U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN B. McNEIL, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 03-688; Submitted on the Record;
Issued August 7, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury in the performance of duty on January 9, 2001; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's October 8, 2002 request for reconsideration.

On May 14, 2001 appellant, then a 39-year-old carrier, filed a notice of traumatic injury alleging that on January 9, 2001 he was traveling from one apartment to another when he fell and injured his lower back, left leg and left foot while in the performance of duty. He also noted, on his CA-1 claim form that, on May 7, 2001, he was standing casing mail when he experienced left foot numbness. Appellant stopped work on May 7, 2001. He returned to limited duty on June 4, 2001.

Appellant's claim was accompanied by a May 7, 2001 "return to work/school" slip signed by Dr. William W. Bucy, a family practitioner, who placed appellant off work until his medical appointment with Dr. Feiyu Chen, a Board-certified neurologist. Additionally, Dr. Bucy reported work restrictions of no "lifting, pulling or straining."

The employing establishment challenged appellant's claim on the basis that the medical evidence did not support a work-related injury and because appellant reportedly provided conflicting accounts on how the injury arose. In one instance, appellant reportedly attributed his current condition to having been chased by a dog several months prior and alternatively he alleged that he fell while delivering the mail on January 9, 2001. The employing establishment provided a copy of a May 7, 2001 email from Curlie M. Fultz, which indicated that appellant had advised her that same day that he would be off work for the next few days because of an injury sustained several months prior. Appellant reportedly told Ms. Fultz that she "should remember

when he was chased by the dog" and that he was leaving today because of what happened back then.[1] The employing establishment also provided a copy of an accident report (PS Form 1769) signed by appellant, which stated that he slipped on wet leaves "on or about [January] 9, 2001" while delivering the mail and fell on his left side. Appellant reported that he continued to deliver the mail but telephoned Eddie Harmon when he was finished to inform him of the accident. Appellant stated that he told Mr. Harmon that he would continue with his route but that he was in pain.

In a letter dated June 8, 2001, the Office advised appellant that in order to establish that he was injured on January 9, 2001 he had to submit a medical report "or record from at or near the time of injury," which provided a description of injury, diagnosis of injury and further explained how that diagnosis was causally related to the alleged work incident. The Office explained to appellant that he was not entitled to continuation of pay since his notice of injury was not filed within 30 days of the date of injury. Appellant was also told that if he believed his disability beginning May 7, 2001 was related to the fall on January 9, 2001 he should pursue the matter by filing a claim for a recurrence of disability. Additionally, the Office requested that appellant explain why he told his supervisor on May 7, 2001 that his problem that day was the result of being chased by a dog.

In an undated statement to the Office, appellant related the following:

> "On [May 7, 2001] I only talked to one supervisor which was Philip Steward and I only told him one date that day which was [January 9, 2001]. They offered no [Form] CA-17 that day. On [May 10, 2001] I talked with [Ms.] Fultz and I asked her did she remember me calling when the dog was after me, because I was letting her know that I [called] a supervisor when I hurt myself and they would tell me to continue the route but I never was told about a [Form] CA-17 until [May 7, 2001]."

The Office also received several reports from Dr. Chen. In a May 10, 2001 report, he related that appellant fell "on January 9, 2001 when he was delivering mail and slipped on a grassy surface and Dr. Chen said that appellant fell on the left side and since that time he is having lower back pain intermittently but never "saw" a doctor for the last four months and [that] he was taking Advil." In a May 30, 2001 report, Dr. Chen advised that appellant was still under his care "for an injury [that] he received to his back." He indicated that he was unable to offer a diagnosis or prognosis regarding appellant's condition, but requested that appellant be placed on light duty. On June 1, 2001 Dr. Chen reported that appellant had been off work due to low back pain with radiculopathy. In a report dated June 1, 2001, he noted under the "description of injury" that appellant slipped and fell while walking up a hill. On June 6, 2001 Dr. Chen again stated that appellant slipped and fell while delivering mail. The diagnosis was unknown.

