U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAHAG Y. TCHAKMAKJIAN and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, El Segundo, CA

Docket No. 98-2639; Submitted on the Record;
Issued February 5, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a back injury in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration of his claim constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a back injury in the performance of duty.

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 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 the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[4] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5] The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[6]

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 his or her subsequent course of action.[7] An employee has not met his 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.[8] 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 facie* case has been established.[9] 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.[10]

On April 30, 1997 appellant, then a 47-year-old quality assurance specialist, filed a traumatic injury claim alleging that he sustained a back injury while lifting a television monitor at work on September 20, 1996. Appellant did not stop work at that time but later stopped work for various periods. Appellant indicated that the injury actually occurred on September 13, 1996. By decision dated July 17, 1997, the Office denied appellant's claim on the grounds that he had not established the fact of injury. By decisions dated October 17, 1997 and February 11, 1998, the Office affirmed its July 17, 1997 decision. By decision dated May 19, 1998, the Office denied appellant's request for merit review.

The Board finds that appellant has established the occurrence of an employment incident on September 13, 1996 when he lifted a television monitor at work. After initially indicating that the claimed incident occurred on September 20, 1996, appellant then indicated that the incident actually occurred September 13, 1996. He explained that the error was inadvertent and that a rechecking of his records confirmed that the employment incident occurred on

[5] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[6] *Elaine Pendleton, supra* note 2; 20 C.F.R. § 10.5(a)(14).

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

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

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

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

September 13, 1996. In a July 1997 statement, Kimberly El, a coworker, indicated that appellant injured his back while lifting a television on September 13, 1996.[11] In June and July statements, David Johnson, a supervisor, indicated that appellant was moving a television monitor on September 13, 1996. The record reveals that the first occasion after September 13, 1996 that appellant sought medical treatment for his back was October 17, 1996. Appellant explained that he delayed seeking treatment because he engaged in self treatment and only gradually became aware of the seriousness of the injury. Although there are some inconsistencies in the record,[12] there is no strong or persuasive evidence to refute appellant's claim that he lifted a television monitor at work on September 13, 1996.

The Board finds, however, that appellant did not submit sufficient medical evidence to establish that he sustained a back injury due to the September 13, 1996 employment incident. Appellant submitted numerous medical reports, beginning in late 1996, which detailed his back condition. However, none of these reports contained an opinion that appellant sustained a back injury on September 13, 1996.[13] Reports of attending physicians from October 1996 and April 1997 indicated that appellant reported a lifting incident in September 1996 but they did not contain any indication that appellant's back problems were employment related.[14] For these reasons, appellant did not meet his burden of proof to establish that he sustained a back injury in the performance of duty on September 13, 1996.

The Board further finds that the refusal of the Office to reopen appellant's case for further reconsideration of his claim 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,[15] 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.[16] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[17] When a claimant fails to meet one of the above standards, it is a matter of

[11] Ms. El initially indicated that the incident occurred on September 20, 1996, but she noted that after researching her records she realized that the actual date was September 13, 1996. She noted that she was initially confused because training classes occurred on more than one date in September 1996. Ms. El stated that she witnessed appellant lifting the television and that he appeared to have injured himself.

[12] It remains unclear why appellant delayed until April 1997 to file a claim and officially report the claimed injury to a supervisor.

[13] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[14] Moreover, the reports listed the reported date of injury as September 20, 1996 or "around" September 19, 1996.

[15] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[16] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[17] 20 C.F.R. § 10.138(b)(2).

discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[18]

In support of his reconsideration request, appellant submitted statements from early 1998, in which his father and fiancée indicated that he had reported hurting his back in mid September 1996 while lifting heavy objects at work. These statements do not clearly identify an injury, which occurred on a specific date as alleged and are essentially vague in nature. Therefore, they are not relevant to the main issue of the present case, *i.e.*, whether appellant met his burden of proof to establish that he sustained a back injury in the performance of duty.[19] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

In this case, appellant has not established that the Office abused its discretion in its May 19, 1998 decision, by denying his request for a review on the merits of its February 11, 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, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The May 19, February 11, 1998 and October 17, 1997 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Dated, Washington, DC
February 5, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[19] In the last merit decision prior to appellant's reconsideration request, the Office had determined that appellant had not established the fact of injury.

[20] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).