U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AMY E. BONCZEWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Wilkes Barre, PA

Docket No. 03-177; Submitted on the Record;
Issued June 24, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an injury in the performance of duty on July 11, 2000, as alleged; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request to subpoena witnesses; and (3) whether the Office properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On August 30, 2000 appellant, then a 36-year-old letter carrier, filed a claim alleging that on July 11, 2000 as a result of three trips lifting and carrying heavy boxes up two flights of stairs, she sustained a herniated disc. In a statement dated August 30, 2000, appellant noted that she was not aware that she could file a Form CA-1 before talking to her shop steward. She explained, "I have never applied for workman's [sic] compensation before and did not know the [Form] CA-1 was available to me. I was given a [Form] CA-2." She further indicated that at the beginning she was hesitant about filing a claim because she thought it would affect her chances of promotion and relocation.

Prior to filing her claim for a traumatic injury, appellant filed a claim for occupational disease (Form CA-2). In a statement submitted with regard to that claim, dated August 17, 2000, appellant indicated that the factors causing her condition were the repetitive lifting of 30- to 40-pound trays and packages up to 75 pounds, carrying a satchel weighing up to 35 pounds and walking several miles. Appellant also noted that she remembered lifting a few parcels to one house up some steps on "the 11th" but did not remember being overcome with pain.

The employing establishment controverted appellant's claim. In a statement dated September 8, 2000, the employing establishment stated that appellant had already filed a Form CA-2 for a herniated disc and the date of injury provided was July 12, 2000. The employing establishment stated that appellant had given an inconsistent history of injury in her claims. The employing establishment also noted that at no time between July 11, 2000, the alleged date of injury and the filing of the Form CA-1 on August 30, 2000 did appellant notify either her supervisor or physician of the alleged traumatic injury. The employing establishment inferred that appellant filed the Form CA-1 to get continuation of pay after being told that she

would not be provided continuation of pay as a result of filing the Form CA-2. Additionally, the employing establishment submitted a September 1, 2000 statement, wherein a supervisor for the employing establishment noted that on August 7, 2000 after "clocking on." appellant stated that she did not think she could go on the road for the reason that her back was bothering her. The supervisor further noted that when appellant was asked what had happened, she stated that she "had no idea what caused it." In a November 1, 2000 statement, the employing establishment stated that the medical documentation contained inconsistencies. The employing establishment argued that due to the inconsistent history of injury provided by appellant and the unreliable medical documentation and the medical tests, the claim for benefits should be disallowed.

In a letter dated September 29, 2000, appellant stated that the employing establishment was aware of her injury "from day [one]." She further noted that she had filed both a claim for traumatic injury and a claim for an occupational disease and noted that she would like to "pull" her claim for traumatic injury as more than 45 days had passed. Appellant subsequently requested that the traumatic injury claim proceed and that the occupational disease claim be dismissed. In a November 5, 2000 statement, appellant noted:

> "On July 11, 2000 I was half-way through my delivery route when I carried three parcels up two flights of steps. I felt a slight pull in my lower back. I still had two-and-a-half to three hours left on my route and continued working. I was informed by my supervisors to list July 12, [2000] as the date of 'first awareness' on the [Form] CA-2 form because that's when I initially called my [physician]."

On November 5, 2000 appellant answered questions from the Office. She noted that from July 11 until August 7, 2000, her pain progressed slowly but consistently. She indicated that her symptoms did not prevent her from working and her physicians did not advise her to restrict activity. Appellant also indicated that her supervisors provided her with a Form CA-2. Appellant indicated that she was told "I was not eligible for a [Form] CA-1 because I was not reporting it on the exact day I was injured. She noted that two of the boxes she carried that day weighed approximately 25 pounds and the third box weighed approximately 40 pounds.

In a September 20, 2000 report, Dr. Joseph Moran, a chiropractor, indicated that appellant stated that on July 27, 2000 she woke in the morning with pain in her left ankle and leg. Dr. Moran noted that appellant had symptoms indicative of a possible herniated disc and recommended a magnetic resonance imaging scan be performed.

In an August 4, 2000 report, Dr. Jacqueline F. Cain, an osteopath, indicated that appellant recently got out of bed with back pain radiating down her low leg. In an August 17, 2000 report, she first mentioned the incident at work. Dr. Cain noted, "[Appellant] was a postal worker who carried three boxes up a flight of stairs, did n[o]t really think much of her back pain until it spread to her leg, began to get worse requiring pain medication and her to be off work." In an August 21, 2000 report, Dr. Cain noted that the only accident appellant reported was at age 16 and 18, but that she noted no long-term sequela from this accident. She further noted that appellant indicated that her back pain might have been triggered by her lifting a heavy crate at work, but listed no date for this incident. Dr. Cain concluded, "I do believe that this was probably an acute problem possibly brought on by the terrain and lifting that is associated with her job."

By decision dated November 6, 2000, the Office denied appellant's claim because there was insufficient evidence to show that appellant sustained the alleged traumatic injury. By letter dated November 30, 2000, appellant requested an oral hearing.

