U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT C. FREEMAN and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MN

Docket No. 02-172; Submitted on the Record;
Issued March 19, 2003

DECISION and ORDER

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

The issue is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on August 18, 2001 as alleged.

On August 22, 2001 appellant, then a 58-year-old automotive technician, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that he sustained an injury to his "lower back and leg/buttocks" on August 18, 2001. He stopped work that day and returned to work on August 22, 2001. On the reverse of appellant's claim form George A. Stanek, his supervisor, noted that appellant first received medical attention on August 20, 2001 at Schlaffer Chiropractic Office. Mr. Stanek checked the box "yes" that appellant was injured in the performance of duty on August 18, 2001 and signed the form on August 22, 2001.

In support of his claim, appellant submitted an authorization for absence slip from Dr. Joseph S. Schlaffer, a chiropractor, who advised the employing establishment that he sustained a lower back injury and should be on light duty through August 26, 2001. He recommended that appellant be excused from work and all physical activities and noted that he should return to work on August 27, 2001. The employing establishment requested that Dr. Schlaffer clarify the restrictions of appellant's work duties. He advised the employing establishment that appellant could return to his normal work duties on August 28, 2001.

In a letter dated September 4, 2001, the Office of Worker's Compensation Programs advised appellant that the information submitted in his claim was insufficient to determine whether he was eligible for benefits under the Federal Employees' Compensation Act. The Office advised him of the additional medical evidence needed to support his claim. Specifically, appellant was asked to provide a report from the private physician who examined him as a result of his condition. He was allowed 30 days to submit the requested evidence. No response was received within the allotted time.

By decision dated October 12, 2001, the Office denied appellant compensation on the grounds that he failed to establish fact of injury. The Office specifically found that the evidence

was sufficient to establish that appellant actually experienced the claimed incident; however, there was insufficient medical evidence to establish that a condition had been diagnosed in connection with the accepted work incident.

The Board finds that appellant failed to establish a causal relationship between his August 18, 2001 low back injury and his employment-related incident.[1]

An employee seeking benefits under the Act[2] 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.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[6] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.

In the instant case, the Office concluded that the evidence of record was sufficient to establish that the claimed incident occurred on August 18, 2001 as alleged. Because 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,[7] the Board finds that the work-related pushing incident occurred on August 18, 2001, as alleged. However, the Board also finds that appellant has submitted insufficient evidence to establish a causal relationship between his lower back injury and the employment incident on August 18, 2001.

[1] The Board notes that on appeal appellant submitted additional evidence. As this evidence was not previously considered by the Office prior to its decision of October 12, 2001, the evidence represents new evidence, which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(a). Appellant may submit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[2] 5 U.S.C. §§ 8101-8193.

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

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

[5] *Elaine Pendleton, supra* note 3.

[6] *Id*.

[7] *Linda S. Christian*, 46 ECAB 598 (1995).

To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the factors of employment identified by appellant as causing his injury and, taking these into consideration as well as findings upon examination of appellant and his medical history, state whether these employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his opinion.[8]

In support of his claim, appellant submitted an authorization for absence slip from Dr. Schlaffer, a chiropractic physician. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under 5 U.S.C. § 8101(2). A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[9] The Office found that appellant did not submit medical evidence to establish that he sustained an injury as alleged. No other evidence of record establishes a causal relationship between appellant's alleged employment injury and a diagnosed condition.

The medical evidence submitted to support appellant's claim does not establish a causal relationship between his August 18, 2001 employment-related incident and his diagnosed condition.

Despite being advised of the deficiencies in his medical evidence appellant failed to submit a rationalized medical opinion within the allotted time addressing the issue of causal relationship and, therefore, failed to establish fact of injury. As he has failed to establish fact of injury, he is not entitled to compensation.

[8] *See Woodhams, supra* note 4.

[9] *Thomas R. Horsfall*, 48 ECAB 180 (1996). The Office received additional evidence from chiropractor Schlaffer after the October 12, 2001 decision. This evidence was not before the Office at the time of its final decision and cannot be reviewed by the Board on appeal.

The decision of the Office of Workers' Compensation Programs dated October 12, 2001 is hereby affirmed.

Dated, Washington, DC
March 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member