U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS VALENTIN and U.S. POSTAL SERVICE,
POST OFFICE, San Juan, PR

Docket No. 99-994; Submitted on the Record;
Issued June 23, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established an injury in the performance of duty on July 9, 1990; (2) whether appellant has established a recurrence of disability commencing July 9, 1990, causally related to his August 31, 1983 employment injury; and (3) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

In the present case, the Office accepted that appellant sustained a low back strain in the performance of duty on August 31, 1983. On September 19, 1990 appellant filed a claim for a recurrence of disability commencing July 9, 1990. By decision dated September 17, 1992, the Office denied appellant's claim for a recurrence of disability.

On June 29, 1993, appellant filed a claim for traumatic injury (Form CA-1) on July 9, 1990, stating that he injured his back while lifting wooden skids. By decision dated October 28, 1994, the Office denied the claim on the grounds that fact of injury was not established. In a decision dated June 1, 1995, an Office hearing representative affirmed the October 28, 1994 decision. Appellant requested an appeal to the Board. By decision dated August 5, 1997, the Board remanded the case for proper reconstruction of the record.[1] The Board noted that the hearing representative had referred to evidence from the August 31, 1983 injury claim, but the case record submitted to the Board included only evidence from the July 9, 1990 traumatic injury claim.

In a decision dated December 17, 1997, the Office determined that appellant had not established either a new injury on July 9, 1990, nor any disability commencing July 9, 1990 causally related to the August 31, 1983 employment injury. By decision dated May 5, 1998, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

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[1] Docket No. 95-2626.

The Board has reviewed the record and finds that appellant has not established an injury in the performance of duty on July 9, 1990.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing that he or she sustained an injury while in the performance of duty.[3] In order to determine whether an employee actually sustained an injury in the performance of 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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[4]

With respect to the occurrence of the alleged incident, the Board notes that appellant did not file his claim until June 1993, nearly three years after the alleged incident. The record contains a leave analysis (employing establishment Form 3972) which indicates that on July 9, 1990 appellant used 8 hours of sick leave. Appellant has not provided additional detail regarding the occurrence of the employment incident, in view of the leave analysis, nor has he provided contemporaneous evidence of a July 9, 1990 employment incident. There are, for example, treatment notes from July 1990 indicating that appellant reported back pain, but no history of the alleged employment incident was provided. The initial reference to a July 9, 1990 incident appears to be in a January 25, 1991 report from Dr. Juan Reyes, an orthopedic surgeon, who notes a July 9, 1990 employment incident in his medical history.

It is well established that a claimant cannot establish fact of injury if there are 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.[5] The record does not contain sufficient evidence to establish that the employment incident occurred as alleged and, therefore, appellant has not met his burden of proof in this case.

The Board further finds that appellant has not established a recurrence of disability on or after July 9, 1990.

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the

[2] 5 U.S.C. §§ 8101-8193.

[3] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

[4] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[5] *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[6]

In a note dated July 9, 1990, Dr. Benjamin Casado, a general practitioner, reported that appellant was complaining of severe low back pain and he diagnosed lumbosacral syndrome. Dr. Casado did not discuss causal relationship with the August 31, 1983 employment injury. Similarly, in an August 6, 1990 note he diagnosed lumboscaral syndrome without discussing causal relationship with employment.

In a report dated November 23, 1990, Dr. Reyes provided a history and results on examination. The diagnoses included herniated nucleus pulposus at L5-S1 and L4-5, cervical spondyloarthritis, with degenerative joint disease aggravated by trauma and lumbar spine arthritis. He indicated that appellant was totally disabled, concluding that the disability "was caused by a lumbosacral trauma, pushing a janitorial equipment cart." Dr. Reyes did not discuss disability as of July 9, 1990, nor does he provide medical reasoning to support his opinion on causal relationship of disability in November 1990 with the employment injury.

In a form report (Form CA-20), a physician indicated that appellant was disabled from November 3, 1990 to November 4, 1991 and checked a box "yes" that the condition found was employment related.[7] The checking of a box "yes" in a form report, without additional explanation or rationale, is of little probative value.[8] In a report dated October 19, 1992, Dr. Reyes indicated that appellant had an aggravation of his condition on June 2, 1992. He did not provide a reasoned medical opinion as to causal relationship between any disability and the August 31, 1983 employment injury.

As noted above, it is appellant's burden to establish a recurrence of disability, by providing probative medical evidence containing an opinion, based on a complete background and with sound medical reasoning, that appellant had a disabling condition causally related to the accepted employment injury. The evidence of record does not contain such an opinion for any period of claimed disability on or after July 9, 1990. Accordingly, the Board finds that appellant has not met his burden of proof in this case.

The Board further finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's 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 fact not previously considered by the Office, or (3) submitting relevant and

[6] *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

[7] The physician's signature, the date of the report and the diagnosis are illegible.

[8] *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).

[9] 5 U.S.C. § 8128(a) (providing that "[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").

pertinent evidence not previously considered by the Office.[10] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[11]

In the present case, appellant submitted a letter dated April 15, 1998 requesting reconsideration. Appellant referred to "new and better evidence" regarding his claim, but he did not further explain or submit any additional evidence. The Board finds that he did not meet any of the requirements of section 10.138(b)(1) and, therefore, the Office properly denied his request for reconsideration without merit review.

The decisions of the Office of Workers' Compensation Programs dated May 5, 1998 and December 17, 1997 are affirmed.

Dated, Washington, D.C.
June 23, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[10] 20 C.F.R. § 10.138(b)(1).

[11] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).