United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 06-1627**
	)	**Issued: February 8, 2007**
DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD, Employer	)	

Appearances:
Appellant, pro se
Paul J. Klingenberg, Esq., for the Director

Oral Argument November 15, 2006

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 11, 2006 appellant filed a timely appeal from the August 30, 2005 merit decision of the Office of Workers' Compensation Programs, which denied his claim for compensation and his request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of appellant's claim and the denial of subpoenas. The Board also has jurisdiction to review the Office's May 18, 2006 decision denying a second hearing.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty; (2) whether the Office abused its discretion in denying appellant's request for subpoenas; and (3) whether the Office properly denied appellant's request for a second hearing.

FACTUAL HISTORY

On December 19, 2002 appellant, then a 45-year-old secretary (office automation), filed a claim alleging that he had stress-induced disability, chronic depression, acid reflux disease, liver

problems and severe shifting eye astigmatism as a result of his federal employment: "Had to perform all the duties of a coworker released in July 2001 whose position was not refilled until January 2002." He submitted a narrative statement detailing the factors to which he attributed his emotional and physical difficulties.

The Office received a two-page patient record from Dr. Oliver M. Bennett, a Board-certified family practitioner. The record showed an illness date of January 25, 2002 and a "last diagnosis" of abdominal pain left upper quadrant, abnormal liver enzyme and hyperlipidemia. On March 19, 2003 the Office asked appellant to submit additional evidence to support his claim, including the following:

> "Provide a comprehensive medical report from your treating physician which describes your symptoms; results of examinations and tests; diagnosis; the treatment provided; the effect of treatment; and the doctor's opinion, with medical reasons, on the cause of your condition. Specifically, if your doctor feels that exposure or incidents in your [f]ederal employment contributed to your condition, an explanation of how such exposure contributed should be provided."

In response to the Office's request for additional information, appellant submitted a fuller description of the circumstances that led him to file a grievance. The employing establishment responded with a statement on April 15, 2003.

After receiving additional evidence, the Office issued a decision on October 17, 2003 denying appellant's claim for compensation. The Office found that the factual evidence was insufficient to establish that incidents implicated by appellant occurred at the time, place and in the manner alleged. Further, the Office found that there was no medical evidence providing a diagnosed condition that could be connected to the claimed events.

Appellant requested an oral hearing before an Office hearing representative. In a December 5, 2003 facsimile transmission, he stated:

> "I believed I provided the email address of Angenita McCoy, who in addition to being a career NIH employee, had seniority in the Investigational Drug Branch for about 7 years, and is thus the ideal witness to make statements about certain 'managerial practices' -- including adverse personnel actions processed under the direction of the manager, Louise B. Grochow, when she was rotated into the Branch."

On December 10, 2003 appellant added:

> "Please issue a subpoena to Mr. Richle Taffet, the present Human Resources Chief in the NIH Office of the Director who replaced Nancy Bagley and who is handling NCI cases. Given the implementation/non-implementation of the December 2002 settlement scenario that the EEOC Office in Baltimore is aware of, his presence could be needed as I present my concerns and spell-out what it is

that I am requesting from Workman's Compensation. His phone number is [number]."[1]

On March 5, 2004 appellant again addressed his request for a subpoena:

"In addition to the subpoena I wish to have delivered to Ms. Angenita McCoy, a senior coworker who experienced similar adverse actions in the Investigational Drug Branch of the National Cancer Institute, you should feel free to contact the Administrative Judge who issued Summary Judgment in the case and settle in my favor by clearing my federal record and authorizing my full reinstatement eligibility. He can be reached at [number]. He specifically requested that he be contacted when the hearing date approaches.

"As I indicated in my first letter, please make an initial inquiry with Ms. McCoy via email at [address]. Given her status as a career NIH employee, I believe that she should be accommodated as much as possible to make providing testimony comfortable for her, for such reasons as her age, the type of issues that could come up, etc. She is the most senior support staff member in the Branch; thus, her judgments and viewpoints are directly relevant to all aspects of the case, especially for such issues as organization of the support positions, managerial practices, etc., since she has served under several Branch Chiefs."

