U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICK E. GOBERT and BUREAU OF INDIAN AFFAIRS, BLACKFEET AGENCY, Browning, MT

Docket No. 02-1499; Submitted on the Record; Issued November 19, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an injury in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On March 16, 2001 appellant, then a 37-year-old laborer, filed a traumatic injury claim alleging that on March 1, 2001 he injured his right arm and shoulder while changing cutting edges on a V-Plow. On the reverse side of the claim form, appellant's supervisor indicated that his knowledge of the facts agreed with appellant's statement regarding the injury. Appellant stopped working on March 5, 2001 and returned to work at March 12, 2001.

Following a March 23, 2001 letter from the Office requesting additional information, appellant provided further details regarding his claimed injury. On March 29, 2001 appellant asserted that while straining to put on the cutting edge, he dropped it then picked it up and put it back on again. He stated that he felt "good" until the next morning. Appellant informed his supervisor and went to the hospital. He stated that he felt right arm and neck pain and thought he had pulled muscles and that his pain was getting worse. Appellant worked for four days and, although the pain increased each day, he prolonged going to the physician. Appellant indicated that he went to the hospital on "March 1st."

Appellant submitted an emergency visit report dated March 1, 2001, which indicated that he was seen that day after pulling on a pipe at work on Tuesday. The report noted that appellant woke on Wednesday with pain and swelling to the right arm, shoulder and neck. It indicated that appellant had problems of right shoulder impingement syndrome, right trapezial and triceps muscle spasm and neck pain, with possible cervical radiculopathy.

Appellant also submitted a report dated March 7, 2001, which noted appellant's complaints of pain and stiffness in the right upper extremity and reported that he was working on pulling pipes and cutting hedges seven days ago and was seen in the emergency room over the weekend. Appellant further submitted an emergency report dated March 8, 2001, which

indicated that he returned after 10 days with no improvement and that the pain was getting worse. The report noted that appellant had a persistent problem; however, his C-spine films had been normal.

A March 15, 2001 follow-up report noted that appellant continued to experience cervical pain and radiculopathy. A separate treatment note indicated that a radiologist reported that he had herniated cervical discs at C5-6 and C6-7, a deformed cord, spinal block and neural foramina involvement. Appellant submitted a March 16, 2001 report, which indicated that "8 (eight) days ago while cutting edges on a plow, pick-up got stuck. States had to jerk several times to get truck out. Felt okay until next a.m. when awoke with pain, right side neck, shoulder/trapezius radiating down arm to fingers…."

By decision dated May 2, 2001, the Office denied appellant's claim. The Office found that appellant failed to establish that his condition was caused by the event of March 1, 2001.

In a letter dated May 15, 2001, appellant requested reconsideration. Appellant submitted a May 9, 2001 letter from Eldon LaTray, a physician's assistant. Mr. LaTray noted that he had first seen appellant on March 1, 2001 in the emergency room and then on March 5, 8 and 16, 2001 for follow-up care. He noted his belief that the herniated discs, which appellant suffered, were caused by his employment.

Appellant further submitted reports including a magnetic resonance imaging scan of the cervical spine dated March 14, 2001, which showed severe secondary canal stenosis and complete spinal block with deformity of the right lateral and ventrolateral spinal cord and right C5-6 and C6-7 neural foraminal stenosis.

In a May 23, 2001 letter, appellant through counsel requested an oral hearing. Appellant's counsel submitted argument and evidence including a March 19, 2001 narrative report from Mr. LaTray, who noted that appellant's history that he was cutting edges on a plow on February 27, 2001 and had an onset of upper extremity pain the following morning. He further noted appellant's diagnosis of herniated discs.

By decision dated July 9, 2001, the Office modified the prior order to reflect that the evidence of record established that appellant had not met his burden of proof in establishing the factual component of fact of injury. The Office found, therefore, that the May 2, 2001 decision denying the claim based on causal relationship was premature.

Appellant's counsel resubmitted his May 23, 2001 request for an oral hearing. By decision dated August 23, 2001, the Office denied appellant's request pursuant to section 8124 of the Federal Employees' Compensation Act. The Office found reconsideration had previously been requested under section 8128 and the Office issued its reconsideration decision dated July 9, 2001.

On September 12, 2001 appellant through counsel requested reconsideration. He submitted a narrative statement dated July 17, 2001, in which appellant stated that the injury occurred on February 26, 2001 when he prevented a 200- to 300-pound wing cutting edge, which he had picked up from hitting the floor. Appellant indicated that on February 27, 2001 he woke up around 6:00 a.m. with the above-described upper extremity pain and went to work, at

which time he complained of the pain to his coworkers and supervisor. Appellant noted again that he proceeded to work until March 1, 2001, when the pain was increasingly worse, then appellant went to the emergency room where he was treated by Mr. LaTray, a physician's assistant.

Appellant's counsel submitted a witness statement from appellant's coworker who stated that appellant reported to him on February 28, 2001 that his neck was hurting and that he and other coworkers speculated that he had slept wrong. Appellant further submitted a May 15, 2001 report from Dr. Michael Luckett, a Board-certified orthopedic surgeon, who reported that appellant injured his neck while changing a snowplow on February 27, 2001 discussed his clinical herniation findings and stated that appellant had no history of neck or upper extremity pain and weakness.

