U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN A. ORLANDO and U.S. POSTAL SERVICE, POST OFFICE, Niles, OH

Docket No. 98-628; Submitted on the Record;
Issued February 23, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an injury in the performance of duty on September 8, 1995; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (3) whether the Office abused its discretion in denying appellant's request for reconsideration.

On September 13, 1995 appellant, then a 33-year-old mailhandler, filed a claim alleging that she sustained a back injury on September 8, 1995 at 10:30 a.m. while unloading her employing establishment vehicle. On the reverse of the claim form, appellant's supervisor, Thomas Kerns, stated that appellant told him that she did not injure her back at work.

In a statement dated September 11, 1995, Postmaster Greg Marsteller noted that Mr. Kerns had returned from lunch and had seen appellant's automobile at an apartment complex where another employee lived. He stated that he telephoned the employee's apartment and appellant answered and advised that her left side was "going numb on her from time to time" and that her back was so sore she "could hardly stand it." Mr. Marsteller asked if she had seen a doctor and she replied that she would see one later that day. He stated that she arrived at the employing establishment about 4:50 p.m. with a disability certificate and advised that the condition was work related.

In a disability certificate dated September 11, 1995, Dr. Richard Catterlin, a family practitioner, stated that he had treated appellant for a pinched nerve in her lower back and she could return to work on September 18, 1995. In subsequent disability certificates dated September 13, 15, 25 and October 20, 1995, he extended the disability date to November 3, 1995.

In reports dated October 30 and November 2, 1995, Dr. James D. Brodell, an orthopedic surgeon, related appellant's complaint that she felt a pulling in her lower back while unloading a mail truck. He diagnosed recurrent lumbosacral sprain/strain, indicated that appellant was

disabled and checked the block marked "yes" indicating that the condition was causally related to her employment.

In a written statement, Mr. Kerns related that, on September 9, 1995, appellant told him that she had injured her back the night before "off the job" and asked for a few hours of sick leave. He stated that he told appellant that if she wished to use sick leave she would have to see a doctor that day. Mr. Kerns stated that appellant offered to carry part of her route but he told her he did not want her to aggravate the condition and to finish casing the mail and then see a physician and that she finished casing the mail and left for the day. He stated that he immediately told the union steward that she had advised him that the injury occurred off the job. Mr. Kerns stated that he told the other supervisor, Paul Dragos, that appellant had reported an off-the-job injury because she had a history of injuring herself on the job but not reporting the incidents for several days. He noted that on September 11, 1995 he asked appellant if she had seen a physician on September 9, 1995 and she replied that she "did n[o]t have time" but would see a physician that morning. Mr. Kerns stated that he was unable to contact appellant at her home but she was reached at the home of another employee at 2:00 p.m. and she had not yet been to the doctor but later that day brought in a disability note from a doctor.

In a written statement, Mr. Dragos stated that Mr. Kerns told him on September 9, 1995 that appellant had reported that she injured her back off the job the prior evening. He related that Mr. Kerns granted her request for sick leave and instructed her to see a doctor that day, advised the shop steward of appellant's off-the-job injury and told Mr. Dragos about the situation because appellant had a history of not reporting on-the-job injuries as required. Mr. Dragos stated that, as the "late" supervisor, he worked until 5:30 p.m. on September 8, 1995 but appellant did not report an on-the-job injury at any time that day.

In a statement dated October 10, 1995, a shop steward, Paul Rohrbaugh, stated that, on September 9, 1995, Mr. Kerns told him that appellant had asked for sick leave and stated that she injured her back off the job. He related that appellant was told that she should see a doctor right away.

In another witness statement, Sam Banozic indicated that he heard some of the conversation which took place between appellant and Mr. Kerns on September 9, 1995. He stated that it sounded to him that appellant had hurt her back off the job and she wanted some time off from work but that she felt she could deliver the mounted part of her route but that Mr. Kerns told her that someone else would carry her route and she should just case the mail.

By decision dated November 22, 1995, the Office denied appellant's claim for compensation benefits.

By letter dated December 21, 1995, appellant requested a review of the written record and submitted additional evidence.

In a report dated March 28, 1996, Dr. Catterlin related that appellant stated that she was unloading her postal vehicle on September 8, 1995[1] when she felt pain in her lower back. He diagnosed an acute lumbar strain and sprain occurring at work.

In a statement received by the Office on April 17, 1996, Mr. Kerns stated that, on September 9, 1995, appellant told him that she had injured her back the previous day off the job and asked for sick leave and that he granted leave and advised that she needed to see a doctor that day and provide medical documentation of her inability to work that day and she agreed to do so. He stated that a second conversation occurred later at appellant's work station and she offered to deliver the portions of her route where she did not have to walk but he told her to just finish casing the mail and then have her physician examine her for an off-the-job injury. Mr. Kerns stated that another carrier overheard the second conversation.