An oral hearing was held before an Office hearing representative on August 26, 2004. Appellant appeared and testified. He submitted additional evidence, including a September 4, 2004 note from Dr. Martin D. Gensler, who performed a vision examination on July 19, 2003. Dr. Gensler diagnosed myopia, astigmatism, anisometeropia and presbyopia, all of which, he reported, could be corrected with spectacles. Appellant submitted a copy of prescription labels and an information sheet indicating that he was diagnosed with obsessive-compulsive disorder. He submitted a patient service record dated April 24, 2004 showing a diagnosis of hyperlipidemia. A January 25, 2002 treatment note showed that appellant complained of "stress at work" and wanted a letter to enable him to take time off. A March 7, 2002 treatment note stated that he complained of going through considerable stress in his workplace and of having problems with his supervisor. Appellant was diagnosed with depression, anxiety and hypertension. Dr. Bennett provided some basic medical information on January 14, 2003, including when appellant was first and last seen, height, weight and diagnoses of depression and anxiety, hepatitis C and hypertension. A January 5, 2002 treatment note related appellant's physical complaints, findings on physical examination and medications.

Following the hearing, the employing establishment submitted an October 1, 2004 statement taking issue with some of appellant's testimony.

[1] Appellant has repeatedly confused the EEOC process -- including hearings thereunder, subpoenas and implementation of his EEOC settlement agreement -- with the process of claiming workers' compensation benefits through the Office of Workers' Compensation Programs. Neither the Office, the Office hearing representative nor the Board has any jurisdiction over the EEO matter. And the EEO matter has essentially no bearing on his claim for workers' compensation benefits.

In a decision dated November 10, 2004, the Office hearing representative affirmed the denial of appellant's claim for workers' compensation benefits. After a thorough review of the evidence and testimony, the Office hearing representative affirmed the denial of compensation, modified to find that the following incidents occurred in the performance of duty: that appellant's work area was divided into two workstations and that the telephone line was not transferred to the claimant's workstation, thus requiring going back and forth between the two workstations to get faxes. The Office hearing representative reviewed the medical record, however, and found no medical evidence in which a physician displayed knowledge of this accepted employment factor, provided a definitive diagnosis and an unequivocal opinion regarding causal relationship between this accepted employment factor and the diagnosis provided and supported that opinion with medical rationale.

On April 2, 2005 appellant requested reconsideration. Among other things, he stated that he believed he was not accorded due process at the August 2004 oral hearing, "where I requested subpoenas be issued to other NCI/CTEP employees who were similarly situated and who experienced similar difficulties with the department in which my position was organized." Appellant submitted a prescription for corrective lenses and two disability certificates from Dr. Bennett, who wrote that appellant was unable to work from January 25 to February 7, 2002 and from March 7 to 20, 2002.

In a decision dated August 30, 2005, the Office hearing representative adopted the November 10, 2004 decision and amended such to include a denial of the requested subpoenas:

> "The claimant's request for Mr. Taffet to be subpoenaed fails to describe the address and location of the witness, fails to explain why the testimony or evidence is directly relevant to the issues at hand and does not indicate that utilization of the Office's subpoena power is the best and only method or opportunity to obtain such evidence. The claimant merely indicated that Mr. Taffet's 'presence could be needed.' Accordingly, it is the opinion of this reviewer that the subpoena request for Mr. Taffet be denied.
>
> "With regard to the claimant's subpoena request for Angenita McCoy, it is further the opinion of this reviewer that such request must be denied as it entirely failed to describe the address and location of the witness, failed to explain why the selected party's testimony would be directly relevant to the issues at hand and failed to demonstrate that the Office's subpoena power was the best method to obtain such evidence. The claimant merely indicated that such party experienced 'similar adverse actions.'"

On January 12, 2006 appellant wrote that he understood that he had the right to another hearing by a different examiner. On March 3, 2006 he requested an oral hearing before an Office hearing representative and stated, "I am specifically requesting another [r]eviewer."