By letter dated January 3, 2001, appellant requested subpoenas be issued for Peter Shuleski and Melissa While, both customer service supervisors, as they could testify regarding the difficulty of her route. She also requested that her personnel file be brought to the hearing as this would show that she was a dedicated worker. By letter dated July 13, 2001, the hearing representative denied the issuance of the subpoenas as he found that the information would not be relevant to the issue at the hearing. He noted that the issue was whether appellant sustained a traumatic injury and that the testimony regarding a lack of prior injuries and her dedication as a worker were not relevant to this issue. He further noted that to the extent that they might be relevant, appellant had not shown that this information could not be obtained by other means not requiring the issuance of subpoenas.

The hearing was held on August 23, 2001. Appellant testified that on July 11, 2000 she felt a small pull in her lower back while carrying three large parcels up two flights of steps to a house and that she kept working. Appellant further noted that she was going to be off for a few days and she thought that if she rested, it would get better.

By decision dated October 30, 2001, the hearing representative denied appellant's claim finding that appellant had not met her burden of proof to establish the occurrence of an injury at the time, place and in the manner alleged.

By letter dated June 27, 2002, appellant through her attorney, requested reconsideration and submitted the hospital reports regarding her December 1, 2000 left L5-S1 laminotomy and discectomy reports by Dr. Joseph D. Paz, an osteopath, regarding a series of injections appellant received between September 19 and October 3, 2000 and duty status reports dated September 15 and November 2, 2000. All of these documents had been submitted previously.

By decision dated August 22, 2002, the Office found that the evidence submitted on reconsideration was repetitious in nature and insufficient to warrant review of the prior decision.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury on July 11, 2002 as alleged.

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 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

[1] 5 U.S.C. §§ 8101-8193.

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

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 has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury, which must be considered. 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] An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[5] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the 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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[7] The medical evidence required to establish causal relationship is, generally, rationalized medical opinion evidence.[8]

The Board has held that a claimant's statement 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] However, in the instant case, the Board finds that appellant has failed to establish that she sustained an injury, as alleged, due to numerous inconsistencies in how she sustained an injury. For example, on August 18, 2000 appellant filed a claim for compensation for occupational disease. In a statement written on August 17, 2000 and filed with her claim, appellant indicated that factors of her employment, which led to the injury involved repetitive lifting of 30- to 40-pound trays and packages up to 75 pounds and carrying a satchel weighing 35 pounds. When asked to list specific exposures, she listed "the terrain and length of my specific route." She made no reference to a lifting incident occurring on July 11, 2000. Furthermore, appellant's supervisor indicated that on August 7, 2000, after appellant clocked in, she indicated that she was having back pain. The supervisor noted that when asked how it happened, she replied that she had no idea what caused the back pain. In addition, the early medical reports make no mention of any specific incident, which occurred on July 11, 2000. On August 4, 2000 Dr. Cain indicated that appellant recently got out of bed with back pain and that she carried a 30-pound bag on her job. The first notation of a specific incident occurring was in Dr. Cain's August 17, 2000 report, when she indicated that appellant carried three boxes up a

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

[4] *Elaine Pendleton, supra* note 2.

[5] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

[6] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[7] *Elaine Pendleton, supra* note 2.

[8] *Id.*

[9] *Thelma Rogers*, 42 ECAB 866, 869-70 (1991).

flight of stairs and did not really think much about it until the pain spread to her leg. Dr. Cain also noted that appellant's only accident was when she was 16 or 18 years old. On August 30, 2000, over one month after the alleged incident, appellant filed a claim for traumatic injury in which she alleged that her injury was the result of three trips lifting and carrying heavy boxes up two flights of stairs. Appellant's failure to report this injury until 6 weeks after the alleged incident, combined with the fact that she filed a notice of occupational disease, which did not mention this incident on August 18, 2000 and the fact that there is no record of any specific injury in her medical reports until August 17, 2000, create a substantial question as to the July 11, 2000, lifting incident. Appellant has not met her burden to establish that she sustained an injury in the performance of duty on July 11, 2000.

The Board finds that the Office hearing representative properly refused to issue subpoenas.

Section 8126[10] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is no other means, by which the testimony could have been obtained.[11] The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment, or action taken, which is clearly contrary to logic and probable deductions from established facts.[12] The Office hearing representative did not abuse his discretion in denying subpoenas, as he found that the testimony would be irrelevant and could be obtained by other means.

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim.

[10] 5 U.S.C. § 8126.

[11] 20 C.F.R. § 10.619.

[12] *Dorothy Bernard*, 37 ECAB 124 (1985).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[13]

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that 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.[14]

The evidence appellant submitted with his request for reconsideration had already been received by the Office. Furthermore, this evidence does not address the issue of whether appellant sustained a work-related incident, which was the reason that her claim was denied. Finally, appellant did not advance any new legal arguments. Accordingly, the Office properly denied appellant's request for reconsideration on the merits.

[13] 5 U.S.C. § 8128(a).

[14] *James R. Bell*, 52 ECAB 414 (2001); *Eugene F. Butler*, 35 ECAB 393 (1984).

The decisions of the Office of Workers' Compensation Programs dated August 22, 2002 and October 30, 2001 are hereby affirmed.

Dated, Washington, DC
June 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member