U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SCOTT G. OBRIGEWITSCH and U.S. POSTAL SERVICE,
POST OFFICE, Issaquah, WA

Docket No. 01-1369; Submitted on the Record;
Issued July 10, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded the acceptance of appellant's claim.

On July 26, 1999 appellant, then a 31-year-old custodian/laborer, filed a traumatic injury claim, alleging that on June 19, 1999 he injured his neck and back while he was buffing a floor. In a statement contained on the claim form, James R. Clowers, a union steward, declared that on June 21, 1999 appellant told him that he had injured his back and was in extreme pain. A supervisor, Wolfram Taube, stated that he was not aware of the injury.

By letter dated September 20, 1999, the Office informed appellant of the type of evidence needed to support his claim. On September 24, 1999 the employing establishment advised that, effective that day, appellant had been "excessed" from the Issaquah employing establishment to the Seattle Bulk Mail Facility. On September 27, 1999 appellant filed a traumatic injury claim, alleging that on October 28, 1998 he hurt his back when he was pulling weeds at work. His supervisor, Mr. Taube, declared that this was not an on-the-job injury.

In support of his claims, appellant submitted an undated statement, in which he asserted that he informed his supervisor, John R. Dale, that he injured his back while weeding and buffing floors. He alleged that he was forced to sign a statement indicating that he was injured at home or he would be fired. Appellant continued that he reinjured his back on June 19, 1999 again while weeding and buffing floors. He related that he told "Bill" and Mr. Clowers about the injury. Appellant further stated that he was harassed by employing establishment management concerning his injuries and that he stopped work on July 26, 1999. In a statement dated September 22, 1999 he reiterated that pulling weeds and buffing floors caused his back condition and stated that he informed his supervisor, Timothy Stipek, of the injury the day it happened.

Appellant also submitted statements from friends, Kenneth J. Klukas and Brian Burnett, who asserted that in October 1998 appellant related that he hurt his back at work. He further

submitted medical evidence from Dr. John Morris, a Board-certified family practitioner and Dr. Bailey Ferkel, a chiropractor.

In a treatment note dated October 28, 1998, Dr. Morris[1] advised that appellant had a history of recurrent low back dysfunction and about three times a year sprained his lower back. He stated: "This particular episode started at home and there is no [history] of work injury...." Dr. Morris diagnosed acute lumbar strain. In a treatment note dated August 4, 1999, he noted appellant's complaints of radiating low back pain "since he injured his back at work, he thinks, last September." Dr. Morris reported findings on examination and diagnosed lumbar strain with possible nerve-root impingement. He continued to submit reports and by letter dated October 26, 1999, noted that appellant took issue with the history of injury reported in his October 28, 1998 treatment note. Dr. Morris continued:

> "A review of [appellant's] chart shows that he was treated in this clinic for low back pain on January 14, 1998. That note stated that [he] had a 'past history of back strain.' At this time, I cannot substantiate that [appellant] had been seeing an osteopath for treatment of his lumbar strain three or four times a year."

Appellant also submitted numerous reports from Dr. Bailey Ferkel, a chiropractor, who initially saw him on October 28, 1998 when he noted a two-to three-week history of low back pain that seemed to be worsening. He diagnosed lumbar and lumbosacral sprain and myospasm. Dr. Ferkel continued to treat appellant and, in an undated letter to Dr. Morris, advised that appellant's last treatment was on December 21, 1998 and that he responded well to care with good prognosis. In a June 22, 1999 report, he advised that appellant had acute neck pain after lifting a truck top.

The employing establishment submitted a statement signed by appellant and dated October 30, 1998, stating, "[l]ast weekend I strained my back at home." In a statement also dated October 30, 1998, Mr. Dale, a supervisor, stated that appellant informed him that his back was hurting but said he had injured his back at home. Mr. Dale further noted that appellant wrote a statement indicating that the injury had occurred at home. Also submitted was a statement dated July 28, 1999, in which Robert L. Crawford, Jr., a coworker, discussed the October 1998 injury, stating, "he stated to me that he had hurt his back at home." In a statement dated September 24, 1999, Mr. Dale advised that he agreed with his original statement.

