United States Department of Labor
Employees' Compensation Appeals Board

RAMOND A. LEWIS, Appellant	)	
and	)	**Docket No. 03-1047**
	)	**Issued: January 20, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Ramond A. Lewis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 17, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decisions dated April 23 and October 11, 2002 and the Office nonmerit decision dated February 25, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case and the nonmerit decision.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a back injury in the performance of duty on January 20, 2000; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 21, 2000 appellant, then a 54-year-old mail carrier, filed a claim asserting that on January 20, 2000 he sustained a recurrence of disability due to an injury sustained at

work on October 15, 1996.[1] On the Form CA-2a, appellant noted that on January 20, 2000 he developed muscle spasms and pain similar to that experienced with the initial injury. He later indicated that he experienced the pain while lifting mail at work on January 20, 2000. In several work restriction forms dated in January and February 2000,[2] Dr. Jennifer Carr, an attending Board-certified family practitioner, indicated that appellant sustained "back pain" due to an unspecified October 16, 1996 injury and recommended various work restrictions.[3]

The Office developed appellant's recurrence of disability claim as a claim for a new injury with an alleged date of injury of January 20, 2000. In a letter dated June 9, 2000, the Office advised appellant that the information submitted with the claim was insufficient to establish that he sustained an employment injury on January 20, 2000. Appellant continued to submit medical reports dated from early to mid 2000. In several reports, Dr. Kennedy S. Daniels, an attending Board-certified orthopedic surgeon, noted that appellant reported back complaints, but Dr. Daniels did not clearly identify a specific cause for appellant's problems.[4] By decision dated July 11, 2000, the Office denied appellant's claim on the grounds that he did not establish the fact of injury on January 20, 2000. The Office found that appellant did not show that the alleged injury occurred at the time, place and in the manner alleged. Appellant requested a review of the written record and, by decision dated December 6, 2000, an Office hearing representative affirmed the Office's July 11, 2000 decision. The Office again noted that there were inconsistencies in appellant's reporting of the date of injury.[5]

Appellant continued to work in limited-duty positions for the employing establishment and stopped work for an increasing number of days. He submitted additional reports of Dr. Daniels and Dr. David Urquia, another attending Board-certified orthopedic surgeon, but these reports did not contain any explanation of the cause of appellant's back problems. In a September 27, 2000 report, Dr. Urquia noted that appellant reported "onset of symptoms around July 2 of this year, picking up a package out of a truck," but he did not provide an opinion that appellant sustained an injury on that date. In a report dated October 24, 2000, Dr. Urquia indicated that appellant reported concern about the effect of "heavy lifting" at work, but Dr. Urquia did not provide any opinion that such lifting contributed to appellant's condition.

[1] Appellant did not stop work at that time, but he later periodically stopped work for various periods.

[2] The first of these was dated January 24, 2000.

[3] The record does not reflect that the Office accepted that appellant sustained an injury in the performance of duty in October 1996, although appellant does appear to have worked in a limited-duty position during that period. The Board notes that on April 23, 1996 the Office accepted that appellant sustained a musculoligamentous lumbar strain on January 9, 1996, which had resolved. Appellant was not entirely consistent in reporting the date of injury which he believed caused his current back injury; he variously listed the dates January 9 and October 15, 1996 and January 20, 2000. Appellant indicated that he dug out of the snow on January 9, 1996 and placed mail trays in his vehicle on October 15, 1996.

[4] The record contains the findings of diagnostic testing from 1996 and 2000 which show that appellant had a herniated disc at L5-S1.

[5] Although the Office discussed whether a recurrence of some 1996 work injury had occurred, the decision essentially found that appellant did not meet his burden of proof to establish that he sustained a new work injury on January 20, 2000.

By decision dated December 17, 2001, the Office affirmed its December 6, 2000 decision indicating that appellant had not shown that he sustained a back injury in the performance of duty on January 20, 2000.[6] Appellant submitted several brief reports of Dr. Carr, dated between January and March 2000, in which Dr. Carr discussed appellant's back complaints, diagnosed "back pain," and recommended limited-duty work. In these reports, appellant variously described experiencing back pain at work when delivering mail in the week before Christmas,[7] delivering packages and sitting in a chair in early February 2000, and standing and making a "stamping" movement in March 2000. Dr. Carr did not provide any opinion on the cause of appellant's back problems.

By decision dated April 23, 2002, the Office affirmed its December 17, 2001 decision. However, the Office effectively modified the prior decision to accept the occurrence of the employment incident on January 20, 2000[8] and further find that appellant did not submit sufficient medical evidence to establish that he sustained a back injury due to that incident. Appellant submitted a June 26, 2002 report in which Dr. Carr stated, "According to my office note dated January 24, 2002, [appellant] injured his back while performing his job." By decision dated October 11, 2002, the Office affirmed its April 23, 2002 decision.[9]

In conjunction with a January 2003 request for reconsideration, appellant submitted a handwritten undated report of Dr. Carr, in which she stated that he came to her on January 24, 2000 with a complaint of back pain which he said had started during the Christmas holidays when he was "more active at work." Dr. Carr noted, "He had injured his back several years ago while on the job and felt certain this was a reinjury. For several months he was unable to perform his work duties due to pain and discomfort." By decision dated February 25, 2003, the Office denied appellant's request for merit review.

