United States Department of Labor
Employees' Compensation Appeals Board

K.J., Appellant	)	
and	)	**Docket No. 09-1825**
	)	**Issued: April 2, 2010**
U.S. POSTAL SERVICE, SUBURBAN PROCESSING & DISTRIBUTION CENTER, Gaithersburg, MD, Employer	)	

Appearances:
B.J. Jones, for the appellant
No appearance, for the Director

Oral Argument January 6, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2009 appellant filed a timely appeal from a January 23, 2009 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for a merit review and a November 14, 2008 merit decision that denied his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty; 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). On appeal, appellant contended that he had been consistent in his statements regarding his injury occurring on September 25, 2008. At the time of the injury, he noted that he worked a night shift so that his work shift began on September 24, 2008 and the injury occurred later in his shift on September 25, 2008.

FACTUAL HISTORY

On October 1, 2008 appellant, then a 40-year-old clerk, filed a traumatic injury claim alleging that he injured his back when a plastic tray handle broke while he was bending over. The front of the form listed September 24, 2008 as the date of injury. On the back of the form, the date of injury was noted as September 25, 2008. Appellant's work hours were from 11:00 p.m. to 7:30 a.m. Crandall Cotton, Supervisor Distribution Operation, noted that appellant related that his injury occurred at approximately 4:00 a.m. on September 25, 2008. He related that appellant stated that he did not wish to file an accident claim when Mr. Cotton asked him at 11:05 p.m. on September 25, 2008. Mr. Cotton stated that appellant "failed to report the accident in a timely fashion" and that "the employee complained of back pain prior to performing any function of duty."

In support of his claim, appellant submitted a Shady Grove Adventist Hospital emergency room note and duty status report (Form CA-17), which were both dated October 1, 2008 and signed by Michael Nogan, a physician's assistant, who diagnosed a lower back strain in the October 1, 2008 CA-17 form, which he stated was due to a broken tray and provided work restrictions. In the emergency report, Mr. Nogan stated that appellant was seen on October 1, 2008. He diagnosed a back injury and released appellant to work with restrictions on October 6, 2008.

By correspondence dated October 9, 2008 letter, the Office informed appellant that the evidence was insufficient to support his claim. It addressed the additional factual and medical evidence he needed to submit and requested that he submit this information within 30 days. No evidence was received within the time allotted.

By decision dated November 14, 2008, the Office denied appellant's claim on the grounds that he failed to establish that the incident occurred as alleged. In this regard, it stated that the factual information was unsubstantiated because the employing establishment related that appellant experienced back pain prior to the beginning of his shift and that the injury did not occur on September 24, 2008 as he had indicated on the Form CA-1. The Office also found that appellant had not submitted medical evidence rendering a diagnosis that could be connected to the claimed work-related event.

On November 18, 2008 appellant requested reconsideration and submitted an October 24, 2008 CA-17 form and an October 1, 2008 employing establishment health unit report. The October 1, 2008 report revealed that appellant sustained a lower back strain on September 25, 2008 when a tray of mail he was about to load broke.

By decision dated January 23, 2009, the Office denied appellant's reconsideration request without performing a merit review. It did not indicate that it had reviewed the October 24, 2008 CA-17 form.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 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.[2] 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.[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.[4] 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 must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[5] An injury 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 statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[6] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[7] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[8] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.[9]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *C.S.*, 60 ECAB ___ (Docket No. 08-1585, issued March 3, 2009).

[3] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *B.F.*, 60 ECAB ___ (Docket No. 09-60, issued March 17, 2009).

[5] *R.T.*, 60 ECAB ___ (Docket No. 08-408, issued December 16, 2008); *D.B.*, 58 ECAB 464 (2007).

[6] *M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008).

[7] *H.G.*, 59 ECAB ___ (Docket No. 07-2397, issued June 11, 2008).

[8] *S.P.*, *supra* note 3.

[9] *C.S.*, *supra* note 2.

The second component in establishing fact of injury is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[10] As part of this burden, the claimant must present rationalized medical evidence based upon a complete factual and medical background showing causal relationship.[11]

ANALYSIS -- ISSUE 1

The Office found that appellant failed to submit sufficient evidence to establish that the September 24, 2008 event occurred as alleged. It indicated that the employing establishment related that he experienced back pain prior to the start of his shift and that the injury did not occur on September 24, 2008 as alleged on his CA-1 form. The Office noted that it had requested that appellant provide medical and factual information, which he failed to do. Appellant alleged that at approximately 4:00 a.m. on September 25, 2008 he experienced back pain when a plastic tray handle broke while he was bending over. The employing establishment noted that he did attend work on the night of September 25, 2008 when he complained of back pain. Medical records support that appellant sought medical treatment six days after his injury on September 25, 2008, presenting back pain related to a plastic tray handle breaking while he was bending over. Appellant timely notified the employing establishment of his injury and filed a claim on October 1 2008, only six days after the incident.