The employing establishment further submitted a fitness-for-duty examination report dated August 24, 1999, from Dr. Richard G. McCollum, a Board-certified orthopedic surgeon, who reported that appellant was seen to evaluate an injury "that allegedly occurred" on June 16, 1999. He stated that appellant reported an initial injury in October 1998 and had complaints of pain in the right mid back radiating to the low back and upper posterior thigh. Dr. McCollum noted findings on examination and diagnosed cervical and lumbar sprain due to the injury on June 16, 1999. He further advised that there were no significant positive objective findings, continuing, "I do n[o]t know why he cannot work in his usual occupation without any restrictions." Magnetic resonance imaging (MRI) of the lumbar spine done on October 13, 1999 was reported as demonstrating left paracentral L1-2 disc protrusion with slight crowding of the

[1] Appellant further submitted evidence from Dr. Morris that was not relevant to the instant claim.

intrathecal nerve roots and central L3-4 and L4-5 small disc protrusion with the latter resulting in minimal anterior dural sac effacement.

By decision dated November 10, 1999, the Office denied both claims on the grounds that fact of injury had not been established. The Office found that the record contained too many inconsistencies regarding the facts surrounding the alleged injuries.[2]

On December 16, 1999 appellant requested a hearing and on February 2, 2000 underwent a bilateral L5-S1 laminectomy with bone graft. In a decision dated February 24, 2000, an Office hearing representative accepted that appellant sustained cervical and lumbar strains on June 19, 1999 based on the opinion of Dr. McCollum. She further found that appellant had not established that he sustained an employment-related injury on October 28, 1998 but vacated the previous decision in that regard, in order to preserve appellant's appeal rights.

Appellant continued to submit medical evidence and in a report dated November 30, 1999, Dr. Kim B. Wright, a Board-certified neurosurgeon, reported that appellant was injured at work 14 months previously when "he was doing a lot of physical labor." He noted that appellant's pain worsened in June 1999 with classic radiating lower back pain. Dr. Wright noted the MRI findings of disc herniation and findings on examination include a positive straight leg-raising test. He stated: "It is my opinion that [appellant] has obviously aggravated a preexisting problem." Flexion and extension x-ray of the lumbar spine demonstrated slight instability at L5 with slight spondylolisthesis and mild degenerative disc changes at L4-5 with mild disc narrowing. In a duty status report also dated November 30, 1999, Dr. Wright advised that appellant could not work.

Dr. Robert Perry, a general practitioner, provided a December 7, 1999 treatment note in which he related a history that appellant was injured in October 1998 and reinjured on June 19, 1999 when he pulled weeds for five hours. He advised that appellant had intractable pain and continued to submit reports in which he noted appellant's continued complaints of pain.

Computerized tomography/myelogram done on December 21, 1999 was reported as showing a disc protrusion at L1-2 distorting the dural sac and mild central bulging at L3-4 and L4-5 without encroachment. Spondylolisthesis was present at L5-S1 with possible neural foraminal compromise.

Appellant further submitted a statement in which Mr. Clowers advised that "in the latter part of 1998" when appellant was within two weeks of completing probation, he injured his back pulling weeds. Mr. Clowers stated that appellant sought advice from him and he advised that appellant should report the injury but that when he did so, he was forced to sign a statement indicating that he was not injured at work or he would be fired. Mr. Clowers further stated that on July 26, 1999 appellant reported to work with a back brace and a doctor's note, which advised that he had to wear the brace at work. He was then told by his supervisor, Bill Tobie, to sign out

[2] The record indicates that the June 19, 1999 claim was adjudicated by the Office under file number 140343624 and the October 28, 1998 claim was adjudicated under file number 140346599. The claims were doubled on November 12, 1999.

on sick leave. Lastly, Mr. Clowers advised that on or about August 6, 1999 the postmaster, Gordon Erickson, declared that appellant was to be put on an absent-without-leave status.

A telephone conference was held on July 7, 2000 between an Office claims examiner and Mr. Clowers, who stated that he also was a maintenance worker, that he did not witness the October 1998 injury because he was not at work that day, that neither he nor appellant liked weeding or spreading mulch. He further stated that he did not witness the June 1999 injury, stating that appellant said he was injured at home because he feared retribution from the employing establishment. Mr. Clowers stated that grievances had been filed and indicated that he had no knowledge of appellant's neck injury. The claims examiner stated that Mr. Clowers had difficulty separating his personal complaints from those of appellant, advising that Mr. Clowers felt that both were subject to unfair labor practices.

On July 18, 2000 the district Director sent an inquiry to the Office of Hearings and Review, requesting clarification of the February 24, 2000 decision. In August 2000 report appellant underwent surgery to the cervical spine.

