U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR S. COOK and U.S. POSTAL SERVICE,
POST OFFICE, Boise, ID

Docket No. 00-2072; Submitted on the Record;
Issued June 5, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on August 22, 1999; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On August 25, 1999 appellant, then a 46-year-old mail processor, filed a traumatic injury claim alleging that on August 22, 1999 he sustained "severe back pain, going down [my] right leg." He related that the injury occurred when he "mov[ed] a tray of mail from a cage…. Mail began slipping out of my hand. I lunged forward to grab the mail." Appellant stopped work on August 25, 1999. On the reverse side of the claim form, a supervisor disagreed with appellant's statement and indicated that appellant "could not decide on how tray caused the accident."

By decision dated November 1, 1999, the Office denied appellant's claim on the grounds that he did not establish fact of injury. The Office found that appellant had submitted insufficient evidence to establish that the incident occurred at the time, place and in the manner alleged.

In letters dated November 29 and December 20, 1999, appellant requested reconsideration of his claim. In a decision dated February 16, 2000, the Office found that the evidence submitted was cumulative and thus insufficient to warrant review of its prior decision.

The Board finds that the case is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim

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[1] 5 U.S.C. §§ 8101-8193.

was timely filed within the applicable time limitation period of the Act, 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.[2] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[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.[4] An injury does not have to be confirmed by eyewitnesses in order to establish 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 his or her subsequent course of action.[5] An employee has not met his or 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.[6] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[7] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.[8]

The Office found that appellant had not established that the employment incident occurred as alleged. In this case, there are some inconsistencies in the evidence that cast doubt regarding the occurrence of the injury. In a statement dated August 26, 1999, Ed Abajian, a supervisor, related that on August 22, 1999 appellant informed him that his back felt "different." Mr. Abajian related:

> "I asked [appellant] if he had injured his back subsequent to the start of his shift. He said, '[n]o.' I asked him again if he had hurt himself running a machine or anything else. [Appellant] stated that he had not. He said that his back just felt 'different' and that he just wanted me to know that."

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[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendelton*, 40 ECAB 1143 (1989).

[3] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *See Elaine Pendelton*, *supra* note 2.

[5] *Charles B. Ward*, 38 ECAB 667 (1989).

[6] *Tia L. Love*, 40 ECAB 586 (1989).

[7] *Merton J. Sills*, 39 ECAB 572 (1988).

[8] *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

In undated statement, Daniel W. Cook, an official with the employing establishment, related that he had interviewed appellant regarding the circumstances surrounding his injury. Mr. Cook described his attempt to elicit what happened to make the tray slip and what was in the tray at the time. He concluded that appellant "could not clearly point out the cause of the accident. He was very unclear as to what happened."

Nevertheless, as noted above, 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.[9] The Board notes that appellant has presented a consistent history of injury since filing his traumatic injury claim. On his claim form, appellant related that he hurt his back when a tray of mail slipped and he lunged to grab the mail. In a statement to the Office dated September 30, 1999, appellant again related that he hurt his back when he reached forward to grab a tray of mail weighing approximately 20 pounds. He stated that he told his supervisor of his injury when he finished his shift. In his statement to Mr. Cook, appellant described the injury as occurring when he reached for a tray that "slipped out of his hands." The record further establishes that appellant notified his supervisor that his back felt "different" the day of the incident and sought medical treatment the next day. The medical reports of record contain a history of injury generally consistent with appellant's account of events.

Under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence. The Board, therefore, finds that the evidence of record is sufficient to establish an incident as alleged on August 22, 1999.

The remaining issue is whether the medical evidence establishes an injury causally related to the employment incident. In a report dated August 26, 1999, Dr. John E. Bishop, a Board-certified orthopedic surgeon and appellant's attending physician, related:

> "[Appellant] presented with an acute flare of back pain on August 26, 1999. We saw [him] a year ago with an acute exacerbation of very chronic back pain problems. We did work [appellant] up at that time with [an] MRI [magnetic resonance imaging scan]. He has multilevel disc disease with an intra-annular tear and minor herniation with no major root compromise in May 1998. [Appellant] recently started work for the [employing establishment] and on August 22, 1999 he was bending over in a stooped posture, moving a tray of mail, when he lost his grip partially and the tray started to fall. He lurched forward to grab ahold and felt a straining, immediate sharp pain in his low back followed by an electric shock discomfort. Since the onset of pain, he has had severe discomfort with any attempt to stretch his legs out straight."

In an accompanying form report of the same date, Dr. Bishop diagnosed sciatica and found appellant unable to work for 10 days. He checked "yes" that the history of injury provided by appellant corresponded to the history provided on the form, that of appellant pulling his back while dropping a tray.

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[9] *Id*.

An MRI scan obtained on September 12, 1999 revealed a herniated disc at L4-5 which deformed the thecal sac and right L5 rootlet. The MRI scan also showed a small disc protrusion at L5-S1 "minimally deforming the anterior surface of the thecal sac" without nerve rootlet. At the request of the employing establishment, a physician reread the September 12, 1999 MRI scan in conjunction with appellant's May 13, 1998 MRI scan. He stated, "There has been progressive right posterior L4-5 disc extrusion since the previous examination. This disc extrusion now results in right L5 rootlet deformity and displacement and mild central spinal canal stenosis as described above." The physician found that the L5-S1 disc protusion had not changed since the prior examination.

In an office visit note dated September 16, 1999, Dr. Bishop reviewed appellant's MRI scan and found that it revealed "disc degeneration predominantly at L4-5 and at L5-S1 and at L4-5 he does have a frank herniation with root compression." He recommended surgery and noted that he would request authorization from the employing establishment.

Proceedings under the Act[10] are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.[11]

The Board finds that the opinion of Dr. Bishop, while supportive of appellant's claim, is not sufficiently rationalized to meet his burden of proof. Dr. Bishop's reports do, however, raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[12] The case, therefore, will be remanded to the Office for further development of the medical evidence. On remand, the Office should prepare a statement of accepted facts which includes a description of the August 22, 1999 employment incident and refer appellant to an appropriate medical specialist for an opinion on whether he sustained an injury to his back or aggravation of a preexisting back condition due to the August 22, 1999 employment incident. After such further development as is necessary, the Office should issue a *de novo* decision on appellant's claim.[13]

[10] 5 U.S.C. §§ 8101-8193.

[11] *John J. Carlone*, 41 ECAB 354 (1989).

[12] *Id*.

[13] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.

The decisions of the Office of Workers' Compensation Programs dated February 16, 2000 and November 1, 1999 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
June 5, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member