U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. COLEMAN and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, INDEPENDENCE NATIONAL PARK, Philadelphia, PA

Docket No. 99-753; Submitted on the Record;
Issued July 27, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, A. PETER KANJORSKI

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 February 18, 1998, as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

On April 28, 1998 appellant, then a 36-year-old gardener, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that, on February 18, 1998, as a result of pulling carbine staples out of old documents, he sustained swelling and numbness in both hands, and tingling in his thumb and pinky fingers. He submitted medical evidence in support of his claim.[1]

On February 18, 1998 Dr. Schnall examined appellant. He reported:

> "[Appellant] was very upset regarding his return to work. The agreement was that [appellant] was to return to part-time sedentary duty at four hours per day, not involving repetitive tasks. Instead, [appellant] reports that he was given tasks that significantly flared his pain, particularly in the wrists. He states that it involved removal and the placement of heavy staples on a repetitive basis. He indicated that his hand pain and numbness was much worse since doing that activity."

[1] The record reveals that appellant has filed 10 workers' compensation claims with the Office, including the current one. Dr. Barry Schnall, a Board-certified physiatrist and Dr. Paul Steinfield, a Board-certified orthopedic surgeon, have been treating appellant for numerous medical problems, including bilateral ulnar neuropathy at the elbow, bilateral guyon tunnel syndrome affecting ulnar sensory branch at wrist, brachial plexus injury, rotator cuff sprain and strain, myofasciitis of the shoulder area and chest wall sprain. With this claim, appellant submitted medical opinions from these physicians which predated the current February 18, 1998 alleged date of injury. The Office has not accepted any of appellant's claims for carpal tunnel syndrome.

Dr. Schnall indicated that examination revealed increased pain and tenderness in the wrists and hands. Tinel's and Phalen's signs were very positive bilaterally. Cervical range of motion remains somewhat reduced. Inclinometer measurements revealed forward flexion and extension as normal. Rotation to the left is lacking five degrees and to the right is lacking seven degrees. He diagnosed a flare of carpal tunnel syndrome, flare of cervical and rotator cuff strain and sprain on the left, ulnar neuropathy and easing left brachial plexus exacerbation. Dr. Schnall requested that appellant cease work activities until "we could clear with his employer the issues regarding the specific activities."

On February 20, 1998 Dr. Steinfield examined appellant. Appellant stated that the carpal tunnel injection administered at the time of his last visit gave him significant relief of symptoms. Regarding the history of the current injury, Dr. Steinfield reported:

> "[Appellant] returned today indicating that he has right-handed numbness. [Appellant] attempted to return to work on February 12, 1998. [Appellant] tells me that he had to pull out very heavy gauge staples all day long which increased his symptoms. He is presently out of work because of increased symptoms."

Dr. Steinfield noted that examination revealed a positive Tinel's sign over the median nerve at the wrist and elbow. Tinel's sign is also positive over the ulnar nerve at the elbow. Phalen's sign is positive on the right side. He injected appellant's right carpal tunnel syndrome with cortisone and lidocaine.

On March 23, 1998 Dr. Steinfield reiterated his findings and recommended that appellant undergo carpal tunnel release. In an attending physician's report, Form CA-20, dated April 29, 1998, Dr. Schnall diagnosed carpal tunnel, ulnar neuropathy, right shoulder rotator cuff and cervical strain. He indicated with a checkmark "yes" that appellant's condition was due to the work injury. Dr. Schnall noted that appellant had been pulling carbine staples out of documents. He recommended that appellant have carpal tunnel surgery. Dr. Schnall reiterated his findings in an authorization for medical treatment Form CA-16 also dated April 29, 1998.

In a report dated May 1, 1998, Dr. Schnall stated:

> "[Appellant] completed a recent electrodiagnostic evaluation showing continued and progressive carpal tunnel syndrome. [Appellant] requires surgery before he can consider returning to work activities. I should note that when [appellant] returned to work activities he was put in an inappropriate job position. He was asked to staple various objects which is inappropriate for patients with an active carpal tunnel syndrome. Because of the February 18, 1998 episode, his problem became much more severe and required further treatment."

On May 12, 1998 Dr. Steinfield performed carpal tunnel release on the right side. On July 7, 1998 he performed carpal tunnel surgery on the left side.

By letter dated July 2, 1998, the Office requested more information from appellant. Specifically, the Office indicated that appellant should describe in detail how the alleged February 18, 1998 injury occurred and to provide information concerning any hobbies involving

repetitive tasks. In a letter dated July 15, 1998 and received by the Office on July 23, 1998, appellant explained that the February 18, 1998 injury occurred by pulling staples out of documents. He claimed that he was pulling staples out of documents on February 17, 1998 for two and one-half hours and on February 18, 1998 for one hour. Appellant stated he had two prior claims involving carpal tunnel syndrome dated April 6, 1995 and November 12, 1997.[2] He also stated that he had no hobbies that involved repetitive tasks.

