U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT F. BIRKS and DEPARTMENT OF THE AIR FORCE, EGLIN AIR FORCE BASE, FL

Docket No. 98-2107; Submitted on the Record;
Issued March 28, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay because he failed to provide written notice of his injury within the time specified by the Federal Employees' Compensation Act; and (2) whether appellant has established that he sustained a recurrence of disability on September 26, 1997 causally related to his June 11, 1997 employment injury.

On November 20, 1997 appellant, then a 54-year-old pest controller, filed a traumatic injury claim alleging that on June 11, 1997 he injured his lower back when he fell getting off the back of a truck. On the reverse side of the claim form, the employing establishment controverted continuation of pay because appellant did not report the injury within 30 days. Appellant stopped work on June 7, 1997 and returned to work on November 17, 1997.

On February 11, 1998 the Office accepted appellant's claim for low back strain, resolved and, by decision dated February 24, 1998, denied continuation of pay because appellant did not file written notice of his claim within 30 days of the date of injury.

On March 23, 1998 appellant filed a notice of recurrence of disability alleging that on September 26, 1997 he sustained a recurrence of disability causally related to his June 11, 1997 employment injury.

By decision dated June 15, 1998, the Office denied appellant's claim on the grounds that the evidence failed to establish that he sustained a recurrence of disability due to his employment injury.

The Board finds that appellant's claim for continuation of pay is barred by the time limitation provision of the Act.

Section 8118 of the Act[1] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."[2] The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury.[3]

In this case, appellant filed a traumatic injury claim, Form CA-1, on November 20, 1997, which was more than 30 days after the June 11, 1997 injury. Although appellant indicated that he verbally notified his supervisor of the injury on June 24, 1997, the Board has held that oral notice is insufficient to satisfy the requirements of law,[4] and that the failure of a supervisor to submit proper notice of injury does not provide a basis for granting continuation of pay.[5] The responsibility for filing a claim rests with the injured employee.[6] Moreover, section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitations provisions for filing a claim for compensation because of "exceptional circumstances" is not applicable to section 8118(a)[7] which sets forth the filing requirements for continuation of pay.[8] There is, therefore, no provision within the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury.[9] Thus, since appellant did not file his claim within 30 days of the June 11, 1997 employment injury, he is not entitled to continuation of pay.[10]

The Board further finds that appellant has not established that he sustained a recurrence of disability on September 26, 1997 causally related to his June 11, 1997 employment injury.

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[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8118.

[3] *See George A. Harrell*, 29 ECAB 338 (1978).

[4] *See Saundra N. Phillips*, 43 ECAB 311 (1991).

[5] *See Nicholas A. Dalo*, 39 ECAB 506, 512 (1988).

[6] *See Cathrine Budd*, 33 ECAB 1011 (1982).

[7] 5 U.S.C. § 8118(a).

[8] 5 U.S.C. § 8122(d)(3); *see also Dodge Osborne*, 44 ECAB 849 (1993).

[9] Additionally, the applicable statute specifies that the notice must be given on a form approved by the Secretary of Labor; *see* 5 U.S.C. § 8118. The Board has consistently required that a notice for compensation must contain "words of claim" which could be construed as a claim for continuation of pay under section 8118 of the Act. Accordingly, the Board has held that notices, such as narrative statements, forms other than the CA-1, or memoranda, which are submitted within the 30-day time period but which do not contain "words of claim" are insufficient forms of notice with respect to claims for continuation of pay under section 8118 of the Act; *see Saundra N. Phillips*, *supra* note 4.

[10] This decision does not affect appellant's possible entitlement to compensation in the form of medical benefits or wage-loss benefits.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.[11] This burden includes the necessity of furnishing evidenced from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[12]

In the present case, the Office accepted that appellant sustained low back strain due to an injury on June 11, 1997. In a report dated January 13, 1998, Dr. J. O'Brien, an osteopath and appellant's attending physician, stated that he could return to work without restrictions on September 22, 1997. Appellant resumed his regular employment on September 23, 1997.

In support of his claim for a recurrence of disability, appellant submitted office visit notes dated January through March 1998 from Dr. Anju Garg, who specializes in family practice. The office visit notes do not contain an opinion regarding the causal relationship between appellant's condition and his employment injury, and thus are of little probative value.

In a form report dated March 20, 1998, Dr. Garg diagnosed back sprain, spondylitis at L4-5 and L5-S1, and narrowing of the spinal canal between L4-S1. He found that appellant was totally disabled from January 12 to March 17, 1998 and checked "yes" that the condition was caused or aggravated by employment. Dr. Garg explained his causation finding by stating that "the fall from the truck, landing on buttocks on concrete floor, could result in a back sprain." Dr. Garg's finding that appellant's fall "could result" in a back sprain is speculative and inconclusive in nature, and thus of diminished probative value.[13] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, neither can such an opinion be speculative or equivocal. The opinion should be one of reasonable medical certainty.[14]

In a report dated March 16, 1998, Dr. Ronald A. MacBeth, a Board-certified orthopedic surgeon, discussed appellant's employment injury and diagnosed "[l]ow back pain with severe L4-5 degenerative changes with MRI [magnetic resonance imaging] [study] changes consistent with probable stenosis." Dr. MacBeth did not address the cause of appellant's condition or find that he was disabled from employment and thus his opinion is of little relevance to the issue at hand.

In a report dated March 30, 1998, Dr. Council, a Board-certified physiatrist, discussed appellant's June 11, 1997 employment injury and found that appellant has "[s]tatus low back pain after fall on June 11, 1997 at work." Dr. Council stated:

[11] *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[12] *Id.*

[13] *Connie Johns*, 44 ECAB 560 (1993).

[14] *Norman E. Underwood*, 43 ECAB 719 (1992).

> "He does have degenerative findings on MRI [scan] but I feel a large component of his pain is myofascial. Prognosis at this time is guarded due to the prolonged course of pain. I do certainly feel that his reported injury could be causing his pain pattern and most likely is."

In a form report of the same date, Dr. Council diagnosed low back pain, found that appellant was partially disabled from June 11, 1997 to the present, and checked "yes" that the condition was related to employment because he "fell at work." Dr. Council's finding that appellant's employment injury "could be causing his pain pattern" is speculative in nature and thus of diminished probative value.[15] Additionally, Dr. Council did not provide any medical rationale in support of her causation finding or attribute a specific diagnosed condition to his employment injury[16] and therefore her opinion is insufficient to meet his burden of proof.[17]

In a report dated March 24, 1998, Dr. Adkins, a Board-certified anesthesiologist, discussed appellant's complaints of back pain since his June 11, 1997 employment injury and diagnosed "[r]ight lumbar radiculopathy as well as secondary thoracic and cervical pain with MRI scan evidence of spinal stenosis in the lumbar region and work-related injury [on] June 11, 1997." Dr. Adkins did not specifically attribute appellant's radiculopathy or stenosis to his June 11, 1997 employment injury or find him unable to perform his employment, and thus his opinion is of little probative value.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[18] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and his medical history, state whether the employment injury caused or aggravated appellant's diagnosed condition and present medical rationale in support of his or her opinion. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge his burden of proof.

[15] *See Roger Dingess*, 47 ECAB 123 (1995).

[16] Pain is a symptom of injury rather than a diagnosed condition.

[17] Medical reports not containing rationale on causal relation are entitled to little probative value. *Carolyn F. Allen*, 47 ECAB 240 (1995).

[18] *Donald W. Long*, 41 ECAB 142 (1989).

The decisions of the Office of Workers' Compensation Programs dated June 15 and February 24, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member