U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER J. CASIAS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Pueblo, CO

Docket No. 03-1262; Submitted on the Record;
Issued September 5, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a back injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On October 7, 2002 appellant, then a 54-year-old distribution clerk, filed a traumatic injury claim alleging that on that date he hurt his back while presorting bundles of mail. Appellant stopped work on October 8, 2002. Appellant's claim was accompanied by an employing establishment letter dated October 8, 2002 controverting his claim and medical evidence.

In an October 21, 2002 letter, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that appellant submit additional factual and medical evidence supportive of his claim.

By decision dated November 29, 2002, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty on October 7, 2002. In a letter dated February 13, 2003 and postmarked February 17, 2003, appellant requested a review of the written record accompanied by the Office's November 29, 2002 decision and medical evidence.

In a March 31, 2003 decision, the Office denied appellant's request for a review of the written record as untimely filed. The Office further found that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and by submitting evidence not previously considered by the Office which established that he sustained an injury as alleged.

The Board finds that appellant has failed to establish that he sustained a back injury in the performance of duty.

A person who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim, including that he sustained an injury while in the performance of duty and that he had disability as a result.[2] In accordance with the Federal (FECA) Procedure Manual, to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with the 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 or exposure, which is alleged to have occurred.[3] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[4] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[5] The belief of the claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.[6]

Regarding the first component, the Office found the evidence of record insufficient to establish that appellant sustained an injury at the time, place and in the manner alleged. An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment, may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[7]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Evans*, 48 ECAB 692 (1997); *see* 20 C.F.R. § 10.110(a).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[4] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

[5] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[6] *Charles E. Evans*, *supra* note 2.

[7] *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

Karen Arellano, appellant's supervisor, stated that appellant did not immediately report the accident to a supervisor and that management had no knowledge of the alleged accident occurring during duty hours. She also stated that the accident was not reported to management until over four and one-half hours after appellant was at home. In an October 8, 2002 statement, Ms. Arellano indicated that appellant repaired automobiles during his off hours and that it was unknown whether he injured himself while performing this type of work at home after the alleged accident occurred.

Appellant submitted an October 8, 2002 duty status report of a physician whose signature is illegible, revealing that he injured his back while presorting on October 7, 2002. It also revealed a diagnosis of back strain and appellant's physical restrictions. An October 2002 report from Dr. George Birks, an internist, provided a history that appellant hurt his back while working with bundled flats on October 7, 2002. Dr. Birks diagnosed dorsal back strain and noted appellant's physical restrictions. Dr. Birks' hospital emergency room report dated October 8, 2002 provided a history that appellant experienced moderate back pain while lifting at work.

Although the employing establishment contended that it did not receive immediate notice of appellant's injury, the Board finds that the above-noted reports and medical treatment notes provide a consistent history of incident and establish that appellant received medical treatment for his back injury contemporaneous to the October 7, 2002 incident. Accordingly, the Board finds that the evidence of record supports that the incident occurred at the time, place and in the manner alleged.[8]

The Board, however, finds that the medical evidence of record fails to establish that appellant sustained a back injury due to the October 7, 2002 employment incident. The October 8, 2002 duty report from the physician whose signature is illegible failed to address whether appellant's back strain was caused by the October 7, 2002 employment incident. Similarly, Dr. Birks' October 2002 report, which revealed a diagnosis of dorsal back strain, failed to address whether appellant's condition was caused by the accepted employment incident. His October 8, 2002 hospital emergency room report diagnosing back strain did not address whether this condition was caused by the October 7, 2002 employment incident.

An October 17, 2002 duty status report from Dr. Ben Martinez, a Board-certified family practitioner, provided a history that appellant experienced aggravated back pain with lifting on October 7, 2002, a diagnosis of back and shoulder pain and appellant's physical limitations. Dr. Martinez did not provide a firm diagnosis other than pain. Moreover, there is no reasoned opinion on causal relationship between appellant's condition and the October 7, 2002 employment incident. Similarly, Dr. Birks failed to provide a firm diagnosis in his October 8, 2002 hospital emergency room report as he stated that appellant had moderate back pain and he did not discuss whether appellant's condition was caused by the accepted employment incident. His prescriptions of the same date failed to provide a diagnosis and address whether appellant sustained a back injury due to the October 7, 2002 employment incident.

[8] *Louise F. Garnett*, 47 ECAB 639, 643-44 (1996); *Constance G. Patterson*, 41 ECAB 206 (1989); *Julie B. Hawkins*, 38 ECAB 393 (1987).

The October 8, 2002 medical treatment notes of a nurse whose signature is illegible indicated that appellant suffered from back strain. A registered nurse is not competent to render a medical opinion under the Act.[9] Accordingly, the October 8, 2002 treatment notes are of no probative value.

An October 8, 2002 chest x-ray report performed by Dr. Danny Ballenger, a Board-certified radiologist, was normal.

Although the Office advised appellant of the type of medical evidence needed to establish his claim, he failed to submit medical evidence responsive to the request. Consequently, appellant has not established that his back injury was caused by factors of his federal employment.

The Board further finds that the Office properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative or review of the written record, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim or a review of the written record, before a representative of the Secretary."[10] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[11] Thus, a claimant has a choice of requesting an oral argument or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulations.

Section 10.616(a) of the Office's regulations[12] provides in pertinent part that "the hearing request must be sent within 30 days as determined by postmark or other carrier's date of marking of the date of the decision for which a hearing is sought."

The Board has held that the Office, in its broad discretionary authority, in the administration of the Act, has the power to hold hearings or a review of the written record, in certain circumstances where no legal provision was made for such hearings or review and that the Office must exercise this discretionary authority in deciding whether to grant a hearing or review.[13] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request or a review of the written record 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 or a

[9] *See* 5 U.S.C. § 8101(2); *Vicky L. Hannis*, 48 ECAB 538, 540 (1997).

[10] 5 U.S.C. § 8124(b)(1).

[11] 20 C.F.R. § 10.615 (1999).

[12] 20 C.F.R. § 10.616(a) (1999).

[13] *Samuel R. Johnson*, 51 ECAB 612 (2000).

review of the written record,[14] when the request is made after the 30-day period for requesting a hearing or review.[15] 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.[16]

In this case, appellant's request for a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision dated November 29, 2002 and, thus, appellant was not entitled to a review of the written record as a matter of right. Appellant requested a review of the written record in a February 13, 2003 letter that was postmarked February 17, 2003, which is more than 30 days after the Office's November 29, 2002 decision. Therefore, appellant was not entitled to a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he sustained an injury as alleged could equally well be addressed by requesting reconsideration.[17] Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a review of the written record.

The March 31, 2003 and November 29, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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

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

[16] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[17] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).