By letter dated August 3, 1998, the Office requested more detailed information from appellant concerning the February 18, 1998 injury, specifically, how many staples appellant pulled out on February 17 and 18, 1998. In a statement dated August 3, 1998, appellant stated that, on February 12, 1998, he received a notice to return to work the next day. On February 17, 1998 appellant stated that he pulled carbine heavy-duty gauge staples from old and outdated application documents that needed to be shredded for 1 and ½ hours at a rate of 25 to 50 staples being pulled. He reported that, on February 18, 1998, he pulled carbine heavy-duty gauge staples out of documents for 2 and ½ hours at a rate of 50 to 75 staples.

In an attending physician's report, Form CA-20, dated August 6, 1998, Dr. Schnall again indicated with a checkmark "yes" that appellant's present condition was due to the February 18, 1998 injury. He opined that appellant was still totally disabled but was tentatively scheduled to return to work on September 14, 1998.

On August 14, 1998 the employing establishment controverted the claim and disputed appellant's history of the injury. The employing establishment noted that appellant was assigned to light duty after recuperating from a November 1997 injury. Vanessa Russell, employee relations specialist, disputed appellant's assertion that he pulled staples for two and one-half hours on February 17, 1998. On that day, she noted that he had been provided with reading material and was asked to make phone calls pertaining to safety training and videos. Ms. Russell asserted that he did not pull staples or shred documents. She also disputed appellant's assertion that he pulled staples for one hour on February 18, 1998. Accompanying the controversion was an August 13, 1998 statement from Virginia Russell, Personnel Officer, who was supervising appellant in his new light-duty tasks in the Human Resources Department. Ms. Russell stated:

> "On February 18, 1998 [appellant] was assigned to my unit to perform clerical duties. I asked him if he could shred applications from out-dated merit promotion files. This assignment involved standing and placing groups of papers in a shredding machine. Since the machine is old and sensitive, staples had to be removed prior to shredding. The documents for shredding were 5 to 10 pages thick. Regular sized staples were to be removed with a staple remover. He was told if removing the staples would present a problem he could leave the stapled items and shred the other documents. I left the area to discuss employment opportunities with a potential candidate; the meeting took less than 15 minutes. I returned to my office and [appellant] informed me that his physician told him to

[2] As discussed *infra* at footnote 1, an Office claims examiner indicated that, while appellant has 10 claims with the Office, none has been accepted for carpal tunnel syndrome.

go home because the assignment … shredding paper aggravated his work-related injury."

In an August 20, 1998 Office note, an Office claims examiner indicated that she had received a telephone call from appellant informing her that someone from the employing establishment was going to send by facsimile a corrected statement. Ms. Russell contacted the Office and was asked about this. She said that appellant had tried to get her to send a corrected statement to the Office but that she refused. Ms. Russell contended that her August 13, 1998 statement was accurate.

By decision dated August 20, 1998, the Office denied appellant's claim for failure to establish fact of injury.

On August 25, 1998 appellant requested reconsideration. Accompanying appellant's request for reconsideration was an August 21, 1998 letter purportedly signed by Ms. Russell. In this letter, Ms. Russell claimed that appellant did indeed pull staples and shred documents on February 17, 1998 for one and one-half hours and did the same tasks on February 18, 1998 for two and one-half hours.

In a memorandum to the record dated September 8, 1998, Ms. Russell stated that she did not write the letter dated August 21, 1998. She reiterated that she "reviewed the content and do[es] not agree with it. I stand on my previous statement which indicates that [appellant's] actual tasks of removing staples consist[ed] of 15 minutes of work."

By decision dated September 8, 1998, the Office found that the newly submitted evidence was insufficient to warrant modification of the prior decision.[3]

The Board finds that appellant has not established that he sustained an injury on February 18, 1998, as alleged.

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 filed within the applicable time limitations 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 the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[6]

[3] Subsequent to the September 8, 1998 decision, appellant submitted several new medical opinions from Drs. Schnall and Steinfield. The Board cannot consider evidence on appeal that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. § 8101 *et seq.*

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

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

In order to determine whether an employee actually sustained an injury in the performance of a 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.[7] 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.[8] 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.[9]

