U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH MORRIS and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

Docket No. 99-320; Submitted on the Record;
Issued May 9, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established the fact of injury on February 18, 1998; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

The Board finds that appellant established the fact of injury on February 18, 1998, but that the case is not in posture for decision in that further evidentiary development is required regarding whether appellant sustained a disabling employment-related injury on February 18, 1998.

An employee who claims benefits under the Act[1] 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.[2] 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 her subsequent course of action.[3] An employee has not met her 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.[4] 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*

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[1] 5 U.S.C. §§ 8101-8193.

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

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

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

facie case has been established.[5] 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.[6]

On February 18, 1998 appellant, then a 46-year-old clerk, filed a traumatic injury claim alleging that she sustained an injury due to a fall at work on that date.[7] Appellant stated, "coming from roof [I] took steps to second floor, got to second step, fell onto landing and ankle was still on second step, turned opposite direction, hurt right thumb and left shoulder, twisted left leg and ankle." In a supplemental statement dated April 13, 1998, appellant stated that the fall occurred when she went down stairs from the rooftop parking lot at work.[8] By decision dated June 18, 1998, the Office denied appellant's claim on the grounds that she did not establish the fact of injury on February 18, 1998. By decision dated September 3, 1998, the Office denied appellant's request for a hearing as untimely.

The Board notes that there is no strong or persuasive evidence to refute the assumption that appellant sustained an incident at work on February 18, 1998 as alleged. Appellant consistently and repeatedly reported that she sustained an injury due to a fall at work on February 18, 1998. She did not delay in seeking treatment for the injury, in that she visited physicians for treatment of the injury on the day of the injury. Appellant visited an employing establishment physician on February 18, 1998. In a report dated February 18, 1998, the employing establishment physician listed the date of injury as February 18, 1998, stating that appellant reported that she "fell down steps with injury to left ankle," and diagnosed left lateral ankle sprain.[9] Appellant then visited a hospital emergency room on February 18, 1998 where a physician diagnosed left lateral ankle sprain.[10] The results of x-ray testing obtained at the hospital on February 18, 1998 revealed no fractures, dislocations, destructive processes or soft tissue abnormalities of the left ankle.

Appellant continued to seek medical treatment for her condition and provided consistent accounts of how she sustained an injury at work on February 18, 1998. In a report dated February 19, 1998, Dr. Gary Gray, an attending physician specializing in internal medicine, stated that appellant reported that she injured herself the prior day at about 8:00 p.m. when she fell down steps at work. Dr. Gray diagnosed left ankle sprain and recommended that appellant engage in light-duty work. In reports dated February 20, 1998, Dr. Michael J. Spezia, an attending Board-certified family practitioner, stated that appellant reported that she fell down steps at work on the evening of February 18, 1998. Dr. Spezia diagnosed left ankle sprain and

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

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

[7] Appellant indicated that the injury occurred at 8:00 p.m.

[8] Appellant stopped work for various periods after February 18, 1998. She received continuation of pay for the period February 20 to April 17, 1998 and claimed entitlement to compensation beginning April 18, 1998.

[9] This physician released appellant to work in a light-duty position.

[10] Appellant reported that she fell down steps at about 8:00 p.m. on February 18, 1998.

recommended light-duty work. In a report dated March 9, 1998, Dr. Frank R. Luechtefeld, an attending Board-certified orthopedic surgeon, stated that he first treated appellant on February 20, 1998 and that appellant reported that she fell at work on February 18, 1998. Dr. Luechtefeld diagnosed left ankle sprain and indicated that appellant was totally disabled from February 20 to March 8, 1998 and partially disabled thereafter. In a report dated March 13, 1998, Dr. Luechtefeld indicated that appellant reported a fall at work on February 18, 1998 and stated that appellant had a diagnosis of fractures of the medial malleolus of her left ankle. He noted that previous x-rays findings were not "really readable" and that he had new x-ray testing performed which revealed the current diagnosis.[11]