By decision dated July 1, 1996, an Office hearing representative affirmed the Office's November 22, 1995 decision.

In a statement dated March 13, 1996, received by the Office on July 19, 1996, appellant stated that she was unloading her postal truck on September 8, 1995 when she pulled a muscle in her back. She stated that the next day she told Mr. Kerns that she was injured on the job. Appellant stated that she had never told Mr. Banozic or Mr. Rohrbaugh that she was hurt off the job.

An undated signed statement purportedly from appellant's parents but which appears to be in appellant's handwriting,[2] states that appellant told her parents on the evening of September 8, 1995 that she injured her back while unloading her postal truck.

By letter dated August 20, 1996, appellant requested reconsideration of the denial of her claim.

In a statement dated August 16, 1996, appellant asserted that the statement from Mr. Banozic was not credible as the conversation between herself and Mr. Kerns on September 9, 1995 took place at Mr. Kerns' desk, out of earshot of Mr. Banozic. She also stated that it was not credible that Mr. Banozic heard her tell Mr. Kerns that she would deliver the mounted part of her route as her route had no mounted deliveries. Appellant alleged that Mr. Banozic was also not credible because he received special consideration from Mr. Kerns as he had recently experienced a severe head injury.

An office memorandum of a telephone call on January 8, 1997 relates that Mr. Kerns stated that there were two conversations held with appellant on September 9, 1995, one at his desk and one at appellant's work station and the conversation which took place at appellant's work station, overheard by Mr. Banozic, involved Mr. Kerns' concern that appellant not deliver any mail that day to avoid aggravating the injury which she had stated was nonwork related. He

[1] He stated in his March 28, 1996 report that the date of injury was June 2, 1993 but corrected the date to September 8, 1995 in an April 12, 1996 addendum.

[2] Both the written statement and the two signatures of the parents appear to be in appellant's handwriting.

denied appellant's allegation that Mr. Banozic received special consideration due to an injury. Regarding appellant's statement that no part of her route was "mounted," Mr. Kerns stated that most of the route was not mounted but, on one street, there were four or five houses too far apart for her to walk and she normally drove to each of those houses. He stated his belief that appellant requested sick leave because she had no annual leave available and wished to attend a wedding with some coworkers.

By decision dated January 8, 1997, the Office denied modification of its July 1, 1996 decision.

By letter dated May 21, 1997, appellant requested a hearing before an Office hearing representative. She submitted a statement dated April 25, 1997 in which she noted that Mr. Kerns had stated that Mr. Banozic had not heard the first conversation between appellant and Mr. Kerns on September 9, 1995 because it took place at Mr. Kerns' desk. Appellant stated that there was no evidence that any witness overheard her tell Mr. Kerns that the injury occurred off the job.

By decision dated July 24, 1997, the Office denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration and was therefore not entitled to an oral hearing as a matter of right and on the grounds that the issues in the case could be equally well addressed by a request for reconsideration and submission of additional evidence.

By letter dated September 12, 1997, appellant requested reconsideration and submitted a copy of her April 25, 1997 statement previously submitted.

By decision dated November 5, 1997, the Office denied appellant's request for further merit review of her claim on the grounds that the evidence submitted in support of her request was of a repetitious nature and insufficient to warrant review of its prior decision.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained an injury in the performance of duty on September 8, 1995.

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 of the Act.[4] The claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[5]

[3] 5 U.S.C. §§ 8101-8193.

[4] *Donald R. Vanlehn*, 40 ECAB 1237, 1238 (1989).

[5] *Brian E. Flescher*, 40 ECAB 532, 536 (1989).

In this case, appellant alleged that she sustained a back injury on September 8, 1995 while unloading her employing establishment vehicle. However, on the reverse of her claim form Mr. Kerns, stated that appellant told him that she did not injure her back at work. In a written statement, he related that, on September 9, 1995, appellant told him that she had injured her back the night before "off the job" and asked for sick leave. Mr. Kerns stated that he told appellant that if she wished to use sick leave she would have to see a doctor that day. He stated that he immediately told the union steward that she had advised that the injury occurred off the job. Mr. Kerns stated that he told the other supervisor, Mr. Dragos, that appellant had reported an off-the-job injury because she had a history of injuring herself on the job but not reporting the incidents for several days. He noted that on September 11, 1995 he asked appellant if she had seen a physician on September 9, 1995 and she replied that she "did n[o]t have time" but would see a physician that morning. Mr. Kerns stated that he was unable to contact appellant at her home but she was reached at the home of another employee at 2:00 p.m. and she had not yet been to the doctor but later that day brought in a disability note from a doctor.