[1] In an employing establishment memorandum dated May 7, 2001, Ms. Fultz related that appellant brought in documentation from a doctor stating that he would be off work for several days. Ms. Fultz stated, "[appellant] immediately told me that I should remember when he [was] chased by the dog. He was 'chased' not bitten. This happened months and months ago. [Appellant] told me that he left today because of what happened back then, that he had tingling in his leg and numbness in his foot." Ms. Fultz noted that after an investigation by the dog catcher the villainous dog ended up being a "baby pooch."

On June 25, 2001 appellant filed a claim for a recurrence of disability from May 7 through June 6, 2001. The date of the original injury was listed as January 9, 2001. He indicated that he had received medical treatment from Dr. Chen and was placed on limited duty effective June 6, 2001.

In a decision dated August 2, 2001, the Office denied appellant's claim for compensation on the grounds that he failed to establish fact of injury. The Office noted the following inconsistencies with respect to his case. First, appellant did not report his injury until over four months after the claimed event. When asked by his supervisor why he did not report the injury sooner, he alleged that he called in on January 9, 2001 and reported the incident by telephone. Appellant's supervisor, however, contends that appellant only reported being hurt while being chased by a dog. Thus, the Office concluded that the evidence did not support appellant's allegation that he reported the incident by telephone. Secondly, the Office noted that appellant's behavior was inconsistent with him having sustained an injury as alleged on January 9, 2001 since he did not seek medical attention and continued to work full duty without complaint until May 2001.

Appellant subsequently requested a hearing, which was held on March 26, 2002. At the hearing, he submitted additional witness statements. In a March 8, 2002 statement, Mark Webb stated that he spoke with appellant "the day of the fall on the telephone." Additionally, Mr. Webb stated, "I also witnessed [appellant] speak with Mr. Fultz concerning the accident."

In a statement dated March 15, 2002, Jimmy Reece, a retired letter carrier, stated:

> "On or about [January 11, 2001] I returned to the [employing establishment] ... at approximately 2:45 pm. It had rained hard that morning and my feet were wet from getting in and out of the mail truck. [Mr.] Stewart was the [s]upervisor and I asked him if he needed help on the street.... He stated no, but if necessary he could use [appellant] on 3843. [Mr.] Stewart was not sure if [appellant] was able since he fell and hurt his back in the apartments.... On my way to my case, I saw [appellant] casing on 3843. I noticed his left side was wet and muddy and that he had a back support belt on. I asked him if he was okay and if he needed a ride home. He said he would appreciate the ride home and that he fell while delivering mail in the apartments. [Appellant] stated that he reported it to [Mr.] Harmon when he got back to his truck by telephone. I gave him a ride home and while talking I stated again to make sure he reported it to the [s]upervisor. He stated again that he reported it to [Mr. Harmon] and [Mr. Harmon] asked him if he was able to finish his route, which would be all mounted."

Finally, appellant provided a witness statement from his wife, Sheila A. McNeil, indicating that when appellant returned home from work on or about January 9, 2001 his clothes were muddy up and down the left side. She stated that appellant told her that he had fallen on wet leaves while delivering mail and that he had reported the fall to his supervisor.

With respect to the medical record, appellant provided two reports dated October 10 and November 12, 2001 from Dr. Maurice M. Smith, a Board-certified neurologist. In both reports,

he described appellant as having sustained an injury when he slipped on a wet surface while delivering mail and fell on his left hip. Dr. Smith diagnosed disc herniations at L4-5 and L5-S1 and opined that appellant required a lumbar fusion. He stated that appellant was totally disabled for work as of October 10, 2001.

In a decision dated September 3, 2002, an Office hearing representative affirmed the Office's August 2, 2001 decision.

In an October 8, 2002 letter, appellant requested reconsideration and submitted office notes from Dr. Chen dated May 10, June 8 and 22, July 25, September 24 and 28, October 5 and December 19, 2001.[2] In each office note, Dr. Chen indicates that appellant is being seen for treatment of spondylolisthesis at L4-5, but he does not address a history of injury or otherwise describe how appellant developed his back condition.

In a decision dated October 29, 2002, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office properly denied appellant's claim for compensation on the grounds that he failed to establish fact of injury.[3]

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 medical evidence required to establish causal relationship is usually rationalized medical evidence.[6]

In this case, the Office determined that appellant failed to establish the first component of fact of injury. The Office found the evidence insufficient to establish that appellant sustained an injury on January 9, 2001 at the time, place and in the manner alleged. Thus, the Office denied compensation.

