

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY COLBERT and DEPARTMENT OF THE ARMY,
MADIGAN MEDICAL CENTER, Fort Lewis, WA

*Docket No. 99-1749; Submitted on the Record;
Issued November 28, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128 on September 17, 1998.

On February 6, 1998 appellant, then a 42-year-old painter, filed a notice of traumatic injury and claim for continuation of pay/compensation (CA-1)¹ alleging that on November 6, 1997 he had "sharp pains" in his back and knee while "climbing" a ladder.²

In a November 11, 1997 report, Dr. Gordon Wheat, a Board-certified family practitioner, noted that appellant had a four-day history of severe back pain with no significant injury. Dr. Wheat noted that the pain was primarily in the low back, with some tingling and slight shooting pain going down his left leg. He stated that appellant had a history of similar pain symptoms over the past four years, which began after he had moved.

In a treatment note of November 24, 1997, Dr. Daniel Conrad, a Board-certified family practitioner, noted that appellant's date of injury was June 5, 1997 and his last day worked was November 6, 1997. Dr. Conrad related that appellant complained of low back pain for about

¹ Appellant previously filed a claim for a recurrence of disability on January 12, 1998 alleging that on November 11, 1997 he sustained a recurrence of disability due to his June 3, 1997 original injury for which he stopped work on November 10, 1997. The Office determined that the claim should be developed as a new traumatic injury and combined the relevant claim files.

² Appellant also completed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) on June 13, 1997 indicating that he was on a ladder painting and reached up a little too far and pulled his back on June 3, 1997. This claim was accepted by the Office on December 10, 1997 for sprain to the lumbar region. Appellant also filled out a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) for a January 28, 1993 injury. The Office issued a decision denying this claim on August 27, 1998. Appellant has not appealed the August 27, 1998 decision.

three weeks, that the pain was radiating from the low back to the legs and that he was recently treated for an on-the-job injury for low back pain. He noted that appellant walked “bent over leaning to one side.” Dr. Conrad diagnosed acute back pain.

In a December 26, 1997 report, Dr. Julia L. Sokoloff, a Board-certified family practitioner, noted that appellant was having trouble with his back for the last two months and that he was experiencing knee symptoms.

In a December 31, 1997 magnetic resonance imaging (MRI) scan of the left knee, Dr. Robert D. Karl, Board-certified in diagnostic radiology, noted that appellant had a small linear calcification adjacent to the medial femoral condyle consistent with injury to the proximal insertion of the medial collateral ligament. This report stated that appellant had a history of pain for about 10 to 11 months.

In a December 31, 1997 disability certificate, Dr. Conrad indicated that appellant was disabled from November 6 to December 29, 1997.

In an attending physician’s report dated January 1, 1998, Dr. Conrad noted that appellant was moving a heavy counter at work and had low back pain radiating into the left foot on November 6, 1997. The date of first examination was noted as November 11, 1997.

By letter dated January 26, 1998, the Office informed appellant that it had received his claim for compensation for November 6 to December 28, 1997, but could not process the claim because it was unclear why he was disabled for the period claimed.

In a January 27, 1998 report, Dr. Joan Sullivan, a Board-certified orthopedic surgeon, indicated that appellant had an onset of knee pain that began in November 1997. Dr. Sullivan noted that appellant was working and injured his back but did not remember doing anything specific to his knee, except he noticed an effusion in November. Dr. Sullivan also stated that the x-rays were basically normal with some mild changes associated with degenerative joint disease. Appellant was diagnosed with a possible meniscal tear.

In a February 6, 1998 narrative statement, appellant explained:

“On November 6, 1997 I was standing on a ladder painting a wall. I attempted to reach and paint an area. When I did, I felt a ‘pinch’ accompanied by a sharp pain in my lower back. This caused me to lose my balance. While trying to prevent myself from falling, my left knee ‘twisted’ causing a sharp pain in my knee as well. In the days that followed, my condition began to worsen instead of improve, causing me to seek medical treatment on November 11, 1997. I was told I had a ‘lower lumbar strain’ and was given pain meds and muscle relaxers. This did not alleviate the pain, even with complete bed rest as ordered. I then returned to the doctor complaining that my condition was not improving. I also told them of the worsening of pain in the left knee. I had thought that my knee was hurting because of the ‘crooked’ posture I had adopted due to my back pain. I was told of the possibility of a ‘herniated disc’ and referred to the neurosurgery unit and a CAT [computerized axial tomography] scan. At this time I was told there was some herniation in my lower discs along with degenerative joint disease in these same discs. I was also advised that surgery would not correct this

condition. As of December 29, 1997, I was released for work with 'light[-]duty assignments only' advised."

In a February 10, 1998 attending physician's report, Dr. Conrad gave appellant's history of severe pain in the back and left leg after moving a heavy cabinet at work on November 6, 1997. He also noted chronic back pain on and off in the lumbar area for four years. Dr. Conrad diagnosed chronic lumbosacral strain/pain and checked the "yes" box on the form indicating the condition was employment related.