The Board finds that the record does not contain inconsistencies such as to cast serious doubt on the validity of appellant's claim. Appellant related at oral argument before the Board that he began his shift at 11:00 p.m. on September 24, 2008 and that the injury occurred during the second part of his shift, which was on September 25, 2005 at approximately 4:00 a.m. The information provided by Mr. Cotton on the back of the CA-1 form supports appellant's claim. In the supervisor portion of the form, Mr. Cotton noted that appellant's work hours were from 11:00 p.m. to 7:30 a.m. and reported the date of injury as September 25, 2008. He indicated that appellant informed him at the beginning of his shift at about 11:05 p.m. on September 25, 2008 that he had injured his back during his prior shift at approximately 4:00 a.m. that day. On the CA-1 form, Mr. Cotton stated that appellant "complained of back pain prior to performing any function of duty." The statements provided by Mr. Cotton on the CA-1 form support appellant's version of how his back injury occurred. In addition, appellant sought medical treatment on October 1, 2008, which was shortly after the occurrence of the injury on September 25, 2008. He gave timely notification of his injury to the employing establishment, filing his claim within six days of the incident. Furthermore, the medical record generally supports appellant's claim that he injured his back on September 25, 2008 at work.[12]

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[10] *C.B.*, 60 ECAB ___ (Docket No. 08-1583, issued December 9, 2008); *D.G.*, 59 ECAB ___ (Docket No. 08-1139, issued September 24, 2008).

[11] *P.K.*, 60 ECAB ___ (Docket No. 08-2551, issued June 2, 2009).

[12] *Cf. M.H., supra* note 6 (where the Board accepted that appellant established that the incident occurred as alleged, despite the fact that the claimant neglected to respond to the Office's initial development letter requesting information as to the circumstances of the alleged incident. Here, appellant sought medical attention within six days, informed his supervisor at the beginning of his shift following the injury about the incident, filed his claim within six days and the record did not contain any inconsistencies as to the factual circumstances of the incident).

The Board finds that the factual evidence supports that the September 25, 2008 incident occurred as alleged. However, the Board further finds that the medical evidence is insufficient to establish that appellant sustained an injury related to the accepted incident.

The Office advised appellant in an October 9, 2008 letter as to the type of medical evidence needed to establish his claim. Appellant did not submit a rationalized medical report from an attending physician addressing how specific employment factors may have caused or aggravated his claimed condition.

The medical evidence appellant submitted in support of his claim are a Shady Grove Adventist Hospital emergency room note and duty status report (Form CA-17), which were both dated October 1, 2008 and signed by Mr. Nogan, a physician's assistant. The reports of a physician's assistant are entitled to no weight, as a physician's assistant is not a physician under the Act.[13] Therefore, these reports are insufficient to meet appellant's burden of proof.

The Board finds that the factual evidence was sufficient to establish that the September 17, 2007 incident occurred as alleged. However, the medical evidence fails to establish that appellant sustained a left shoulder, left arm or neck injury causally related to the accepted incident.

LEGAL PRECEDENT -- ISSUE 2

The Act[14] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[15] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[16]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain 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.[17]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[18] A timely request for reconsideration may be granted if the

[13] 5 U.S.C. § 8101(2). *See George H. Clark*, 56 ECAB 162 (2004) (a physician's assistant is not a physician as defined under the Act and any report from such individual does not constitute competent medical evidence.

[14] 5 U.S.C. §§ 8101 *et seq.*

[15] *Id*. at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[16] 20 C.F.R. § 10.605.

[17] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[18] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[19]

ANALYSIS -- ISSUE 2

On reconsideration appellant submitted an October 24, 2008 duty status report, which was received by the Office on November 18, 2008, the same day it received his request for reconsideration along with an October 1, 2008 employing establishment health unit report. There is no evidence that the Office considered the October 24, 2008 report prior to issuing its January 23, 2009 nonmerit decision. The Board finds that medical evidence related to appellant's claim was received but not reviewed by the Office prior to its denial of his request for reconsideration. As noted, the Board's decisions are final as to the subject matter appealed and it is crucial that the Office review all newly received evidence relevant to that subject matter prior to the time of issuance of its final decision. Therefore, in accordance with the Board precedent,[20] the case will be remanded for a proper review of the evidence and an appropriate final decision on appellant's request for reconsideration.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that he sustained an injury in the performance of duty. While the evidence is sufficient to establish that the September 25, 2008 incident occurred as alleged, there is no report from a physician who has provided a well-reasoned explanation of how this incident caused or contributed to an injury. Further, the Board finds that the case is not in posture for a decision regarding the Office's denial of appellant's reconsideration request and that the case must be remanded for further review of the evidence and issuance of an appropriate final decision.

[19] *Id*. at § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

[20] 20 C.F.R. § 501.6(c). *L.C.*, 60 ECAB ___ (Docket No. 08-1923, issued May 13, 2009) (The Office must review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision); *see also William A. Couch*, 41 ECAB 548 (1990) (the Office did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where the Office did not consider a medical report received on the date of its decision).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 23, 2009 is set aside and the case remanded for further action consistent with this decision. The November 14, 2008 Office decision is affirmed as modified.

Issued: April 2, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board