U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLIE McRAE and DEPARTMENT OF VETERANS AFFAIR, VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC

Docket No. 98-1730; Submitted on the Record;
Issued February 22, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a right shoulder, arm and hand injury on March 27, 1997 in the performance of duty, causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

On May 7, 1997 appellant's supervisor received a Form CA-1 claim for compensation alleging that on March 27, 1997 appellant, then a 49-year-old medical supply technician, sustained a sharp pain which ran down his right arm as he was unzipping the cover from a bed. Appellant claimed an injury to his right shoulder, arm and hand. Appellant's supervisor, George G. Goodman, indicated that his knowledge of the facts of injury did not agree with appellant's statements, noting that he had no knowledge of a job-related injury as described.

A May 8, 1997 statement from Brenda G. Crowe, the timekeeper, was also submitted which stated that appellant had provided no medical documentation for his absences beginning March 31, 1997 and that after questioning, appellant provided the name of a physician who, when contacted stated that appellant's magnetic resonance imaging (MRI) scan did not disclose anything significant and asked the timekeeper if appellant was not back at work, indicated that appellant had been experiencing a great deal of pain, but seemed reluctant to furnish a statement to support appellant's absences. Appellant told the timekeeper that the doctor had advised him that he had probably injured his back on the job and he needed to fill out an accident report. Appellant indicated that he would fill out a CA-1 on May 5, 1997.

Additionally submitted was a May 8, 1997 narrative statement from Mr. Goodman stating that he had no knowledge of appellant's injury being job related, that appellant never mentioned a job-related injury to him or to any other area personnel, that appellant was out of work as a result of an automobile accident from March 26 through May 31, 1996 and that he was having surgery for a ruptured cervical disc that week. Mr. Goodman further noted that he received the Form CA-1 on May 7, 1997 and at that point attempts to obtain a doctor's statement and had been unsuccessful, even after contact by Brenda Crowe.

The employing establishment controverted continuation of pay and the entire claim for lack of medical evidence and untimely submission.

On June 10, 1997 the Office received a note from Dr. Yoosun Park, a Board-certified physical medicine and rehabilitation specialist, which stated: "above named veteran has been treated in physical therapy April 11 through May 2. 1997." Also submitted was a billing form from a physician with an illegible signature dated May 5, 1997 for a C5-6 spondylosis.

By letter dated June 16, 1997, the Office advised appellant that further information was required, including a description of exactly how the injury occurred, witnesses, medical treatment received and medical history prior to injury and it requested that he submit a comprehensive medical report from his treating physician discussing causal relationship with specific work factors.

In response, appellant submitted a May 5, 1997 report from Dr. Stephen W. Hipp, a Board-certified neurosurgeon, which noted appellant's present complaints of right paracervical pain which radiated down by the scapula as well as into his right arm which was made worse by appellant turning his head to the right. Dr. Hipp reported that cervical MRI and computerized tomography (CT) scans revealed several levels of degenerative disease, worse at C5-6, which was primarily spondylitic and that appellant had dermatomal sensory changes and diminished right reflexes. He diagnosed C6 radiculopathy.

Additionally submitted was a June 2, 1997 form from Dr. Hipp, which noted a diagnosis of C5-6 spondylosis and noted that he was awaiting authorization to perform a myelogram.

Also in response, appellant claimed that he notified his supervisor within 30 days, that he told his boss on the date of injury that he needed to go to the doctor, that the injury occurred when he unzipped a bed and that he initially sought chiropractic care.

By decision dated August 12, 1997, the Office rejected appellant's claim finding that he failed to establish fact of injury. The Office found that the initial evidence of record established that appellant experienced the claimed event, but that the evidence submitted did not establish that a condition had been diagnosed in connection with the event.

By letter dated January 9, 1998, appellant requested an oral hearing. By decision dated February 26, 1998, the Office denied appellant's request finding that it was untimely made and that the issue could be equally well addressed by requesting reconsideration from the Office and by submitted further relevant evidence.

By letter to the Office dated April 17, 1998, appellant requested reconsideration by the Office and he included further medical evidence. The date of the decision for which appellant was requesting reconsideration was not specified. Appellant submitted a March 27, 1997 employing establishment note which was illegible and was signed illegibly. Complaints were noted by the nurse that there was pain and numbness in right hand and arm. Diagnosis appears to be "radicular pain C-spine (C6-7)." No history of injury was noted. Appellant submitted an illegible April 1, 1997 employing establishment report with an illegible signature. Diagnosis appeared to be "neck pain." Appellant submitted an illegible April 3, 1997 employing establishment report signed illegibly. Appellant submitted an April 6, 1997 employing

establishment note signed with an illegible signature which noted that a cervical spine x-ray demonstrated severe degenerative joint disease. The examiner noted that appellant complained of right shoulder and arm pain especially when moving neck and he diagnosed degenerative joint disease. Appellant submitted an April 13, 1997 employing establishment note signed by a physician with an illegible signature, which noted that appellant was seen with numbness in his hand with a painful right shoulder and right elbow, with the duration of the complaint being two and one half weeks. The physician noted that appellant denied trauma to the area but admitted to the inability to grip with the right hand. He noted that appellant could raise his right arm without difficulty but that the pain continued and radiated to the right side with turning. The physician diagnosed possible cervical disc disease and diabetes mellitus. Nursing notes were also submitted.