Appellant did not delay in filing a compensation claim in connection with her claimed February 18, 1998 injury in that she filed such a claim on February 18, 1998. The record further reveals that appellant asserted that she reported the injury to a supervisor, Ona Mackey, on February 18, 1998. In an undated statement received by the Office on February 19, 1998, Ms. Mackey stated that appellant reported late at approximately 8:15 p.m. on February 18, 1998.[12] She stated, "[Appellant] stated to me that she fell down the stairs at home and injured herself. At no time did she state that she injured herself on duty."[13] Appellant, however, has presented a credible argument that Ms. Mackey misinterpreted their conversation on February 18, 1998. Appellant explained that she told Ms. Mackey on February 18, 1998 that she was late for work on that date because she had to take her daughter to the doctor's office for medical treatment. She indicated that she also informed Ms. Mackey that she injured herself when she fell at work while rushing back to her work site.[14] The Board notes that, when viewed in conjunction with the other evidence of record, it is plausible that Ms. Mackey misinterpreted appellant's presence at the doctor's office as being for her own nonwork-related condition.[15]

For the above-described reasons appellant has established the fact of injury on June 18, 1998. The Board notes, however, that the case is not in posture for decision in that further evidentiary development is required regarding whether appellant sustained a disabling employment-related injury on February 18, 1998.

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[11] Appellant's left foot was placed in a cast in early April 1998; the cast was removed approximately three weeks later. Dr. Luechtefeld indicated that appellant was totally disabled during this period and thereafter. In a report dated May 19, 1998, he indicated that appellant needed physical therapy and continued to be disabled.

[12] Employing establishment records reveal that appellant normally started work at 3:00 p.m.

[13] During a May 20, 1998 telephone conversation with an Office official, Ms. Mackey reconfirmed the details of her written statement.

[14] The record contains a note from Dr. Spezia which indicates that appellant was in his office with her daughter on February 18, 1998. An annotation to the note, made on March 5, 1998, indicates that the note was given to appellant at 7:30 p.m. on February 18, 1998, that appellant walked out of the office on February 18, 1998 with no limping or signs of pain, and that she had no complaints of a fall.

[15] On February 19, 1998 appellant also reported the February 18, 1998 injury to her immediate supervisor, Laurette McDonald. The record contains a February 19, 1998 accident report, signed by Ms. McDonald, in which appellant reported that she injured herself when she fell at work on February 18, 1998 while taking the steps from the rooftop.

A claimant under the Act has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[16] However, it is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[17]

As detailed above, appellant submitted several reports in which attending physicians indicated that she sustained a left ankle sprain at work on February 18, 1998 and noted that she had partial disability for various periods. The record also contains reports in which Dr. Luechtefeld indicated that appellant sustained fractures of the medial malleolus of her left ankle on February 18, 1998 and noted that she had partial and total disability for various periods.[18] The Board notes that, while none of the reports of appellant's attending physicians are completely rationalized, they are consistent in indicating that appellant sustained an employment-related left ankle injury on February 18, 1998, and are not contradicted by any substantial medical or factual evidence of record. Therefore, while the reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between appellant's claimed condition and the employment incident of February 18, 1998, and are sufficient to require the Office to further develop the medical evidence and the case record.[19]

Accordingly, the case will be remanded to the Office for further evidentiary development regarding whether appellant sustained a disabling employment-related injury on February 18, 1998. This development should include an evaluation of the nature of any employment injury which might have been sustained on February 18, 1998 and the extent of any disability which might have occurred as a result. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[20] As section 8124(b)(1) is unequivocal in setting

[16] *Ruthie Evans*, 41 ECAB 416, 423-24 (1990); *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[17] *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

[18] Dr. Luechtefeld changed his initial diagnosis of left ankle sprain after viewing the results of new x-ray testing.

[19] *See Robert A. Redmond*, 40 ECAB 796, 801 (1989).

[20] 5 U.S.C. § 8124(b)(1).

forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made with in the requisite 30 days.[21]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[22] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[23] when the request is made after the 30-day period for requesting a hearing,[24] and when the request is for a second hearing on the same issue.[25]

In the present case, appellant's July 21, 1998 hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated June 18, 1998 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter dated and postmarked July 21, 1998. Hence, the Office was correct in stating in its September 3, 1998 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's June 18, 1998 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its September 3, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case be resolved by requesting reconsideration and submitting additional medical evidence to establish the fact of injury. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[26] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

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[21] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[22] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[23] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[24] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[25] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[26] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decision of the Office of Workers' Compensation Programs dated June 18, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board. The decision of the Office dated September 3, 1998 is affirmed.

Dated, Washington, D.C.
May 9, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member