In a November 20, 2001 letter, the Office requested further clarification as to the date of injury, whether the claimed injury occurred on February 26, 2001 as stated by appellant in his July 17, 2001 statement or February 27, 2001, as identified by his coworker and Dr. Luckett. In a statement dated November 27, 2001, appellant's counsel responded that the injury occurred on Tuesday, February 27, 2001, but that the medical record was inaccurate in stating that appellant was pulling pipe on February 27, 2001. He further noted that on Wednesday, February 28, 2001 appellant discussed the pain with his coworker and sought emergency treatment for the injury on March 1, 2001.

By merit decision dated January 31, 2002, the Office denied modification of the prior decision. The Office indicated that appellant's notice of injury gave a date of injury of March 1, 2001, which differed from the medical record and further that some reports of record did not provide an accurate history of the injury. The Office further noted that the facts seemed questionable that appellant felt no physical symptom or reaction after almost dropping an object that weighed at least 200 pounds and made no mention of the accident until the next day. The Office, therefore, found that the factual and medical evidence of record was still insufficiently convincing to reverse the prior denial of benefits.

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty as alleged.

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

[1] 5 U.S.C. §§ 8101-8193.

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

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

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]

An award of compensation may not be based on surmise, conjecture or speculation,[6] when a claim for compensation is predicated on traumatic injury, the employee must establish the fact of injury by proof of an accident or fortuitous event having relative definiteness with respect to time, place and circumstances and having occurred in the performance of duty,[7] while appellant may be reasonably certain as to the fact of injury, he has the burden of showing by reliable, probative and substantial evidence that his injury was incurred at the time, place and in the manner alleged, or to present evidence from which such fact of injury may be reasonably inferred.[8]

The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred. In this case, the Board finds that the totality of evidence of record is sufficient to reasonably infer that an incident occurred at work on February 27, 2001. While appellant initially provided a date of injury of March 1, 2001, which differed from some evidence of record, appellant and his counsel ultimately clarified that the injury occurred only days earlier on February 27, 2001 and that appellant actually received medical treatment for the injury on March 1, 2001. Further, appellant's supervisor indicated that his knowledge of the facts agreed with appellant's statement regarding the injury. Appellant asserted that he felt an onset of pain on February 28, 2001 and prolonged going for treatment until March 1, 2001. It seems reasonable that appellant may have believed his pain the morning of February 28, 2001 was associated with the event of struggling with a 200-pound object the day before and that he might have prolonged treatment for a few days until his pain increased. The medical record, although inaccurate in one report regarding the history of injury, is clear that appellant received treatment on March 1, 2001 for pain complaints that he related to a work event a few days earlier. While no one witnessed the alleged injury on February 27, 2001, appellant's coworker submitted a statement corroborating appellant's assertion that he woke up with upper extremity pain on February 28, 2001 and discussed his condition at work. The Board, therefore, finds that the inconsistencies of the case do not rise to a level, which cast serious doubt on the validity of the claim.[9] 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

---

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

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

[6] *See Miriam L. Jackson Gholikely*, 5 ECAB 537 (1953).

[7] *See Loretta Phillips*, 33 ECAB 1168 (1982).

[8] *Samuel L. Licker*, 4 ECAB 458 (1951).

[9] *See Nathaniel Cooper*, 46 ECAB 1053 (1995).

persuasive evidence.[10] Because appellant's statement of events on February 27, 2001 is not specifically contradicted by the employing establishment or the record in general, it carries sufficient weight to establish that a work incident occurred at the time, place and in the manner alleged.

The remaining issue to be resolved is whether the medical evidence establishes a causal relationship between the February 27, 2001 work incident and the claimed condition and disability. The Board finds that appellant has failed to establish a causal relationship between the incident on February 27, 2001 and his claimed condition and disability. Appellant submitted emergency treatment and follow-up reports from Mr. LaTray, a physician's assistant, dated from March 1 through 15, 2001 and later a May 9, 2001 report, which provided his opinion as to the cause of appellant's cervical condition. However, a physician's assistant is not a "physician" as defined in the Act and his reports are, therefore, of little probative value.[11] Appellant further submitted a May 15, 2001 report from Dr. Luckett, a Board-certified orthopedic surgeon, who stated that appellant injured his neck while changing a plow on February 27, 2001 discussed his clinical findings of herniation and that appellant had no prior history of neck or upper extremity pain. However, Dr. Luckett did not provide a rationalized medical opinion explaining the medical mechanics, by which the February 27, 2001 incident caused an injury.

Consequently, appellant has not met his burden of proof in establishing fact of injury, as he has submitted insufficient medical evidence indicating that work factors caused or aggravated any medical condition on February 27, 2001.

The Board further finds that the Office properly denied appellant's request for an oral hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[13]

In this case, the Office on August 23, 2001 denied appellant's request finding that reconsideration had previously been requested under section 8128 and the Office had issued its reconsideration decision dated July 9, 2001. This is considered a proper exercise of the Office's

---

[10] *Doyle W. Ricketts*, 48 ECAB 167 (1996).

[11] As defined by the Act in 5 U.S.C. § 8101(2), "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.

[12] 5 U.S.C. § 8124(b)(1).

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

discretionary authority.[14] The Board finds no abuse of the Office's discretionary authority in this case.

The August 23, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed. The January 23, 2002 decision is modified to reflect that appellant had established that the February 27, 2001 incident occurred as alleged and affirmed on the grounds that the medical evidence failed to establish causal relationship.

Dated, Washington, DC
November 19, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[14] *See Mary E. Hite*, 42 ECAB 641, 647 (1991).