United States Department of Labor
Employees' Compensation Appeals Board

FRED BEROTTE, JR., Appellant	)	
and	)	**Docket No. 04-1780**
	)	**Issued: December 8, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, CA, Employer	)	

Appearances:
Fred Berotte, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 9, 2004 appellant filed a timely appeal from a July 17, 2003 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim. He also appealed from nomerit decisions of the Office dated May 7 and June 23, 2004 denying his requests for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the May 7 and June 23, 2004 nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury on May 24, 2003 in the performance of duty; (2) whether the Office, in its May 7, 2004 decision, properly denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to reopen appellant's case for review of the merits under section 8128; and (3) whether the Office, in its June 23, 2004 decision, properly denied reopening appellant's case for review of the merits under section 8128.

FACTUAL HISTORY

On June 2, 2003 appellant, then a 58-year-old distribution clerk, filed a traumatic injury claim for an injury occurring on May 24, 2003 in the performance of duty. He stated, "[W]hile bending down trying to reach a tray of mail in a hamper, I felt a sharp pain in my lower back, but I still continued to work." Appellant indicated that he also experienced pain in his right shoulder and the right side of his neck. On the reverse side of the claim form, a supervisor with the employing establishment listed the date of injury as May 31, 2003. He noted that appellant failed to report his injury until June 2, 2003 when he called into work requesting sick leave. The supervisor challenged the claim stating that appellant "appeared to be in good condition [at] the end of the workday on May 31, 2003."

The record contains a partial medical report dated June 3, 2003 from a physician who indicated that appellant was hospitalized since May 27, 2003 for "multiple medical problems including spontaneous bacterial peritonitis…."[1] The physician noted that appellant's problems were "unrelated to his prior back injury."

By letter dated June 11, 2003, the Office provided appellant 30 days to submit additional factual information, including clarification of the date of injury as well as an explanation regarding his delay in reporting his injury to his supervisor and in seeking medical treatment. The Office also requested a comprehensive medical report from appellant's attending physician addressing the causal relationship between any diagnosed condition and the alleged employment injury.

Appellant did not respond within the time allotted.

By decision dated July 17, 2003, the Office denied appellant's claim on the grounds that he did not establish fact of injury. The Office found that the evidence was insufficient to establish that he experienced the claimed employment incident.

On April 28, 2004 the Office received an unsigned appeal request form from appellant, indicating that he desired reconsideration. In support of his request for reconsideration, appellant submitted a statement dated April 21, 2004, in which he related that his injury occurred on May 24, 2003 and that his supervisor had the date incorrect. He stated that he did not delay reporting his injury and that no one saw his injury because he was working alone at the time. Appellant also submitted medical evidence in support of his claim.[2]

In a decision dated May 7, 2004, the Office denied appellant's request for merit review of its prior decision. The Office determined that appellant had submitted an unsigned form requesting reconsideration and stated, "Because your unsigned form neither raised substantive legal questions nor included new and relevant evidence, it is insufficient to warrant a review of our prior decision at this time."

[1] The name of the physician is not fully legible.

[2] The medical evidence contains no reference to the May 24, 2003 employment incident.

Appellant again requested reconsideration on May 17, 2004 and submitted additional medical evidence in support of his claim.

In a decision dated June 23, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 filed within the applicable time limitation; that an injury was sustained while 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[6] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[7] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[8] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[9] 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 cast doubt on an employee's statements in determining whether he has established a *prima facie* case.[10] An employee has not met this burden when there are such inconsistencies in the evidence as to cast

[3] 5 U.S.C. §§ 8101-8193.

[4] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 4.

[6] *Delphyne L. Glover*, 51 ECAB 146 (1999).

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

[8] *Edward W. Malanick*, 51 ECAB 280 (2000).

[9] *See Caroline Thomas*, *supra* note 4.

[10] *Id*.

serious doubt upon the validity of the claim.[11] An employee's statement, however, 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.[12]

Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[13] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[14]

ANALYSIS -- ISSUE 1

In this case, appellant did not submit sufficient evidence to establish that the claimed employment incident occurred at the time, place and in the manner alleged. On his claim form appellant described the injury as occurring on May 24, 2003 when he bent down "to reach a tray of mail in a hamper" and felt pain in his lower back, right shoulder and neck. His supervisor, however, listed the date of injury as May 31, 2003. He further challenged that the employment injury occurred as alleged, noting that appellant did not report his injury until June 2, 2003, when he requested sick leave and that he left work on May 31, 2003 "in good condition." The only medical evidence of record before the Office at the time of its July 17, 2003 merit decision consists of a partial medical report dated June 3, 2003 which described appellant's hospitalization beginning May 27, 2003 for various medical problems unrelated to a prior unspecified back injury. In a letter dated June 11, 2003, the Office requested that appellant clarify the date of injury and explain the circumstances surrounding the injury, including his delay in reporting the injury and seeking medical treatment. Appellant, however, did not respond within the time allotted.

