U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL A. GREEN and U.S. POSTAL SERVICE,
POST OFFICE, Stamford, CT

Docket No. 03-709; Submitted on the Record;
Issued May 6, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an injury in the performance of duty on December 23, 2001, as alleged; (2) whether the hearing representative erred by reviewing appellant's case on the written record rather than conducting a hearing; and (3) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On January 17, 2002 appellant, then a 41-year-old casual truck driver, filed a traumatic injury claim alleging that, on December 23, 2001, while pulling "postcons," he felt a pain in his lower back radiating into his right leg.

The employing establishment controverted the claim and submitted a series of notes dated from January 10 to 23, 2002 from appellant's supervisor. In the January 10, 2002 note, the supervisor indicated that appellant called him on December 31, 2001 and indicated that he would not be at work and that, when he was asked why, he indicated that he awoke with leg pain. The supervisor noted that when he asked appellant if he hurt himself at work he said "no, he did n[o]t know what happened." On January 4, 2002 appellant walked into his office with a cane to pick up his paycheck. The supervisor indicated that the first time he heard that appellant was filing a claim was when he got a call on January 9, 2002 from a doctor's office. The supervisor also indicated that he received a call from appellant on January 10, 2002, in which appellant asked him to send the necessary claim paperwork to complete. The supervisor further indicated: "He then stated he still do n[o]t know (sic) what happened, he woke up that way, but he then stated he did feel a slight pull in his back on the 23rd or 24th of December as he was pulling a postcon and did not think anything of it." The employing establishment also submitted a note from "Sal Buffone," wherein he indicated that on December 28, 2001 appellant stated that he had to go home early because his leg hurt. He indicated that appellant never stated that he was injured on the job.

By letter dated February 20, 2002, the Office requested that appellant submit further information. Appellant's response was received by the Office on March 12, 2002. He reiterated

that, after pulling a "postcon" full of boxes, he strained his back. Appellant indicated that he thought "nothing of" the incident and continued to work. He further indicated that there were no witnesses as he was in the back of the truck assembling the load. Appellant stated that the pain initially was not bad and he would take aspirin to relieve it. He indicated that when his leg started to hurt on December 28, 2001 he had no idea that it was related to his back pain.

Appellant submitted medical reports from Bridgeport Hospital indicating that appellant was seen on January 2, 2002 complaining of back pain. He also submitted a January 9, 2002 medical report by Dr. Eric H. Katz indicating that appellant was treated on that date for acute lumbosacral strain. In the history portion of the report, Dr. Katz noted that appellant stated that on December 23 or 24, 2001 while working for the employing establishment performing repetitive lifting of heavy boxes he experienced acute pain in the low back region. Appellant also submitted a February 4, 2002 note by Dr. Katz indicating that appellant would probably need surgical intervention. In an attending physician's report (Form CA-20) dated February 5, 2002, Dr. Katz diagnosed a herniated nucleus pulposus L5-S1. He checked the box indicating that he believed that the condition was caused or aggravated by an employment activity.

By decision dated March 25, 2002, the Office denied appellant's claim finding that the evidence did not establish that appellant sustained an injury on December 23, 2001, as alleged.

By letter dated April 19, 2002 and received by the Office on April 24, 2002, appellant requested an "oral or written" hearing. By letter to appellant dated May 1, 2002, the Office requested that he specify whether he wanted an oral hearing or a review of the written record. By fascimile dated May 7, 2002 and marked received by the Office on May 9, 2002, appellant requested an oral hearing.

The hearing representative reviewed appellant's case as a request for review of the written record. By decision dated August 26, 2002, the hearing representative affirmed the Office's March 25, 2002 decision. The hearing representative noted that appellant's statements as to the cause of the injury varied, that appellant supplied late notification to his employer, that there was a lack of confirmation of the injury, that appellant continued working after the injury and that appellant delayed seeking medical treatment.

By letter received by the Office on October 25, 2002, appellant requested reconsideration and submitted an April 25, 2002 report from Dr. Katz, who noted that a magnetic resonance imaging of the lumbar spine concluded that there was a recurrent disc herniation at L5-S1 on the right. Dr. Katz indicated that he believed that the stated history and resulting symptoms are causally related to appellant's work injury on December 23, 2001.

By decision dated December 13, 2002, the Office denied appellant's request for reconsideration, as it found that appellant had not submitted evidence sufficient to warrant review of the prior decision.

The Board finds that this case is not in posture for decision on the issue of whether appellant sustained an injury while in the performance of duty on December 23, 2001.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

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

The Office in the present case determined that appellant failed to submit sufficient evidence to establish that he experienced the employment incident at the time, place and in the manner alleged. The Office hearing representative found that appellant's statements with regard to the injury varied, that appellant had supplied late notification of the injury to his employer, that there was no confirmation of the injury, that appellant continued to work after the injury and that appellant failed to timely seek medical attention for the injury.

The Board has consistently held that a claimant's statement 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] In the instant case, appellant stated that he injured himself on December 23, 2001 while pulling "postcons." His delay in filing a claim is consistent with his personal statements indicating progressing pain following this injury. Appellant noted that the pain initially was controlled by taking aspirin. He stated that he did not initially connect his leg pain with the pull in his back. Appellant also noted that there were no witnesses to the incident because he was in the back of a truck assembling a load. The Board finds the evidence sufficient to establish that appellant has established an employment incident on December 23, 2001.

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[1] 5 U.S.C. §§ 8101-8193.

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

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

[4] *Elaine Pendleton*, *supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Thelma Rogers*, 42 ECAB 866, 869-70 (1991).

The Office did not address whether the medical evidence established that this incident resulted in an injury. On remand the Office must determine whether the December 23, 2001 incident resulted in a compensable injury. Thereafter, the Office must issue a *de novo* decision.

Lastly, in light of the Board's finding that appellant established a work-related incident on December 23, 2001, the question of whether the Office erred in reviewing the case on the written record instead of conducting a hearing and the issue of whether the Office abused its discretion in denying merit review are moot.

The decisions of the Office of Workers' Compensation Programs dated December 13, August 26 and March 25, 2002 are hereby vacated and this case is remanded for further action consistent with this decision.

Dated, Washington, DC
May 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member