U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER G. CHIN and DEPARTMENT OF THE AIR FORCE, 11TH TRANSPORTATION SQUADRON, BOLLING AIR FORCE BASE, DC

Docket No. 98-502; Oral Argument Held October 20, 1999; Issued February 7, 2000

Appearances: *Rhonda Framm, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that he sustained an injury causally related to factors of his federal employment; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing; and, (3) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On April 1, 1996 appellant, then a 37-year-old automotive mechanic, filed a traumatic injury claim, alleging that he sustained a head injury when attacked by TSgt Adam Kromeke on March 29, 1996, the date that appellant stopped work. By letter dated March 24, 1997, the Office informed appellant of the type of evidence needed to support his claim. By decision dated May 5, 1997, the Office found that the incident of March 29, 1996 occurred but that the medical evidence failed to establish that appellant sustained an employment-related injury. On July 14, 1997 appellant, through counsel, requested a hearing. In an August 8, 1997 decision, an Office hearing representative denied appellant's request on the grounds that it was not timely filed.[1] On September 2, 1997 appellant, through counsel, requested reconsideration. By decision dated September 29, 1997, the Office denied the request, finding it *prima facie* insufficient to warrant modification of its prior decision. The instant appeal follows.

The Board finds that appellant established that he sustained an employment-related injury.

[1] Appellant's counsel had initially submitted a hearing request to the district office on June 20, 1997. By letter dated June 25, 1997, the Office informed counsel of the methods to be used in exercising appeal rights.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his or her claim[3] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[4] that the claim was timely filed within the applicable time-limitation period of the Act,[5] 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.[6] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7] However, an employee's statement alleging 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 and persuasive evidence.[8]

Causal relationship is a medical issue[9] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10] Moreover, neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

The relevant medical evidence includes a July 8, 1996 report from Dr. Daniel R. Ignacio, a Board-certified physiatrist, who stated that appellant had been under his care for multiple injuries that occurred on March 29, 1996 which resulted in persistent pain and spasm. He advised that appellant could not work. In a September 25, 1996 Office form report, Dr. Marino R. Facelo, an associate of Dr. Ignacio, noted a history that appellant's "head was repeatedly 'pounded' against a concrete floor by a supervisor who assaulted him from behind" on March 29, 1996. He stated that appellant had been seen in the emergency room and was first

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

[4] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[5] 5 U.S.C. § 8122.

[6] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

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

[8] *See Robert A. Gregory*, 40 ECAB 478 (1989).

[9] *Mary J. Briggs*, 37 ECAB 578 (1986).

[10] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, *supra* note 7.

[11] *Minnie L. Bryson*, 44 ECAB 713 (1993); *Froilan Negron Marrero*, 33 ECAB 796 (1982).

seen in his office on April 11, 1996. Dr. Facelo noted electromyographic findings and diagnoses of cervical radiculopathy and bilateral carpal tunnel syndrome along with cervical strain syndrome and treatment with NSAID, muscle relaxants, Fiorinal and Vicodan. He advised that appellant had been totally disabled from the date of injury but could return to work with restrictions to his physical activity on October 1, 1996. Dr. Facelo checked the "yes" box, indicating that the condition was employment related.

The Board finds that the September 25, 1996 report is sufficient to establish that appellant sustained cervical radiculopathy causally related to factors of his federal employment and, thus, appellant is entitled to medical benefits therefrom. The report, however, is not sufficiently detailed to determine the period of disability in which appellant would be entitled to wage-loss compensation. Nonetheless, it is sufficient to require further development of the record. It is well established that proceedings under the Act[12] are not adversarial in nature[13] and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[14] Only in rare instances where the evidence indicates that no additional information could possibly overcome one or more defects in the claim is it proper for the Office to deny a case without further development.[15] The case will, therefore, be remanded to the Office for further development on the issue of the period of disability, if any, resulting from the accepted injury and any additional condition sustained as a result of the assault. On remand, appellant should submit all medical records pertaining to the emergency room or hospital treatment, diagnostic tests performed, physical therapy and medical treatment prescribed, as well as narrative medical reports and Office notes related to the above injury.[16] After such further development as is deemed necessary, the Office shall issue a *de novo* decision.[17]

[12] 5 U.S.C. §§ 8101-8193.