In a decision dated October 31, 2000, the assistant branch Chief of the Office of Hearings and Review noted that 20 C.F.R. § 10.610 provided that at any time and on the basis of existing evidence, the Director could modify, rescind, decrease or increase compensation previously awarded or award compensation previous denied. The assistant Chief then rescinded the February 24, 2000 decision, finding that the decision of the previous hearing representative was improper and premature because she failed to discuss the inconsistencies in the case record. He further found that appellant retained the right to a hearing.

Appellant continued to submit medical evidence and, in a statement dated November 28, 2000, Mr. Klukas declared that in the fall of 1998 appellant informed him that he had injured his back at work and was told by a supervisor that he would be fired if he reported it because he was still on probation. Mr. Klukas further stated that he was a state trooper, who had known appellant since 1983 and considered appellant to be truthful.

In a July 22, 2000 letter, Mr. Dale responded to the conference memorandum, stating that no grievances had been filed by appellant regarding working conditions. He advised that appellant had not informed him or any supervisor that he was having back problems as a result of his job duties. Mr. Dale continued that he was on annual leave on June 19, 1999 and reiterated that appellant told him that he injured his back at home in October 1998.

At the hearing, held on November 30, 2000, appellant testified that he was informed by Mr. Dale that if he reported the October 28, 1998 injury he would be fired. He stated that the injury was caused by continuous yard work and buffing floors and that he saw a physician and a chiropractor on the date of injury. He stated that Dr. Morris did not want to get involved with changing the history on his chart notes. Appellant described his back problems prior to October 1998 and testified that he did not injure himself at home at that time. He further testified that Dr. Morris referred him to Dr. Ferkel and that he continued to work after the October 1998 injury because he was still on probation but was under treatment by Dr. Ferkel for approximately three months. Appellant testified that he injured his back in a motor vehicle accident at sometime before he began work for the employing establishment and was treated by Dr. Morris.

Appellant further testified that he reinjured his back on June 19, 1999 pulling weeds and buffing floors and that he informed the floor supervisor, Mr. Stipek and informed Mr. Taube the following Monday. He saw both Drs Morris and Ferkel on June 22, 1999. Appellant stated that he told both doctors that he was injured at work. He stated that he was given a back brace to wear but that neither the postmaster nor Mr. Taube would let him wear it. Appellant testified that he had tried to file a claim on June 21, 1999 but the employing establishment did not file it until July 26, 1999, when they sent him home because he wanted to wear the back brace. He further testified that he did not tell Mr. Crawford that he injured his back at home in October 1998 and that Mr. Crawford told him he would be fired if he reported the injury which is why he was reluctant to file the claim. Appellant testified that Mr. Klukas was not a postal employee, just a good friend.

Mr. Clowers also testified at the hearing, stating that he did not witness appellant reporting the October 1998 injury to a supervisor but that he was informed by appellant that Mr. Dale forced him to sign a statement or he would be fired. Mr. Clowers further testified that he was not present when appellant hurt his back in June 1999, finding out about it a few days later when he advised appellant to file a claim. He was present at a later time when appellant spoke with Mr. Taube and the postmaster, Gordon Erickson, about wearing a back brace and had further conversation about what type claim appellant should file. Mr. Clowers also testified that appellant told him he hurt his back when he fell down at work. He concluded that during this period a hostile work environment existed at the employing establishment and described how strenuous the work was.

Appellant's wife, Stacy Obrigewitsch, also testified, stating that she was a letter carrier with the employing establishment. She stated that appellant informed her he had injured his back at work in October 1998 doing hard labor. Mrs. Obrigewitsch stated that she advised him to say he injured his back at home so that he would not lose his job. He told her he injured his back on June 19, 1999 when he lifted a flat of mail and felt something pop.

The employing establishment submitted statements[3] dated August 10, 1999 and December 15, 2000 in which Mr. Stipek, a supervisor, advised that appellant did not mention that he had been injured on June 19, 1999. In a second statement dated August 10, 1999, Mr. Taube also stated that he had not been informed on June 21, 1999 that appellant injured himself at work and it was not until June 24, 1999 when he told appellant to mow the lawn that appellant informed him his back was hurting. He stated that he requested medical certification, which appellant provided but did not indicate that he injured his back at work. In a December 19, 2000 statement, Mr. Erickson provided comments on the hearing transcript, declaring that all statements made by appellant and Mr. Clowers were false.

By letter dated January 1, 2001, appellant's union representative provided comments on the hearing transcript, reiterating that appellant provided notice to Mr. Stipek and Mr. Taube. In a January 3, 2001 letter, he requested that the statements by Mr. Taube and Mr. Stipek be stricken from the record.

