U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERRY L. RIVERS and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Hazelwood, MO

Docket No. 00-2535; Submitted on the Record;
Issued July 23, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On August 8, 1999 appellant, then a 41-year-old casual postal worker, filed a notice of occupational disease alleging that she developed pain in her arms, shoulders and upper back due to heavy lifting while working the SR 67 duty station. She stated that the pain developed over the period of July 5 to 17, 1999. Appellant stopped work on July 18, 1999 and was separated from the employing establishment for unsatisfactory service on July 22, 1999.

Appellant submitted a July 18, 1999 work restrictions form signed by Cynthia Arps, a nurse practitioner, which stated that appellant could return to light work, with no pushing, pulling or lifting over 25 pounds. She also submitted a July 19, 1999 return to work certificate signed by Dr. P.M. Tiongson, which stated that appellant could return to work July 20, 1999 with no lifting more than 25 pounds.

By letter dated August 25, 1999, the Office requested additional medical evidence from appellant stating that the initial information submitted was insufficient to establish an injury as alleged. In response to the Office's request, appellant submitted copies of emergency room treatment notes dated August 18, 1999 from Christian Hospital. These treatment notes are signed by a nurse practitioner and note that appellant presented complaining of pain in her arms starting approximately two weeks previously, after lifting heavy bags. The treatment notes contain a diagnosis of neck, upper back and upper arm musculoskeletal pain. In addition, appellant submitted copied prescriptions for ibuprofen dated July 18, August 4 and 18, 1999.

In a decision dated November 3, 1999, the Office denied appellant's claim as the medical evidence was not sufficient to establish that appellant sustained any injuries in the performance

of duty, as required by the Federal Employees' Compensation Act.[1] The Office found that there was no medical evidence submitted which contained a diagnosis of appellant's condition and discussed the causal relationship between the diagnosed condition and appellant's employment.

In a May 12, 2000 letter, appellant requested an oral hearing before an Office representative.

By decision dated July 10, 2000, the Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Act.[2]

The Board finds that appellant has failed to establish that she developed a medical condition in the performance of duty as alleged.

An employee seeking benefits under the Act 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 the 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 the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, 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.[5] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[6] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[7] A consistent history of the injury as reported on medical reports, to the claimant's

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that, subsequent to the Office's November 3, 1999 decision denying appellant's claim, appellant submitted additional medical evidence to the Office. The Board cannot consider this evidence, however, as it was not before the Office at the time of the final merit decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

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

[4] *Victor J. Woodhams,* 41 ECAB 345 (1989).

[5] *Elaine Pendleton, supra* note 3.

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

[7] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[8] In this case, it is undisputed that appellant worked at the SR 67 duty station at the relevant time.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment incident, or activity, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[9] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

In this case, it is not disputed that appellant worked at the SR 67 duty station on July 17, 1999, as well as previous occasions, and it is further not disputed that she experienced pain in her arms, shoulders and upper back, for which she sought medical attention on July 18, 1999. However, the medical evidence is insufficient to establish that appellant's work at the SR 67 duty station caused or aggravated a medical condition. The medical evidence of record consists of a series of treatment notes, all dated July 18, 1999, completed by medical personnel nurses of the emergency department of Christian Hospital. A treatment note signed by a nurse practitioner indicates that appellant complained of arm and shoulder pain of two weeks duration, which began after lifting heavy bags at work and contains a diagnosis of musculoskeletal pain. In addition, the record contains a work restriction form and several prescriptions for ibuprofen, signed by emergency room physician, Dr. Tiongson. The Board finds that the notes of the nurse practitioners have no probative value as a nurse is not a physician under the Act.[11] Therefore, the record contains no probative medical evidence, which contains a diagnosis or provides any explanation of the causal relationship, if any, between the claimed employment activities and appellant's physical symptoms. The medical evidence of record is insufficient to meet appellant's burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of

[8] *Id.* at 255-56.

[9] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[10] *James Mack*, 43 ECAB 321 (1991).

[11] *Joseph N. Fassi*, 42 ECAB 677 (1991).

the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[13]

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 for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. 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 to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[14]

In this case, the Office issued its decision denying appellant's claim for arm, shoulder and upper back pain on November 3, 1999. Subsequently, appellant requested an oral hearing by letter dated May 12, 2000, which was received by the Office May 15, 2000. The Board finds that the hearing request was made more than 30 days after the Office's decision, and thus, it was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

[12] 5 U.S.C. § 8124(b)(1).

[13] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

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

The July 10, 2000 and November 3, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 23, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member