The Board finds that there is evidence to support appellant's contention that he was pulling staples on February 18, 1998. However, appellant has presented conflicting and unconvincing accounts regarding the duration of the February 18, 1998 employment activity. In a statement dated July 15, 1998, appellant alleged that he pulled staples for one hour on February 18, 1998. In an August 3, 1998 statement, appellant stated that he pulled heavy-duty staples for two and one-half hours on February 18, 1998. In contrast to appellant's conflicting accounts of the incident, the employing establishment presented credible evidence that, on February 18, 1988, appellant pulled staples for no more than 15 minutes. Moreover, there is no evidence to corroborate appellant's assertion that he was pulling "heavy duty gauge or carbine staples," as he has indicated on his claim form and in his various statements. Ms. Russell explained that the documents contained no more than 5 to 10 pages and that appellant needed to remove "regular type" staples from documents in order to put them in the shredding machine. Finally, despite appellant's assertion to the contrary, there is no evidence that appellant also pulled staples on February 17, 1998. Instead, the employing establishment presented evidence that, on February 17, 1998, he had been assigned the task of answering telephones. Consequently, the Board finds that appellant was pulling regular-sized staples for no more than 15 minutes on February 18, 1998.

The second component is whether the employment incident caused a personal injury and it generally can be established only by medical evidence. To establish a causal relationship

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

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

[9] *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[10] In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality, and the factors which enter in such an evaluation include the opportunity for, and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion.[11]

In this case, the record contains numerous opinions from Drs. Steinfield and Schnall who were treating appellant for carpal tunnel syndrome.[12] While Drs. Steinfield and Schnall indicated that appellant's carpal tunnel syndrome was causally related to his February 18, 1998 injury, their opinions are not rationalized as they based their opinions on an inaccurate history of appellant's injury.[13] Dr. Schnall who treated appellant on the day of injury reported that appellant was engaged in the removal and placement of heavy staples on a repetitive basis. He further opined that this was an inappropriate activity for appellant given his work restrictions. In an attending physician's report dated April 29, 1998, Dr. Schnall reiterated that appellant was pulling carbine staples out of documents when the injury occurred. A later report notes that appellant had been asked to staple various objects. Dr. Steinfield determined that pulling out heavy-gauge staples all day long caused appellant's carpal tunnel syndrome.

As both Drs. Schnall and Steinfield based their opinions on an inaccurate history of the injury, their reports are insufficient to meet appellant's burden of proof.[14] Moreover, there is no evidence in the record to establish that 15 minutes of pulling regular-sized staples would have been enough to cause appellant's injury. Consequently, appellant has failed to establish that he sustained an injury while in the performance of duty on February 18, 1998.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for a merit review.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the

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[10] *Gary R. Sieber*, 46 ECAB 215, 224 (1994); *Melvina Jackson* 38 ECAB 443, 449-50 (1987); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[11] *Thomas A. Faber*, 50 ECAB ____ (Docket No. 97-2212, issued September 28, 1999).

[12] These physicians were also treating appellant for other medical conditions unrelated to the current workers' compensation claim.

[13] *James A. Wyrich*, 31 ECAB 1805 (1980) (reports based on an incomplete or inaccurate history are of reduced probative value); *see also Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Curtis Hall*, 45 ECAB 316 (1994); *Minnie L. Bryson*, 44 ECAB 713 (1993).

[14] *Thomas A. Faber*, *supra* note 11.

Office.[15] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[16]

In appellant's August 25, 1998 request for reconsideration, appellant submitted an August 21, 1998 letter allegedly from Ms. Russell, a personnel specialist, stating that appellant had indeed been pulling staples on February 17 and 18, 1998 for one and one-half hours and two and one-half hours, respectively. In a memorandum to the record dated September 8, 1998, Ms. Russell stated that she did not write the August 21, 1998 letter, which appellant submitted with his reconsideration request. Moreover, in the September 8, 1998 memorandum, Ms. Russell reaffirmed her earlier statements regarding the extent of appellant's job duties on those days.

The issue on appeal is whether appellant presented new and relevant evidence to the Office which would justify reopening the case under 20 C.F.R. § 10.138. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[17] The Board finds that the only new evidence appellant submitted was an August 21, 1998 letter allegedly signed by Ms. Russell, in which she supported appellant's account of the injury. As Ms. Russell vehemently denied writing this letter, the Board finds that appellant's newly submitted evidence was fabricated. Consequently, this newly submitted letter does not have a reasonable color of validity.[18] Accordingly, appellant did not provide a sufficient evidentiary basis for reopening his claim, and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.

[15] 20 C.F.R. § 10.138(b)(1).

[16] 20 C.F.R. § 10.138(b)(2).

[17] *Norman W. Hanson*, 45 ECAB 430 (1994).

[18] *Id.*

The decision of the Office of Workers' Compensation Programs dated August 21, 1998 is modified to reflect that an employment incident occurred on February 18, 1998. The decision is affirmed with regard to the finding that appellant failed to establish that he sustained an employment-related injury on February 18, 1998. The decision dated September 8, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 27, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member