[3] These were faxed to the Office on December 19, 2000.

By decision dated March 15, 2001, an Office hearing representative affirmed that appellant failed to establish that he sustained injuries on October 28, 1998 or June 19, 1999 and, thus, the Office properly rescinded acceptance of his claim. The hearing representative noted the many inconsistencies in the evidence bearing on the issue of whether he sustained injuries at work on October 28, 1998 and June 19, 1999 at the time, place and in the manner alleged. The instant appeal follows.

The Board finds that the Office properly rescinded acceptance of appellant's claim.

Once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation. This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous. Section 10.610 of the implementing regulations of the Office states:

> "The Federal Employees' Compensation Act specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained.

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. 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.[4] 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.[5]

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,[6] 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.[7] Such circumstances as late notification of injury, lack of

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

[5] *Id*. For a definition of term "traumatic injury," see 20 C.F.R. § 10.5(ee) (1999).

[6] *See Elaine Pendleton*, 40 ECAB 1143 (1989).

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

confirmation of injury, continuing to work without apparent difficulty following 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.[8]

In the instant case, the Board finds that the Office properly rescinded acceptance of appellant's claim. The Board further finds that appellant did not establish fact of injury because of inconsistencies in the record that cast serous doubt as to whether the specific events or incidents of October 28, 1998 and June 19, 1999 occurred at the time, place and in the manner alleged.[9]

Regarding the October 28, 1998 injury, while appellant asserted that he hurt his back when pulling weeds and buffing floors, the employing establishment submitted an October 30, 1998 statement signed by appellant in which he stated that he strained his back at home. Mr. Dale also provided an October 30, 1998 statement in which he indicated that appellant informed him that he had injured his back at home. In a treatment note dated October 28, 1998, Dr. Morris provided a history that appellant had recurrent low back dysfunction and advised that "this particular episode started at home." In his treatment note dated October 28, 1998, Dr. Ferkel noted a two-to three-week history of low back pain. Furthermore, in a statement dated July 28, 1999, Mr. Crawford, a coworker, advised that appellant told him he had injured his back at home. While Mr. Clowers advised that appellant reported that he had injured his back while working in 1998 and that he was forced to sign a statement that he had injured his back at home, Mr. Clowers also advised that he did not witness the injury because he was not at work that day. The Board also finds that appellant's wife testimony, that she advised him to say he had hurt his back at home, of decreased probative value. Likewise, the Board notes that Dr. Morris later indicated that appellant reported that he had injured his back at work and that appellant took issue with the reported history of injury and Drs. Wright and Perry advised that appellant reported a work injury in the fall of 1998. The Board, however, finds the evidence most contemporaneous to the alleged October 28, 1998 employment injury to be of greatest probative value and, based on the many consistencies, finds that appellant did not establish that the claimed October 28, 1998 incident occurred in the time, place and in the manner as alleged.

Similarly, the Board finds that appellant did not establish that the claimed June 19, 1999 incident occurred as alleged. On his claim form, appellant stated that this injury occurred while he was buffing floors. He later stated that it was also due to weeding. In a June 22, 1999 report, Dr. Ferkel advised that appellant had acute neck pain after lifting a truck top. Mr. Clowers again acknowledged that he did not witness an injury on June 19, 1999 and testified that appellant told him he hurt his back when he fell down at work. Appellant's wife testified that appellant reported that he injured his back on June 19, 1999 when lifting a flat of mail. In a treatment note dated August 4, 1999, Dr. Morris advised that appellant reported that he injured his back at work "he thinks last September." While Drs. McCollum and Perry reported appellant's history that the injury occurred at work, Dr. Wright merely noted that appellant's pain worsened in June 1999.

[8] *See Constance G. Patterson*, 41 ECAB 206 (1989).

[9] *Gene A. McCracken, supra* note 7 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in a claimant's statements describing the injury created serious doubt that the injury was sustained in the performance of duty).

Mr. Stipek advised that appellant did not tell him that he injured his back on June 19, 1999 and Mr. Taube advised that, when he asked appellant to mow the lawn on June 24, 1999, he informed him that his back was hurting. Therefore, the Board again finds, in view of these unexplained inconsistencies in the evidence, appellant failed to establish that he sustained an injury on June 19, 1999.[10]

The decision of the Office of Workers' Compensation Programs dated March 15, 2001 is hereby affirmed.

Dated, Washington, DC
July 10, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[10] *Id.*