U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY J. BRUNNING and U.S. POSTAL SERVICE,
POST OFFICE, Jacksonville, FL

Docket No. 98-2456; Submitted on the Record;
Issued May 12, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he sustained lower back injury on either October 21 or 27, 1994 in the performance of duty, causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a).

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the decision of the Office hearing representative dated January 6, 1997 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.[1]

By letter dated December 30, 1997, appellant, through his representative, requested reconsideration of the January 6, 1997 decision. Appellant's representative argued that establishing a specific date and time of injury had never been an absolute requirement under the Federal Employees' Compensation Act and that there was coercion from management not to report injuries.[2] In support of this reconsideration request, appellant also submitted two

[1] The hearing representative found that appellant had failed to establish fact of injury as he provided two different dates when the injury likely occurred, provided very late notification of injury to his supervisor and the employing establishment had no witnesses to the injury or to his contemporaneous actions or statements, continued to work without documented problems and failed to seek medical treatment contemporaneous with either alleged possible date of injury.

[2] Appellant's representative also argued that, because there was no conflicting medical evidence, appellant should have been examined by an impartial physician "to confirm the causal connection."

statements from coworkers. An August 2, 1996 statement from Marlene Repnin noted that she worked at the employing establishment during the time period in question and she alleged:

> "[A]t that facility, work accidents/injuries were commonly not reported to supervisors by workers incurring same. A reason for this was the supervisor's response to such reporting. A supervisor could and would issue a 'letter of warning' to workers reporting their accidents/injuries without regard to the circumstances involving same. A 'letter of warning' indicates a serious employee offense has occurred and is recorded on his/her permanent record which may lead to his/her dismissal."[3]

The second statement was a December 24, 1997 letter from coworker Paul Musselman. He stated:

> "I recall meeting with [appellant] at his home on December 12, 1994. It was the first time we had met apart from an occasional work or two at the [employing establishment] where we were both employed. [Appellant] was obviously in pain. He told me then he had herniated a disc in his low back on the job…. [Appellant] said it occurred as he was lifting a mail sack."

By decision dated January 15, 1998, the Office denied modification of its January 6, 1997 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office noted that Mr. Musselman's statement did not indicate when appellant's alleged injury supposedly occurred and that his knowledge of the alleged injury was not contemporaneous with the incident, but was acquired more than one month after the alleged date of injury and was based only upon appellant's allegations. The Office further found that Ms. Repnin's statement regarding employees receiving letters of warning for reporting injuries, even if this allegation was not rebutted by actual employing establishment statistics, was not an excuse for not timely filing an injury claim.

By letter dated January 23, 1998, appellant, through his representative, again requested reconsideration and argued that the evidence of record required a reversal. Appellant's representative argued that, although much was made of the fact that appellant did not know the actual date of injury, the actual date of injury was never a requirement under the Act.[4] He argued that appellant and his coworkers were discouraged from reporting injuries, that there was

[3] The Board notes, however, that in conjunction with the August 28, 1996 hearing, the employing establishment provided a September 26, 1996 rebuttal to appellant's allegations, noting that, after review of the accident reports for the year in which appellant claimed injury, approximately 30 employees reported on-the-job injuries, which was high for a facility of that size. This tends to contradict allegations that employees at that facility routinely did not report injuries for fear of disciplinary actions. Further, the employing establishment noted that since 1993, approximately 87 accidents had been reported to the plant manager and that out of these 87 employees, not one had been disciplined for reporting an accident. This contradicts the allegation that employees received letters of warning for such reporting.

[4] The Board notes that this is not supported by the text of the Act or by its case law; *see* 5 U.S.C. § 8119(e) which requires the year, month, day and hour when and the particular locality where the injury occurred.

no evidence to the contrary[5] and that appellant's wife having a baby on November 2, 1994 was a valid reason for appellant's delay in reporting the alleged injury.[6] The representative further argued that the hearing representative gave very little weight to the medical reports of record.[7] He argued that appellant had proven a *prima facie* case.

In an addendum dated February 11, 1998, appellant's representative offered another explanation for appellant's continuing to work following the alleged incident, claiming that appellant did not want his supervisors to feel that he was taking advantage of the leave policies by taking off too early when his baby was born. The representative claimed that the actual date of injury was October 21, 1994.

By decision dated May 4, 1998, the Office denied appellant's request for further review of his case on its merits, finding that the evidence submitted in support was cumulative and was therefore not sufficient to warrant review of its prior decision on its merits.

