

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD W. MALANIAK and U.S. POSTAL SERVICE,
POST OFFICE, Edison, NJ

*Docket No. 98-1118; Submitted on the Record;
Issued January 14, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's claim for a herniated cervical disc and dorsal sprain; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a herniated cervical disc and dorsal sprain.

In the present case, appellant, then a 57-year-old letter carrier, filed a traumatic injury claim (Form CA-1) on July 19, 1996 alleging that he sustained a herniated disc in his neck at 9:30 a.m. on July 12, 1996. Regarding the cause of the injury, appellant stated, "Bent down to pick up flats; felt severe pain in upper back down through left arm." He stopped work on July 17, 1996. On November 15, 1996 the Office accepted that appellant sustained a herniated cervical disc and dorsal sprain on July 12, 1996. The Office also authorized a laminectomy which was performed in August 1996. The Office appears to have accepted appellant's claim based on a July 30, 1996 duty status report (Form CA-17) in which an employing establishment physician indicated that appellant sustained a herniated disc on July 12, 1996. Prior to the acceptance of appellant's claim, the record also contained a July 16, 1996 report in which Dr. Ram S. Setia, an attending Board-certified orthopedic surgeon, indicated that appellant reported he bent over to put on his socks and started having severe pain in his left shoulder on July 14, 1996.¹

¹ Moreover, the record contained a July 29, 1996 Form CA-17 in which an employing establishment physician listed a diagnosis of herniated disc but no date of injury and a July 29, 1996 note in which Dr. Setia indicated that he had treated appellant since July 12, 1996.

By decision dated March 14, 1997, the Office rescinded its acceptance of appellant's claim for a herniated cervical disc and dorsal sprain on the grounds that appellant had not established the fact of injury on July 12, 1996. The Office indicated that the rescission was supported by new evidence which was not of record at the time appellant's claim was accepted. In June 1997 appellant requested reconsideration of the Office's March 14, 1997 decision and, by decision dated September 3, 1997, the Office denied appellant's request for a merit review.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.³ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁴ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.⁵

An employee who claims benefits under the Act has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁷ An employee has not met his burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁸ 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.⁹ However, an employee's statement alleging

² 5 U.S.C. § 8128(a). *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

³ *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

⁴ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

⁵ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

⁶ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁷ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁸ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁹ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

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.¹⁰

The Board notes that the Office presented new evidence which displays such inconsistencies regarding appellant's claimed July 12, 1996 injury as to cast serious doubt upon the validity of the claim. In its March 14, 1997 decision, the Office explained how this new evidence showed that appellant did not establish the fact of injury on July 12, 1996. Therefore, the Office presented sufficient new evidence and argument to justify the rescission of its acceptance of appellant's claim for a herniated cervical disc and dorsal sprain.

In support of its rescission, the Office presented, for the first time, a July 12, 1996 report in which a physician at the emergency room of the Hackensack Medical Center indicated that appellant reported "severe pain in the left upper back, beginning five days ago [July 7, 1996] after lifting a table 24 hours previously [July 6, 1996]." In another July 12, 1996 document from the emergency room of the Hackensack Medical Center, appellant reported that he "woke with pain Monday [July 8, 1996] behind shoulder blade down arm to fingers." In a report dated July 14, 1996, a physician at the emergency room of the Hackensack Medical Center indicated that appellant reported having a "history of a traumatic left elbow pain for the past few days associated with left shoulder pain. Reports that he works as a mailman and repetitively uses left arm with recent unusual activity suggesting 'overuse' syndrome."¹¹

The Board notes that these new documents contain sufficient inconsistencies regarding the date of injury, the date of onset of various symptoms and the cause of injury as to cast doubt on the validity of appellant's claim. This new evidence, particularly when viewed in conjunction with previous evidence,¹² shows that appellant did not establish the fact of injury on July 12, 1996 and the Office presented sufficient new evidence and argument to justify the rescission of its acceptance of appellant's claim for a herniated cervical disc and dorsal sprain.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulations provide that a claimant must: (1) show that the Office

¹⁰ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

¹¹ The record was also supplemented to include an August 7, 1996 hospital admission report in which appellant indicated that he was in his usual state of health until July 12, 1996 when he picked up mail flats at work and developed sudden pain in his left shoulder. In his July 19, 1996 Form CA-1, appellant had reported pain radiating down his left arm on July 12, 1996.

¹² The record also contains a July 16, 1996 report in which appellant reported he bent over to put on his socks and started having severe pain in his left shoulder on July 14, 1996. Moreover, appellant worked without apparent difficulty through July 17, 1996 after his claimed July 12, 1996 injury and did not report his injury until July 19, 1996.

¹³ As noted above, under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁶

In support of his June 1997 reconsideration request, appellant submitted a July 30, 1996 report in which Dr. Roy D. Vingan, an attending Board-certified neurosurgeon, indicated that he reported waking up on July 8, 1996 with cervical discomfort which radiated across his upper back and which progressed in intensity over the week. He also indicated that appellant reported experiencing upper left shoulder and arm pain and left index finger numbness when he bent over at work on July 12, 1996. However, this report only serves to highlight the inconsistencies of appellant's claim that he sustained an employment injury in July 12, 1996 in that the report suggests a nonwork-related genesis on July 8, 1996 for his neck and upper body problems.¹⁷ Therefore, it does not adequately relate to the main issue of the present case, *i.e.*, whether appellant submitted sufficient evidence to establish the fact of injury on July 12, 1996 as alleged. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁸ Appellant also submitted a May 9, 1997 statement of a coworker and a May 13, 1997 report of a postal inspector, but these documents also serve to highlight the inconsistencies of appellant's claim.¹⁹ He also submitted evidence which had previously been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²⁰

In the present case, appellant has not established that the Office abused its discretion in its September 3, 1997 decision by denying his request for a review on the merits of its March 14, 1997 decision under section 8128(a) of the Act, because he has failed to show that the Office

¹⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

¹⁵ 20 C.F.R. § 10.138(b)(2).

¹⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁷ In a June 16, 1997 letter to which he attached his July 30, 1996 report, Dr. Vingan stated, "There is a slight discrepancy in this note. [Appellant] originally started having symptoms of neck pain on the Monday preceding July 12[, 1996] when he initially reported a work injury. The radiating arm pain is what started on that Monday July 12[, 1996]." However, the record contains evidence which shows that appellant reported having radiating left arm pain as early as July 8, 1996. Dr. Vingan's June 16, 1997 letter does not clarify the inconsistencies in appellant's claim and it is not relevant to the main issue of the present case.

¹⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁹ For example, the coworker indicated in his statement that appellant reported having back pain for about a week prior to taking leave but he did not report sustaining an injury at work.

²⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 3 and March 14, 1997 are affirmed.

Dated, Washington, D.C.
January 14, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member