim for compensation alleging that she sustained a back condition in the performance of duty. She noted that she first realized her condition was caused or aggravated by her employment on July 9, 1997. The CA-2 form was signed by appellant on June 14, 1997 but was not date-stamped as received by the Office of Workers' Compensation Programs until July 24, 1997. The employing establishment indicated on the reverse side of the CA-2 form that appellant first reported her condition to her supervisor on July 24, 1997. She was off work from July 9 to September 26, 1997, when she returned to limited duty with restrictions.

Attached to the CA-2 form, appellant submitted a personal statement also dated "June 14, 1997." Appellant described her job duties[1] and noted that she was cleaning under the carrier cases on June 9, 1997 when she felt discomfort in her lower back. She stated that she informed her supervisor, Gary Von Smallwood, about her back condition on June 20, 1997, that she took annual leave to rest her back from June 25 to June 30, 1997 and that when she returned to work on June 30, 1997, she reported her back discomfort to Remy Pacion, another supervisor. According to appellant, her back pain intensified on July 8, 1997 and she sought medical treatment.[2]

[1] She stated that her job duties included bending, stretching and twisting the body to clean areas under and behind each carrier case.

[2] Appellant submitted medical records pertaining to a February 25, 1997 wrist injury which is not relevant to the instant case.

In a facsimile transmission dated August 12, 1997, Mr. Smallwood indicated that since appellant lost her driving privileges on June 9, 1997, she was reassigned to clean in the delivery units for fours hours each workday. He stated that he was not informed that appellant injured her back but noted that Mr. Pacion was so informed.

In a "Certificate of Injury/Illness and Return to Work," it was noted that appellant was treated on June 10, 1997 for work-related stress. There was no mention of a back injury or back condition.

In an attending physician's report (Form CA-20), dated July 9, 1997, Dr. Robert W. Hunt, a Board-certified orthopedic surgeon, noted that appellant was bending at work on June 9, 1997, which caused mid and lower back pain. He diagnosed lumbosacral strain with secondary radiculopathy in the left lower extremity and check marked a box indicating that appellant's condition was caused by bending in her employment. He recommended physical therapy and noted that appellant was temporarily totally disabled from July 9 to 23, 1997.

In a July 16, 1997 report, Dr. Hunt related that appellant sustained an injury to her lower back on June 9, 1997 when she was required to bend and clean under carrier cases for approximately three hours. He further related that appellant did not initially report the injury because she thought the back pain would go away, but she noted an increase in her symptoms as she continued performing her duties, specifically on June 20, 1997 when she had to pull a trash bag and was having a lot of pain in her back. According to Dr. Hunt, appellant stated that she treated her symptoms with Motrin and then reported her symptoms to her supervisor on June 20, 1997. He noted appellant's subjective complaints and physical findings. Dr. Hunt opined that appellant sustained a lumbosacral strain with secondary radiculopathy into the left lower extremity while working on June 9, 1997.

In a supplemental report dated August 5, 1997, Dr. Hunt indicated that appellant was seen on June 23, 1997 for follow-up treatment regarding her June 9, 1997 work injury. He requested permission to obtain a magnetic resonance imaging (MRI) scan and noted that appellant was to begin a course of physical therapy. Dr. Hunt concluded that appellant remained totally disabled from work.

By letter dated September 17, 1991, the Office notified appellant that her claim was being processed as a traumatic injury alleged to have occurred on June 9, 1997. The Office requested additional information and evidence.

In a duty status report (Form CA-17) dated September 26, 1997, Dr. Hunt released appellant to limited duty with restrictions.

By decision dated October 9, 1997, the Office denied appellant's claim for compensation on the grounds that she failed to establish fact of injury.

In a statement dated October 12, 1997, appellant alleged that she advised her supervisor, Mr. Smallwood, of her back pain on June 20, 1997 but he ignored her request for a workers' compensation claim form. She indicated that she had been assigned a new and more strenuous job assignment on June 9, 1997 by her supervisor in retaliation and that she was supposed to be

working in a modified position due to a prior, work-related wrist injury. She stated that while she experienced back pain that day she thought she would develop the strength and stamina to perform her duties. She further stated that it did not "take 16 days to realize that [she] needed to rest her back, or to request some relief from management, but [she] could not afford to be off for financial reasons and given her prior experiences with [her supervisor concerning leave requests] she did not expect him to respond in a reasonable manner." Appellant alleged that she told her psychiatrist at Kaiser Permanente on June 10, 1997 that she was experiencing back pain. She noted, however, that she did not seek treatment for her back pain at Kaiser because she was not happy with the treatment she received there for her wrist injury.