As noted above, the claimant has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged by the preponderance of the reliable, probative and substantial evidence.[15] In this case, the record does not establish prompt notification of injury, contemporaneous medical treatment with a history of the alleged incident or other actions consistent with the occurrence of an employment injury at the time, place and in the manner alleged.[16] The employing establishment disputed the date of the alleged employment incident and the medical evidence did not refer to a May 24, 2003 employment incident. The Office requested that appellant explain the apparent inconsistencies; however, he did not provide timely clarification. The Board accordingly finds that appellant has not substantiated that the May 24,

[11] *Louise F. Garnett*, 47 ECAB 639 (1996).

[12] *See Caroline Thomas*, *supra* note 4.

[13] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[14] *Gary J. Watling*, *supra* note 13.

[15] *See Delphyne L. Glover*, *supra* note 6.

[16] *See Caroline Thomas*, *supra* note 4.

2003 employment incident occurred as alleged and, therefore, has not established an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for reconsideration under section 8128(a) of the Act,[17] 20 C.F.R. § 10.606 provides, in relevant part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments and presenting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[18] Section 10.608(a) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[19]

The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his burden of proof.[20] The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.[21] A claimant has a right to secure a review of the merits of his case when he presents new evidence relevant to his contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record, that is, of all of the evidence in order to properly determine whether the newly supplied evidence, considered with that previously in the record shifts the weight of the evidence in such a manner as to require modification of the earlier decision.[22] If the Office determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[23]

ANALYSIS -- ISSUE 2

The Office, in its July 17, 2003 merit decision, denied appellant's claim on the grounds that he did not establish the occurrence of the May 24, 2003 employment incident. In its July 17, 2003 decision, the Office noted that it had received no response from appellant to its June 11, 2003 letter requesting clarification of the circumstances surrounding the alleged employment incident. Appellant requested reconsideration on April 18, 2004. The Office, in its May 7, 2004

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(2).

[19] 20 C.F.R. § 10.608(a).

[20] *Paul Kovash*, 49 ECAB 350 (1998).

[21] *See* 20 C.F.R. § 10.606(b)(2); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[22] *Sydney W. Anderson*, 53 ECAB ___ (Docket No. 01-1395, issued February 12, 2002).

[23] *Donald T. Pippin*, 54 ECAB ___ (Docket No. 03-205, issued June 19, 2003).

nonmerit decision denying appellant's request for reconsideration, determined that he had submitted only an undated form indicating that he desired reconsideration of his claim. Contrary to the Office's finding, however, appellant submitted an April 21, 2004 statement describing the circumstances surrounding his injury. He stated that his supervisor had an inaccurate date of injury and reiterated that the injury occurred on May 24, 2003. Appellant further denied any delay in reporting his injury and explained that there were no witnesses to the employment incident because he was working alone at the time. In order to require reopening a claim for merit review, appellant does not have to submit all evidence necessary to discharge his burden of proof.[24] If the Office determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[25] The April 21, 2004 statement from appellant constitutes relevant factual evidence not previously considered and pertinent to the issue of whether he has established that the employment incident occurred as alleged. The Board, therefore, finds that appellant has submitted sufficient evidence to require the Office to reopen the case for merit review.[26]

On appeal, appellant states that his physicians attributed his back problem to a prior employment injury on March 8, 2001, assigned file number 13-208465. Appellant requested that this case be reopened. The Board has jurisdiction, however, only over final decisions of the Office.[27] Appellant can submit his argument regarding his claim for an injury on March 8, 2001 together with supporting medical evidence to the Office and request for reconsideration under section 8128(a).[28]

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on May 24, 2003 in the performance of duty. The Board further finds that he has submitted sufficient evidence in support of his request for reconsideration under section 8128 to warrant merit review of his claim.

[24] *See Paul Kovash*, *supra* note 20.

[25] *Id.*

[26] In view of the Board's finding regarding the Office's May 7, 2004 denial of appellant's request for reconsideration, the issue of whether the Office properly denied reopening his claim for merit review in its June 23, 2004 decision is moot.

[27] *See* 20 C.F.R. § 501.2(c).

[28] With his request for an appeal, appellant submitted additional evidence. The Board, however, may not review evidence for the first time on appeal that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 23 and May 7, 2004 are set aside and the case is remanded for further proceedings consistent with this decision by the Board. The decision dated July 17, 2003 is affirmed.

Issued: December 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member