In a written statement, Mr. Dragos stated that Mr. Kerns told him on September 9, 1995 that appellant had reported that she injured her back off the job the prior evening. He related that Mr. Kerns granted her request for sick leave and instructed her to see a doctor that day, advised the shop steward of appellant's off-the-job injury and told Mr. Dragos about the situation because appellant had a history of not reporting on-the-job injuries as required. Mr. Dragos stated that, as the "late" supervisor, he worked until 5:30 p.m. on September 8, 1995 but appellant did not report an on-the-job injury at any time that day.

In a statement dated October 10, 1995, Mr. Rohrbaugh, stated that, on September 9, 1995, Mr. Kerns told him that appellant had asked for sick leave and stated that she injured her back off the job. He related that appellant was told that she should see a doctor right away.

In another witness statement, Mr. Banozic indicated that he heard some of the conversation which took place between appellant and Mr. Kerns on September 9, 1995. He stated that it sounded to him that appellant had hurt her back off the job and she wanted some time off from work.

These supervisory and witness statements cast serious doubt as to whether appellant sustained an injury at work on September 8, 1995, as alleged. Moreover, in addition to the discrepancies in the factual evidence, the medical evidence is insufficient to establish that appellant sustained an injury at work on September 8, 1995.

In a disability certificate dated September 11, 1995, Dr. Catterlin stated that he had treated appellant for a pinched nerve in her lower back and she could return to work on September 18, 1995. However, he did not indicate the cause of the condition and therefore this evidence is not sufficient to establish that she sustained a back injury at work.

In reports dated October 30 and November 2, 1995, Dr. Brodell related appellant's complaint that she felt a pulling in her lower back while unloading a mail truck. He diagnosed recurrent lumbosacral sprain/strain, indicated that appellant was disabled and checked the block marked "yes" indicating that the condition was causally related to her employment. The Board has held that an opinion on causal relationship which consists only of checking "yes" to a form

report question on whether the claimant's disability was related to the history given is of little probative value.[6] Without any explanation or rationale, such a report has little probative value and is insufficient to establish causal relationship.[7] Therefore, this report is not sufficient to discharge appellant's burden of proof.

In a report dated March 28, 1996, Dr. Catterlin related that appellant stated that she was unloading her postal vehicle on September 8, 1995[8] when she felt pain in her lower back. He diagnosed an acute lumbar strain and sprain occurring at work. However, Dr. Catterlin merely related appellant's history of the incident. He provided no rationalized medical opinion explaining how the injury was sustained and his report is therefore insufficient to support appellant's claim of a work-related injury.

The Board further finds that the Office properly denied appellant's request for an oral hearing.

Section 8124(b)(1) of the Act[9] provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

Under this provision of the Act a claimant is entitled to a timely requested hearing under section 8124(b) only before the Office has reviewed his claim under section 8128.[10]

In this case, prior to her May 21, 1997 request for an oral hearing, appellant had filed an August 20, 1996 request for reconsideration of the Office's denial of her claim and a decision was issued regarding her request for reconsideration on January 8, 1997 in which the Office denied modification of its last merit decision issued July 1, 1996. Therefore, she was not entitled to a hearing as a matter of right. The Office, however, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely made after reconsideration under section 8128(a) are a proper interpretation of the Act and Board precedent.[11] In this case, the Office further considered appellant's request and properly

[6] *Donald W. Long*, 41 ECAB 142, 146 (1989).

[7] *Id.*

[8] He stated in his March 28, 1996 report that the date of injury was June 2, 1993 but corrected the date to September 8, 1995 in an April 12, 1996 addendum.

[9] 5 U.S.C. § 8124(b)(1).

[10] *Mary G. Allen*, 40 ECAB 190, 194 (1988).

[11] *Henry Moreno*, 39 ECAB 475, 482 (1988).

determined that her request for a hearing could be equally well addressed by submitting a request for reconsideration and additional evidence sufficient to warrant modification of the Office's prior decision. Therefore, the Office did not abuse its discretion in denying appellant's request for a hearing.

The Board further finds that the Office did not abuse its discretion in denying appellant's September 12, 1997 request for reconsideration.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or a fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[12]

In this case, in support of her request for reconsideration, appellant submitted evidence which was previously submitted and considered by the Office. As she did not submit any evidence, point of law, or fact not previously considered by the Office and did not show that the Office erroneously applied or interpreted a point of law, the Office properly denied her request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated November 5, July 24, and January 8, 1997 are affirmed.

Dated, Washington, D.C.
February 23, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[12] 20 C.F.R. § 10.138(b)(2).