In a letter dated March 1, 1998, appellant asserted that his left knee injury happened at the same time as the November 6, 1997 back injury.

Appellant had a left knee arthroscopy and partial medial meniscectomy on March 26, 1998.

By letter dated March 31, 1998, the Office informed appellant that additional information was needed and advised him of the additional factual and medical evidence to establish his claim.

In a memorandum of April 1, 1998, the employing establishment noted that appellant was on sick leave from a back injury claim that originally occurred on June 6, 1997, after which he "called in and said he had reinjured himself by moving a counter top at work the prior Thursday." The employing establishment advised that appellant was placed on sick leave status beginning November 10, 1997 through January 6, 1998 and placed on light duty upon his return.

In a letter dated April 3, 1998, appellant gave a history of his work injuries. He stated that he first hurt his back on August 10, 1993 while helping a coworker move a cabinet top. On June 3, 1997 appellant stated that he reinjured his back while on a ladder painting a wall at work. He advised that on November 6, 1997 he again injured himself while on a ladder painting at work. At that time, appellant stated that he did not immediately feel the full impact of the injury, just the initial "pinches" and "some soreness." After a weekend at home, he noted his condition remained symptomatic and he reported that he sought medical treatment.

In an April 23, 1998 report, Dr. Sullivan stated that appellant was first seen for his left knee problem in January 1997.³ She reported that appellant had an onset of left knee pain since an injury involving his back that occurred in November 6, 1997. Dr. Sullivan also noted that appellant underwent a left knee arthroscopy on March 26, 1998. She also noted that x-rays were consistent with very early degenerative joint disease.

In a decision dated May 5, 1998, the Office found that appellant did not meet his burden of proof in establishing his claim due to inconsistencies regarding how his alleged injury occurred on November 6, 1997.

By letter dated May 28, 1998, appellant requested reconsideration. He attempted to clarify the matter regarding the numerous dates of injury. Appellant noted that his first date of injury was January 28, 1993. He also noted that, ever since the initial injury, he had suffered repeated problems. Additionally, appellant stated that he had reportedly erred when he stated

³ It appears that she intended January 1998 as reflected in her prior treatment notes.

that the first date of injury was August 10, 1993 but it was really another episode of injury stemming from the original January 28, 1993 injury. He set forth the dates of injury as: January 28 and August 10, 1993, June 3 and November 6, 1997. Appellant also explained that, at the time of the November 6, 1997 injury, he did not consider a twist of the knee as significant as he did not realize it was significant until the doctor's indicated such. He asserted that, contrary to the Office's assertion in its May 5, 1998 decision, he never stated that he was injured while climbing a ladder on November 6, 1997.

In a merit decision dated July 13, 1998, the Office found that the information submitted with appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

By letter dated September 11, 1998, appellant, through his attorney, requested reconsideration of the Office's decision. He also supplied additional medical reports.

In an April 13, 1998 report, Dr. Conrad noted that appellant was suffering from a torn meniscus surgery done on March 26, 1998; a torn meniscal tear with minimal degenerative joint disease, gout and chronic low back pain on a mechanical basis. A computerized tomography scan of the cervical spine showed no herniated disc.

In a July 13, 1998 report, Dr. Conrad noted that appellant was seeking medical retirement for chronic low back pain. He was a painter at Fort Lewis military complex and had multiple medical problems including gout, degenerative joint disease and was status postbilateral knee surgery.

In a July 31, 1998 report, Dr. Andrew J. Luk, Board-certified in internal medicine, noted that appellant fell from a ladder in November 1997 and claimed that his arthritis had greatly worsened since then. Dr. Luk stated that appellant's fall made it impossible for him to continue working as a painter. He stated that it was unclear whether appellant's back pain could be totally attributed to his degenerative arthritis in his back as he could have a component of muscle or ligament strain that was causing his back strain.

In a December 8, 1997 report, Dr. John Gibson, Board-certified in neurological surgery, noted that appellant injured his back in June 1997 while lifting a heavy table at work. He noted that appellant had back pain on and off for several years prior to that but this was the first episode where it radiated down the left leg. Since that time, off and on, he was bothered with back and leg pain. Dr. Gibson noted that it was unclear if appellant had some internal derangement and indicated an orthopedic evaluation would be worthwhile as the knee seemed to be a major source of his discomfort.

In a decision dated September 17, 1998, the Office found the evidence submitted on reconsideration was not relevant and therefore insufficient to warrant merit review of the claim.

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of his or her claim⁵ including the fact that the individual is an "employee of the United States" within the meaning of the Act,⁶ that the claim was timely filed within the applicable time limitation period of the Act,⁷ 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.⁸ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁹

To determine whether an employee has sustained a traumatic injury in the performance of duty, it first must be determined whether a "fact of injury" has been established. First, 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.¹⁰ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹¹ An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.¹²

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.¹³ Nor can the Office find fact of injury if evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. 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, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.¹⁴ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

⁶ See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁷ 5 U.S.C. § 8122.