By letter dated October 28, 1997, appellant requested reconsideration. She stated that she considered her claim to be one for an occupational disease and not a traumatic injury. She noted that her CA-2 claim form was actually filed by her on July 14, 1997 and not June 14, 1997, which was a typographical error. According to appellant, she did not seek medical treatment on June 10, 1997 because she thought the back discomfort was to be expected for the amount of bending and stooping she had performed that day, but when her symptoms increased with further work activity during the following weeks, she realized that her pain was not going to go away without medical attention. She further stated that she noticed that her condition was getting worse on June 20, 1997 and she alleged that she contacted an orthopedic doctor on June 27, 1997 but was unable to get an appointment until July 9, 1997.

In a November 13, 1997 decision, the Office denied modification following a merit review of the claim.

The Board finds that appellant failed to establish that she sustained a back injury in the performance of duty.[3]

An employee seeking benefits under the Federal Employees' Compensation Act[4] 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 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.[5] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

In the instant case, the Office properly treated appellant's claim as one for traumatic injury and not an occupational disease. The primary difference between a traumatic injury and

[3] Appellant submitted additional evidence subsequent to the Office's November 13, 1997 decision. The Board, however, does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joe D Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

[6] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

an occupational disease is that a traumatic injury must occur within a single work shift while an occupational disease occurs over more than one work shift.[7]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[9] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.[10]

The Office in the present case, determined that appellant failed to submit sufficient evidence to establish that he experienced the employment incident at the time, place and in the manner alleged. The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.[11] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action.[12] 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 or she has established his or her claim.[13]

In reaching its determination with respect to fact of injury, the Office specifically noted that appellant had not reported a back injury on June 9, 1997 and stressed that she did not seek medical treatment until one month after the alleged employment incident. Despite the Office's analysis, however, an employee's statement alleging that an incident occurred at a given time, place and in a given manner is of great probative value and will stand unless refuted by strong persuasive evidence.[14] Appellant explained that she first experienced back pain after lifting while in a new job assignment on June 9, 1997 but believed her pain would subside and was

[7] *See* 20 C.F.R. § 10.5(a); 20 C.F.R. § 10.20.

[8] *Elaine Pendleton, supra* note 5.

[9] *Id*.

[10] *Id.*

[11] *Elaine Pendleton, supra* note 5.

[12] *See Gene A. McCracken*, 46 ECAB 593 (1995); *Joseph H. Surgener,* 42 ECAB 541 (1991).

[13] *See Constance G. Patterson*, 41 ECAB 206 (1989).

[14] *Id.*

merely the result of poor conditioning. The employing establishment has acknowledged that appellant was given a new work assignment on June 9, 1997. Although appellant did not immediately seek medical treatment for her back condition, the record does not refute her allegation that she experienced a June 9, 1997 incident at work after lifting. Appellant noted she rested her back during the last week of June 1997 while she was on annual leave. After appellant's return to work on June 30, 1997, she reported her continuing back symptoms to a supervisor, which is also confirmed by the employing establishment. Appellant has stated and it is also not refuted in the record, that she sought medical treatment on June 27, 1997 but was unable to get an appointment with Dr. Hunt until July 9, 1997. Dr. Hunt reported the same history of injury provided by appellant to the Office, noting that she was cleaning carrier cases that date. After being advised of her condition, appellant then filed a claim for compensation on July 24, 1997. Appellant's contention that she experienced back pain on June 9, 1997 while cleaning carrier cases is not contradicted by the record and there is no strong and persuasive evidence refuting appellant's statements. The Board finds that appellant has established that she sustained an employment incident on June 9, 1997.

Notwithstanding, the Board finds that the medical evidence of record is insufficient to establish that appellant's incident of June 9, 1997 caused an employment injury. As previously noted, appellant has the burden of proof to establish a causal relationship between the employment incident and any disability related to her back condition.[15] In support of her claim, appellant submitted several reports from Dr. Hunt, her attending physician, which attribute appellant's lumbosacral strain to the June 9, 1997 incident at work, but which fail to provide a rationalized opinion on the issue of causation. Specifically, Dr. Hunt reported degenerative changes at L5-S1 and sclerosis on x-ray but the doctor failed to address the role of appellant's preexisting degenerative back disease to her alleged disability from work.

Neither the fact that a condition became apparent during a period of employment, nor the belief of appellant that the condition was caused or aggravated by an employment incident or factors of her employment, is sufficient to establish such a causal relation.[16] Inasmuch as appellant did not submit rationalized medical opinion evidence in support of her claim, the Board finds that the Office properly denied compensation benefits.

[15] *See Marck A. Cacchione*, 46 ECAB 148 (1994); *Elaine Pendleton*, *supra* note 5.

[16] *Ruby I. Fish*, 46 ECAB 276 (1994); *Jerry D. Osterman*, 46 ECAB 500 (1995).

The decisions of the Office of Workers' Compensation Programs dated November 13 and October 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 21, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member