The Board finds that appellant has failed to establish that he sustained traumatic low back injury on either October 21 or 27, 1994

Following the January 6, 1997 decision of the hearing representative appellant requested reconsideration and in support he submitted two coworker statements. Ms. Repnin's statement regarding disciplinary actions in retaliation for filing injury claims was directly contradicted by employing establishment factual and statistical evidence that had been previously submitted to the record. This statement does not address whether appellant sustained low back injury in the performance of duty on either October 21 or 27, 1994 as alleged. Therefore, this statement is not

[5] Appellant's representative evidently had no copy of the employing establishment's September 26, 1996 rebuttal.

[6] The Board notes that this contention does not explain why appellant waited until February 21, 1995, over three months after his child's birth, to file his injury claim; *see* 5 U.S.C. § 8119(a) which requires that notice shall be given within 30 days after the date of injury.

[7] To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. Initially, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. *John J. Carlone*, 41 ECAB 354 (1989). To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without documented problems and failure to obtain contemporaneous medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim. *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953). Such unexplained omissions and inconsistencies are present in the instant case. The second component necessary to establish "fact of injury" is whether the employment incident caused a personal injury and can generally be established only by medical evidence. However, as appellant provided late notification of injury to his supervisor, the employing establishment and the Office had lack of confirmation of injury by witnesses or contemporaneous statements or actions, continued to work without documented problems until he reached a prescheduled family leave period and failed to obtain medical treatment contemporaneous with either date of alleged injury, October 21 or 27, 1994, the occurrence of an injurious event or incident cannot be established and the Office has no need to consider the causal relationship aspect of the medical evidence.

probative on the issue at hand. Mr. Musselman's statement merely reported that on December 12, 1994 appellant had back pain which he alleged was due to a work injury in October 1994. This statement did not indicate specifically when appellant's alleged injury supposedly occurred, was not reasonably contemporaneous with the incident and was based only upon appellant's version of the facts more than one month after the event allegedly occurred. Due to these deficiencies, this report is of greatly reduced probative value and is insufficient to establish appellant's claim. Therefore, the Board finds that the January 15, 1998 decision of the Office was proper under the law and the circumstances of this case.

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,[8] the Office's regulations provide that a claimant must: (1) show that the Office 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.[9] 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.[10] When a claimant fails to meet one of the above-mentioned 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.[11] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[12] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[13]

By letter dated January 23, 1998, appellant requested reconsideration of the January 15, 1998 decision. In support of the request, appellant's representative argued that providing the actual date of injury was never a requirement under the Act, that appellant and his coworkers were discouraged from reporting injuries, that there was no evidence to the contrary and that appellant's wife having a baby on November 2, 1994 was a valid reason for appellant's delay in reporting the alleged injury. The representative further argued that the hearing representative gave very little weight to the medical evidence of record, that appellant had made a *prima facie* case and that appellant did not report the injury because he did not want his supervisors to feel that he was taking advantage of the leave policies by taking off too early when his baby was born.

[8] 5 U.S.C. §§ 8101-8193.

[9] 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[12] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[13] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The Board notes that the representative's arguments regarding the requirements of the Act and the fact that the employing establishment coerced employees not to file injury claims had previously been made and considered by the Office. Therefore, these arguments do not constitute points of law not previously considered or relevant evidence not previously considered and as such do not constitute a basis for reopening appellant's case for further review of its merits. Further, the Board notes that the arguments that, because appellant's wife was expecting a baby, this was a valid reason for not timely reporting his alleged injury, was specious and therefore irrelevant to the issue in question which was whether fact of injury had been established. Consequently, these arguments do not constitute a basis for reopening appellant's claim for further review on its merits. Finally, the Board notes that the representative's argument that the hearing representative gave insufficient weight to the medical evidence of record is also irrelevant as the issue in this case is whether an incident of injury occurred as alleged and that until that was positively established, the medical evidence need not be considered.

As these above-noted arguments were all either irrelevant to the specific issue in question, or were repetitious and cumulative, they did not constitute the submission of new and relevant evidence not previously considered or advancement of a point of law or fact not previously considered and therefore did not constitute a basis for reopening appellant's claim for further consideration on its merits.

In the present case, appellant has not established that the Office abused its discretion in its May 4, 1998 decision by denying his request for a review on the merits of its January 15, 1998 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered by the Office and failed to submit relevant and pertinent evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[14] Appellant has made no such showing here.

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).

Consequently, the decisions of the Office of Workers' Compensation Programs dated May 4 and January 15, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 12, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member