⁸ See *Melinda C. Epperly*, 45 ECAB 196 (1993).

⁹ See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁰ See *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

¹² As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; see *Frazier V. Nichol*, 37 ECAB 528 (1986).

¹³ See *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁴ See *Gene A. McCracken*, 46 ECAB 593 (1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

the alleged injury, and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established his or her claim.¹⁵

In this case, appellant did not provide sufficient evidence to establish the first component of fact of injury, that is, that the employment incident occurred at the time, place and in the manner alleged.

Appellant originally asserted in his January 12, 1998 notice of recurrence that his original injury occurred on June 3, 1997 and he had a recurrence of disability on November 6, 1997. In his February 6, 1998 statement, he noted that, on November 6, 1997, he was standing on a ladder when he attempted to reach and paint an area. Appellant indicated that he felt a "pinch accompanied by a sharp pain in his lower back." He further stated that he twisted his knee to avoid falling.

In his February 6, 1998 claim form, appellant noted that he "was climbing [a] ladder and had sharp pains in his back and knee." He supplied an April 3, 1998 statement and indicated that he again injured himself while on a ladder painting at work. Appellant noted that he did not immediately begin to feel the full impact of his injury, but had felt the "initial pinches and some soreness." In his May 28, 1998 statement, he explained that moving a heavy counter was the start of his injuries beginning on January 28, 1993. Appellant stated that he never asserted that he was climbing a ladder when he was injured.

In each of his statements, appellant supplied a differing account of what happened, various dates and differing injuries. For instance, in his February 6, 1998 form, he indicated that he was injured climbing a ladder while, in his May 28, 1998 statement, he denied saying that he was climbing the ladder. Likewise, in his February 6, 1998 statement, appellant explained in detail how he experienced "sharp pain" in his low back and knee and twisted the knee when trying to avoid a fall. However, in his April 3, 1998 statement, appellant indicated that he only had some initial pinches and soreness on November 6, 1997 and did not report having any sharp pains on the claimed date of injury.

Furthermore, the medical evidence contains differing histories of injury. The November 11, 1997 report of Dr. Wheat noted that appellant had a four-day history of severe back pain with "no significant injury" and had similar symptoms over the past four years as a result of moving a heavy counter at work. The November 24, 1997 report of Dr. Conrad referred to a June 5, 1997 date of injury but gave no history as to how the injury occurred. The December 26, 1997 report from Dr. Sokoloff did not report any history of injury. The December 31, 1997, January 1 and February 10, 1998 reports from Dr. Conrad referred to moving a heavy counter at work in November 6, 1997. Dr. Sullivan, in her January 27 and April 23, 1998 reports, noted that appellant had the onset of knee pain that began in November 1997. She noted that appellant was working but did not remember doing anything specific to his knee. The histories described by the physicians varied from moving a heavy counter to no specific injury or description of history.¹⁶ While there may be reasonable

¹⁵ See *Constance G. Patterson*, 41 ECAB 206 (1989).

¹⁶ The opinion of the physician must be based upon a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the

explanations for these inconsistencies, they do not appear in the record. For these reasons, the Board finds that appellant did not establish that the claimed November 7, 1997 incident occurred as alleged.

Additionally, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on September 17, 1998.

Under section 8128(a) of the Act,¹⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,¹⁸ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹⁹

In a September 11, 1998 letter request for reconsideration, appellant submitted additional medical reports.

Dr. Conrad's April 13 and July 13, 1998 reports are new but irrelevant as they do not address the history of injury.

Dr. Luk's July 31, 1998 report noted that appellant fell from a ladder in November 1997. His account of appellant's incident differed from appellant's previous accounts as appellant was either standing or climbing with no mention of a fall. Dr. Luk's report did not add consistency or support any of appellant's versions of the claimed incident.

Dr. Gibson's December 8, 1997 report noted that appellant injured his back in June 1997 while lifting a heavy table at work. His account of appellant's incident did not mention standing on or climbing a ladder in November 1997. It did not corroborate either of appellant's versions of how he sustained his injury.

care of analysis manifested and the medical rationale expressed in support of the physician's opinion. *James Mack*, 43 ECAB 321 (1991).

¹⁷ 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.138(b)(1).

¹⁹ 20 C.F.R. § 10.138(b)(2).

The evidence submitted by appellant in support of his request for reconsideration either did not address the history of the injury or contained histories that were inconsistent with appellant's accounts of the incident. Thus, this evidence is not relevant to the issue on which the Office denied appellant's claim, whether the claimed November 7, 1997 incident occurred as alleged. Appellant has not otherwise shown that the Office erroneously applied or interpreted a point of law nor has he advanced a point of law or fact not previously considered by the Office. Thus appellant's reconsideration request was insufficient to require the Office to reopen appellant's claim for review of the merits pursuant to section 10.138(b)(1)(ii). Therefore, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on September 17, 1998.

The decisions of the Office of Workers' Compensation Programs dated September 17, July 13 and May 5, 1998 are hereby affirmed.

Dated, Washington, DC
November 28, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member