However, also by letter dated April 17, 1998, postmarked April 30, 1997 and addressed to the Board, appellant requested reconsideration by the district Office and included the same new evidence. Again no date of decision from which he was requesting reconsideration was provided.

On May 11, 1998 the Board created a docket file for appellant's Office reconsideration request which it treated as a request for an appeal.

However, on May 12, 1998 the Office issued a final decision rescinding the August 12, 1997 decision finding that appellant's response of June 22, 1997 and the medical report of May 5, 1997 had not been taken into consideration.

Also on May 12, 1998 the Office issued a second decision denying appellant's claim for compensation finding that the initial evidence was insufficient to establish that he experienced the claimed accident at the time, place and in the manner alleged because he delayed in reporting it, because he had a prior condition and because he failed to submit supportive medical evidence. The Office further found that the June 22, 1997 statement and the May 5, 1997 medical report were insufficient to establish that he sustained an injury. The Office concluded that appellant had not explained his delay in reporting this injury, which cast significant doubt on the veracity of his claim, that he provided insufficient information on his preexisting condition, including injuries from the recent motor vehicle accident and that none of the medical evidence submitted mentioned a work injury.

On June 24, 1998 appellant completed the Board Form AB-1 clearly stating his intention to appeal to the Board the Office's May 12, 1998 decision. As the initial April 17, 1998 letter to the Board clearly stated that appellant was requesting reconsideration before the district Office, instead of requesting an appeal before the Board and as he submitted new evidence in support of that request which he wished to be considered by the Office, the Board was premature in docketing the case. However, after the June 24, 1998 completion and submission of the Form AB-1 to the Board specifically requesting an appeal of the May 12, 1998 decision, the Board finds that June 24, 1998 is the appropriate date of the appeal, such that the May 12, 1998 decision of the Office is not null and void for lack of jurisdiction.

The Board finds that appellant has failed to establish that he sustained an injury on March 27, 1997 in the performance of duty, causally related to factors of his federal employment.

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 actually experienced the employment incident, which is alleged to have occurred.[1] This component can be established by an employee's uncontroverted statement on the Form CA-1.[2] A consistent history of the injury as reported on medical records, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[3] In this case, however, appellant's claim was controverted by his supervisor and by the employing establishment. He provided no history of injury on any medical records, he was late in notification of the alleged injury, he failed to notify his supervisor until May 7, 1997 and he presented no medical evidence identifying an injury-related diagnosis and he failed to provide medical records revealing that he was even treated for a March 27, 1997 work injury. These actions cast doubt on the veracity of his claim.

The second component is whether the employment incident caused a personal injury and can generally be established only by medical evidence. To establish a causal relationship between the condition and any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.

In the instant case, appellant has submitted no medical evidence that identified him sustaining a work injury or any other injury on or around March 27, 1997. Dr. Park did not mention a March 27, 1997 accident nor any reason for appellant's physical therapy. Dr. Hipp diagnosed cervical spondylosis at C5-6 but did not relate it to a March 27, 1997 incident. He reported that the condition being treated was primarily spondylitic and of a degenerative nature. The illegible employing establishment notes have no probative value as they are unreadable and contain no mention of a March 27, 1997 work injury. The readable employing establishment notes contain no indication of a March 27, 1997 injury and diagnose degenerative joint disease rather than any traumatic injury, with the April 13, 1997 note indicating that appellant denied any trauma to the area. Further, the nurses notes submitted are not considered to be probative medical evidence under the Federal Employees' Compensation Act.[4] As no other medical evidence establishing treatment for a March 27, 1997 injury was submitted and as the fact of the incident is not clearly proven, appellant has failed to meet his burden of proof to establish his claim.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

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[1] For a detailed discussion of the components of an appellant's burden of proof in establishing fact of injury *see Elaine Pendleton*, 40 ECAB 1143 (1989).

[2] *John J. Carlone*, 41 ECAB 354 (1989).

[3] Such circumstances as late notification of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established. *See Nathaniel Cooper*, 46 ECAB 1053 (1995); *Karen E. Humphrey*, 44 ECAB 908 (1993).

[4] *Sheila A. Johnson*, 46 ECAB 323 (1994).

> "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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."[5]

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and section 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[6]

The Board has held that the Office, 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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right for a hearing,[8] when the request is made after the 30-day period for requesting a hearing[9] and when the request is for a second hearing on the same issue.[10] In these instances the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[11] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[12]

In the present case, the Office issued its most recent merit decision denying appellant's claim on August 12, 1997. Appellant requested a hearing in a letter dated January 9, 1998. A hearing request must be made within 30 days of the issuance of the decision as determined by the

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[5] 5 U.S.C. § 8124(b)(1)

[6] 20 C.F.R. § 10.131(a).

[7] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[8] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[9] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[10] *Johnny S. Henderson*, *supra* note 7.

[11] *Id.*; *Rudolph Bermann*, *supra* note 8.

[12] *See Herbert C. Holley*, *supra* note 9.

postmark of the request.[13] Since appellant did not request a hearing within 30 days of the Office's August 12, 1997 decision, he was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its February 26, 1998 decision and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence supporting that he sustained a right shoulder, arm and hand injury on March 27, 1997.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[14] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 12 and February 26, 1998 are hereby affirmed.

Dated, Washington, D.C.
February 22, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] 20 C.F.R. § 10.131(a).

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).