[13] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

[14] *See Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.800.5(c) (April 1993).

[16] The Board notes that appellant submitted additional evidence with his appeal to the Board. This evidence was, thus, submitted subsequent to the Office decision dated September 29, 1997. The Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

[17] In light of the Board's holding regarding the first issue in this case, the following issues are rendered moot.

The decisions of the Office of Workers' Compensation Programs dated September 29, August 8 and May 5, 1997 are hereby set aside and the case is remanded to the Office for further proceedings consistent with this decision.

Dated, Washington, D.C.
February 7, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael J. Walsh, Chairman, dissenting:

I must respectfully dissent from the majority opinion for the following reason: there is an absence of *prima facie* medical evidence in this case on the issue of whether an injury resulted from the incident of March 29, 1996 in which appellant alleged he was assaulted from behind by a supervisor. It is noteworthy that after appellant was absent from work for approximately 123 workdays his supervisor wrote on September 19, l996 as follows:

> "On March 29, 1996 you were physically assaulted by your former supervisor. Although you advised me at the time you were not hurt and declined medical attention, you have not returned to duty since that date. I have repeatedly requested medical documentation from you to determine when or if you will be able to return to duty…."

In support of the claim a note dated July 8, 1996 was submitted over the signature of Dr. Daniel R. Ignacio reading: "[treating] for injuries sustained March 29, 1996." He stated he was disabled for work due to "multiple injuries and persistent pain and spasm." Appellant also submitted a September 25, 1996 CA-20 form report from Dr. Marino R. Facelo, a gynecologist, diagnosing cervical strain, cervical radiculapathy and bilateral carpal tunnel syndrome due to the March 29, 1996 employment incident.

On March 24,1997 the Office of Workers' Compensation Programs requested further factual evidence and a written narrative report from appellant's treating physician as to how the condition claimed was related to the alleged attack by the former supervisor. No response was

received. As a result on May 5, 1997 the Office issued its' denial of the claim on the basis that appellant failed to sustain his burden of proof.

On August 8, 1997 the Office denied appellant's request for a hearing and on September 29, 1997 denied a request for reconsideration on the grounds no new relevant evidence was submitted.

I find the medical evidence in the case is insufficient to establish an "injury" in the performance of duty. The Office has accepted that an incident occurred. The issue now becomes: did an injury result from the incident? The note from Dr. Ignacio is of little probative value. It provides no diagnosis, no explanation of the incident or how it caused a medical condition. The Board has held a physician's opinion is not dispositive simply because it is offered by a physician.[1]

Dr. Facelo, in a form report had several diagnoses and stated that appellant was totally disabled. He supported this conclusion by checking a box that the conditions were work related. The Board has held such a report has little probative value where there is no explanation or rational supporting the opinion on the causal relationship between the diagnosed conditions and the employment. In my view the medical evidence is not sufficient to support this injury.[2]

Although not addressed in the majority opinion because of their disposition of the case on the merits, I would affirm the Office's decision to deny a hearing on the basis that the decision was mailed to appellant's address of record, May 5, l997. A request for hearing was not received by the Office until June 30, 1997. Since the request was not made within 30 days of May 5, 1997 appellant was not entitled to a hearing as a matter of right.[3]

I would also affirm the Office's disposition of the petition for reconsideration filed September 2, 1997. In the petition, appellant relied on evidence already in the file, introducing nothing new or relevant which would have required the Office to reopen the case for a merit review.[4]

[1] *Robert J. Krystyen,* 44 ECAB 227 (1992).

[2] *Lillian M. Jones,* 34 ECAB 379, 381 (1982).

[3] *Jeff Micono,* 39 ECAB 617 (1988).

[4] *Barbara J. Williams,* 40 ECAB 649 (1989).

In conclusion, I would affirm the Office of Workers' Compensation Programs' decisions of September 29, August 8 and May 5, 1997.[5]

Michael J. Walsh
Chairman

[5] Although appellant submitted new evidence on appeal the Board may not consider this evidence in its' review of appellant's case Pursuant to its' rules of procedure the Board's jurisdiction is limited to that evidence which was before the Office at the time it rendered its' final decision, 20 C.F.R. § 501.2(c).