LEGAL PRECEDENT -- Issue 1

An employee seeking benefits under the Federal Employees' Compensation Act[10] has the burden of establishing the essential elements of his 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

[6] While the decision contains language which suggests that the Office did not review appellant's claim on the merits, a complete reading of the decision reveals that the Office conducted a merit review of appellant's claim.

[7] The report in which appellant reported these symptoms was dated January 24, 2000.

[8] Appellant had indicated he experienced back pain while lifting mail at work on January 20, 2000.

[9] While the decision contains language, including the mention of "clear evidence of error," which suggests that the Office did not review appellant's claim on the merits, a complete reading of the decision reveals that the Office conducted a merit review of appellant's claim. The clear evidence of error standard is applied in cases where an untimely reconsideration request has been made. *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992). Appellant's reconsideration request was timely.

[10] 5 U.S.C. § 8101 *et seq.*

compensation is claimed are causally related to the employment injury.[11] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[12]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. 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.[13] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[14] The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[15]

ANALYSIS -- Issue 1

In the present case, appellant alleged that he sustained a back injury on January 20, 2000 due to lifting mail at work. While the Office initially denied appellant's claim on the grounds that appellant did not establish the fact of injury, it later accepted the occurrence of the employment incident and denied his claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an injury due to the employment incident.

The Board finds that appellant has not submitted sufficient medical evidence to establish that he sustained an injury in the performance of duty on January 20, 2000. Appellant submitted several work restriction forms dated in January and February 2000 in which Dr. Carr, an attending Board-certified family practitioner, indicated that he had sustained "back pain" due to an unspecified October 16, 1996 injury and recommended various work restrictions.[16] Dr. Carr did not, however, provide any opinion that appellant sustained a diagnosed back injury due to the accepted employment incident of January 20, 2000.[17] Appellant also submitted several reports, dated between January and March 2000, in which Dr. Carr discussed his back complaints,

[11] *Elaine Pendleton,* 40 ECAB 1143, 1145 (1989).

[12] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[13] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[14] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[15] *Elaine Pendleton, supra* note 11; 20 C.F.R. § 10.5(a)(14).

[16] Appellant had initially indicated that he sustained a recurrence of an October 1996 work injury, but the record does not show such an injury occurred and the case was developed as a claim that he sustained a new injury on January 20, 2000.

[17] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

diagnosed "back pain," and recommended limited-duty work. In these reports, including one dated January 24, 2000, appellant variously described experiencing back pain at work when delivering mail in the week before Christmas, delivering packages and sitting in a chair in early February 2000, and standing and making a "stamping" movement in March 2000. However, Dr. Carr did not provide any true diagnosis or opinion on the cause of appellant's back problems.[18]

Appellant submitted several reports from 2000 in which Dr. Daniels and Dr. Urquia, both attending Board-certified orthopedic surgeons, noted that he reported back complaints, but neither physician clearly identified a specific cause for appellant's problems. These physicians did not provide any opinion that appellant sustained an injury on January 20, 2000 in the performance of duty. Moreover, in a September 27, 2000 report, Dr. Urquia noted that appellant reported "onset of symptoms around July 2 of this year, picking up a package out of a truck" and, in a report dated October 24, 2000, he indicated that appellant reported concern about the effect of "heavy lifting" at work. However, Dr. Urquia did not provide any opinion that these reported matters contributed to appellant's back condition.

LEGAL PRECEDENT -- Issue 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[19] the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[20] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[21] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[22]

ANALYSIS -- Issue 2

In conjunction with a January 2003 request for reconsideration, appellant submitted a handwritten undated report of Dr. Carr in which she indicated that he came to her on January 24, 2000 and reported experiencing back pain which he said had started during the Christmas holidays when he was "more active at work." Dr. Carr further noted that appellant felt that he

[18] The record also contains a June 26, 2002 report in which Dr. Carr stated, "According to my office note dated January 24, 2002, [appellant] injured his back while performing his job." Dr. Carr did not provide any further description of such an injury.

[19] 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[20] 20 C.F.R. §§ 10.606(b)(2).

[21] 20 C.F.R. § 10.607(a).

[22] 20 C.F.R. § 10.608(b).

had sustained a reinjury of an earlier injury. Dr. Carr did not, however, provide any opinion on the cause of appellant's back problems or otherwise indicate that he sustained a work injury on January 20, 2000. Therefore, her report is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish that he sustained an injury in the performance of duty on January 20, 2000. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[23]

In the present case, appellant has not established that the Office improperly refused to reopen his claim for a review on the merits of its October 11, 2002 decision under section 8128(a) of the Act, because he did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a back injury in the performance of duty on January 20, 2000. Appellant did not submit sufficient medical evidence to establish such an injury. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[23] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2003, October 11 and April 23, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member