The Board has held that 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 or her subsequent course of action. 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

[2] Appellant also submitted a copy of Dr. Chen's May 10, 2001 report, which was already of record.

[3] The Board notes that the record in this case is numbered from 1-152 and then 15-36.

[4] *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Id*.

[6] *Michael E. Smith, supra* note 4.

doubt on a claimant's statements in determining whether a *prima facie* case has been established. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[7]

The Board finds that appellant did not meet his burden to establish that he was injured on January 9, 2001 as a result of a fall in the performance of duty. First, appellant did not report an injury at work until May 14, 2001, which is over four months after the alleged incident. Although appellant contends that he did contact his supervisor, Mr. Harmon, by telephone on January 9, 2001 to state he was injured, the evidence of record does not support this contention. What is undisputed is that appellant went to talk to Ms. Fultz during May 1997 and at that time reported that he needed time off work for medical treatment. Appellant, however, did not specifically tell Ms. Fultz about the alleged January 9, 2001 injury. Ms. Fultz provided a statement indicating that during her conversation with appellant he discussed having been chased by a dog many months prior to January 9, 2001. She contends that appellant made no mention of a fall on January 9, 2001.

With regard to the witness statements, Mr. Webb does not describe the nature of appellant's accident on the date alleged or the specifics of either his conversations with appellant or appellant's conversation with Ms. Fultz. Mr. Reece's witness statement is of little probative value since he relates that appellant's injury occurred on or about January 11, 2001 and not on January 9, 2001 as alleged by appellant. Mr. Reece also did not personally witness appellant's alleged fall and can only describe appellant's version of the incident. Finally, appellant's wife may have seen appellant wearing muddy clothes that day, but her statement does not establish that appellant was injured in the manner and at the time and place alleged on his CA-1 claim form.

Further doubt is cast on appellant's claim by the fact that he did not seek medical treatment until May 2001. Dr. Chen first saw appellant for back pain on May 10, 2001, at which time he wrote appellant's description of the injury as having occurred on January 9, 2001 when he was delivering the mail and slipped on grassy surface, falling on his left side and back. Dr. Chen, however, did not address whether the alleged January 9, 2001 incident caused an injury, and he stated on several occasions that he was unable to confirm a diagnosis for appellant's back pain symptoms.

Based on these deficiencies, the Board finds that appellant has failed to carry his burden of proof to establish that he was injured by a fall in the performance of duty on January 9, 2001. Thus, the Board finds that appellant failed to establish fact of injury.

The Board also finds that the Office properly denied appellant's October 8, 2002 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[8] vests the Office with the discretionary authority to determine whether it will review an award for or against

[7] *Irene St. John*, 50 ECAB 521 (1999); *Michael W. Hicks*, 50 ECAB 325 (1999).

[8] 5 U.S.C. § 8101 *et seq*; *see* 8128(a).

compensation.[9] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[10] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[12] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[13]

Appellant's October 8, 2002 reconsideration request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the Board notes that some of the evidence submitted by appellant on reconsideration was previously of record. The May 10, 2001 report by Dr. Chen and the March 7, 2001 report from Dr. Bucy were already of record. As this evidence does not constitute "relevant and pertinent new evidence," it is insufficient to warrant modification of the prior decision.[14]

Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case for merit review.[15] Although office notes from Dr. Chen dating from June 8 to December 9, 2001 were not previously of record, the Board considers this recent evidence to be immaterial to the issue of whether appellant sustained an injury on January 9, 2001. He did not discuss the nature of appellant's injury in relation to events alleged to have occurred on January 9, 2001.

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[9] *See Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[10] 20 C.F.R. § 10.606(b)(2) (1999).

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[12] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[13] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[14] Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[15] *Robert P. Mitchell*, 52 ECAB 116 (2000); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

Because appellant has failed to satisfy the requirements of section 10.606(b)(2), he is not entitled to a merit review. Accordingly, the Board finds that the Office properly denied appellant request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated October 29 and September 3, 2002 are hereby affirmed.

Dated, Washington, DC
August 7, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member