United States Department of Labor
Employees' Compensation Appeals Board

LUIS A. MORALES, Appellant	)	
and	)	**Docket No. 04-334**
	)	**Issued: June 9, 2004**
DEPARTMENT OF HOMELAND SECURITY, BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, Miami, FL, Employer	)	

Appearances:
Luis A. Morales, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 20, 2003 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated June 9 and September 23, 2003, which denied his claim for traumatic injury and denied his request for a review of the written record, respectively. Pursuant to 20 C.F.R. § 501.2(c) and 501.3 the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a back injury on January 8, 2003 causally related to his federal employment; and (2) whether the Office abused its discretion by denying appellant's request for a review of the written record by an Office hearing representative.

FACTUAL HISTORY

On January 8, 2003 appellant, then a 29-year-old detention enforcement officer, filed a claim for traumatic injury alleging that on that date he was walking with a detainee and when he

turned to the right, he felt a "huge pain" in his lower left back which caused him to sit down and rest. He stated that his pain continued for the remainder of the day.

Appellant was treated in the emergency room by a physician's assistant, but the signature of the physician's assistant appears to be cosigned, although illegibly, by a supervising physician, which would render it probative medical evidence. The admitting records note as history of injury that she experienced low back pain secondary to strain yesterday and that appellant reported low back pain secondary to a twisting movement of torso yesterday while at work, that he immediately complained of pain and had decreased range of motion, a tender lumbosacral area and spastic paraspinous muscles. A diagnosis was noted as lumbar strain.

A witness, Victor M. Garcia, stated that he heard appellant complain about his back pain and he saw him sit down for a few minutes. Mr. Garcia noted that appellant kept complaining about back pain during the day. However, appellant's supervisor, Rey A. Muniz, who did not witness the event, indicated that appellant was not performing any specific duties or exerting any physical force other than walking when the alleged injury occurred.

Appellant sought treatment on January 9, 2003 at a local medical center where he was admitted as a patient of Dr. Juan Remos and was diagnosed as having lumbar strain. The history of injury was noted as "low back pain [secondary] to strain yesterday" and that "[appellant] reports low back pain [secondary] to a twisting movement of torso yesterday while at work, [complained of] pain, decreased range of motion." The findings upon examination were noted to include a tender lumbosacral area with decreased range of motion and spastic paraspinous muscles, but with no visible bruises. He was treated with ice, rest, pain medications and muscle relaxants and his treatment form was signed by a physician's assistant and with what appears to be an illegible physician's cosignature. The treating physician's assistant indicated on a cosigned form that appellant could return to work on January 13, 2003 if he avoided strenuous activities.

By letter dated May 7, 2003, the Office advised appellant that the evidence received was insufficient to establish his claim because it did not establish that he actually experienced an injurious employment incident on the date alleged, that no diagnosis had been provided and that no physician provided an opinion on causal relation. The Office requested this evidence and gave appellant 30 days to submit the requested material.

By letter dated June 3, 2003, appellant requested more time to submit the requested evidence, as he claimed that he did not receive the Office request letter until May 22, 2003.

Nothing further was received by the Office within the time limitation period given.

By decision dated June 9, 2003, the Office rejected appellant's claim, finding that he had not proven fact of injury by establishing that an employment incident actually occurred as alleged, nor had he proven that a specific condition had resulted.[1]

On July 18, 2003 appellant requested a review of the written record by the Branch of Hearings and Review.

By decision dated September 23, 2003, the Branch of Hearings and Review denied appellant's request for a review of the written record, finding that it was untimely requested beyond the 30-day time limitation period and because his review of the record could adequately be addressed through submission of further evidence to the Office and a request to the Office for reconsideration under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 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 compensation is claimed are causally related to the employment injury.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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.

[1] Following the June 9, 2003 decision, the Office received further evidence which consisted of a description of the incident of injury. As this evidence was not before the Office at the time of its most recent merit decision, it may not now be considered by the Board on this appeal. *See* 20 C.F.R. § 501.2(c). However, appellant also submitted a valid Form CA-16 authorization for medical treatment. The Board notes that, by issuing him this form, the Office is contractually obligated to pay this bill. *See e.g. Lisa DeLindsay*, 51 ECAB 634 (2000) (where the record contained no CA-16 form or other authorization from the Office that would create a contractual obligation to pay for the cost of the medical services rendered).

[2] 5 U.S.C. § 8101-8193.

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

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

First, 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] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

ANALYSIS -- ISSUE 1

In the present case, appellant promptly reported his low back condition to his supervisor and a witness noted that he sat down to rest when he complained of low back pain. He continued to work his shift, but the pain remained, as his coworker substantiated, so the next day he sought medical treatment at a local emergency room.

The records submitted factually support that an incident occurred while appellant was on duty involving a twisting of his torso, which caused a great deal of pain and caused him to immediately advise his coworker of his pain and to sit down. This evidence supports that a twisting incident occurred as alleged. Further, the records provide a related diagnosis, that of lumbar strain. Therefore, there was an identified medical condition which resulted from appellant's twisting incident. Accordingly, he has established a *prima facie* case. However, no further medical opinion signed legibly by an identifiable physician discussing causal relationship was provided. Therefore, the case record needs to be further developed.

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[7] In the instant case, although none of appellant's medical reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained an injury on January 8, 2003 as alleged, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship between his allegedly disabling complaints and the employment incident that is sufficient to require further development of the case record by the Office.[8] Additionally, there is no opposing medical evidence in the record.

---

[5] *John J. Carlone*, 41 ECAB 354 (1989). To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence so as to cast serious doubt on the validity of the claim. *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984). *See also George W. Glavis*, 5 ECAB 363 (1953).

[6] *Id.* For a definition of the term "injury," see 20 C.F.R. §10.5(a)(14).

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

[8] *John J. Carlone, supra* note 5; *Horace Langhorne*, 29 ECAB 820 (1978).

CONCLUSION -- ISSUE 1

As this case is being remanded to the Office for further development, a new statement of accepted facts should be created and questions to be resolved must be formulated and appellant should be referred, with the relevant case record, to an appropriate specialist for an opinion as to whether he sustained a back injury on January 8, 2003 causally related to his federal employment. After further development as the Office deems appropriate, a decision shall be issued on the merits of the claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] A review of the written record by a hearing representative may also be requested, subject to the same time limitations.

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings or to review the written record 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 or a review of the written record when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[10]

ANALYSIS AND CONCLUSION -- ISSUE 2

As the denial of a review of the written record was not a decision on the case on its merits, none of the evidence submitted after the June 9, 2003 merit decision in support of the request was before the Office at the time of its most recent merit decision and, therefore, it cannot now be reviewed by the Board for the first time on this appeal. *See* 20 C.F.R. § 501.2(c).

The issue of whether the Office abused its discretion by denying appellant's request for a review of the written record by an Office hearing representative is rendered moot by the disposition of the first issue.

[9] 5 U.S.C. § 8124(b)(1).

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 9, 2003 is set aside and the case is remanded for further development in accordance with this decision of the Board. The decision of the Office dated September 23, 2003 is rendered moot.

Issued: June 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member