In a decision dated May 18, 2006, the Office found that appellant was not entitled to a hearing as a matter of right because he had already received an oral hearing on whether he developed a stress condition causally related to factors of his federal employment. Exercising its discretion, the Office denied a hearing on the grounds that the issue in appellant's case could

equally well be addressed by requesting reconsideration before the district Office and submitting evidence not previously considered establishing that the claimed medical condition was causally related to the work-related event.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[3]

Causal relationship is a medical issue,[4] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[5] must be one of reasonable medical certainty,[6] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[7]

ANALYSIS -- ISSUE 1

The Office received statements from appellant describing the various circumstances at work that he believed were responsible for his emotional and physical difficulties. The Office also received statements from the employing establishment clarifying or disputing appellant's allegations. After reviewing the factual evidence developed in this case, the Office determined that some of appellant's allegations, even if true, would not bring his claim for benefits under the coverage of the Act,[8] and that other allegations which would bring his claim within the coverage of the Act were not established to have occurred as a matter of fact. In his November 10, 2004 decision, the Office hearing representative made a finding that one of appellant's allegations was

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

[5] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[7] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[8] Workers' compensation law does not cover each and every injury or illness that is somehow related to employment. *Lillian Cutler*, 28 ECAB 125 (1976).

not only a compensable factor of employment but was also established by the weight of the evidence: that appellant's work area was divided into two workstations and that the telephone line was not transferred to the claimant's workstation, thus requiring going back and forth between the two workstations to get faxes. The Office accepts that appellant established that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The question that remains is whether this specific factor of employment caused an injury.

The Office asked appellant on March 19, 2003 to submit additional medical evidence to support his claim, and described the kind of medical evidence required: "Please provide a comprehensive medical report from your treating physician which describes your … diagnosis … and the doctor's opinion, with medical reasons, on the cause of your condition." The Office added that if appellant's physician felt that exposure or incidents in federal employment contributed to the condition, "an explanation of how such exposure contributed should be provided."

Appellant submitted no such medical opinion or explanation. The submitted medical records show a number of diagnosed conditions. Treatment notes reflect appellant's complaint of unspecified "stress at work" and having unspecified problems with his supervisor.[9] No physician, however, has attributed even one of appellant's diagnoses to the division of his work area. No physician has rationally explained how going back and forth between the two workstations to get faxes caused or aggravated a diagnosed medical condition. Disability certificates from Dr. Bennett do not support that appellant sustained an employment injury or that his disability for work for particular dates was a result of an employment injury.

As noted, a physician must relate a complete factual and medical background of appellant, must express his opinion as one of reasonable medical certainty, and must support his opinion with medical rationale explaining the nature of the relationship between the diagnosed condition and the division of appellant's work area. This evidence is critical to appellant's claim. Without it, he cannot establish that he sustained an injury in the performance of duty. The Board will affirm the Office's August 30, 2005 decision denying his claim for compensation benefits.

[9] In *Kathrine W. Brown*, 10 ECAB 618 (1959), a physician attributed the claimant's ulcer to unspecified feelings of job insecurity. The Board found that the physician's opinion was insufficient to establish a causal relation because, in part, he did not recite the actual circumstances upon which he predicated his conclusion.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[10] Office regulations provide:

> "A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses, and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts.…
>
> "To request a subpoena, the requestor must: … Explain why the testimony or evidence is directly relevant to the issues at hand, and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained."[11]

ANALYSIS -- ISSUE 2

In his August 30, 2005 decision, the Office hearing representative denied appellant's request for subpoenas. Appellant did not explain to the hearing representative why oral testimony was the best way to ascertain the facts. Although he stated that Ms. McCoy was the ideal witness to make statements about certain "managerial practices" and that her judgments and viewpoints were directly relevant to all aspects of the case, he did not make clear whether she had first-hand knowledge of the specific incidents he was alleging in his claim for compensation. Appellant noted instead that she had experienced "similar adverse actions." This raises a question of how her experiences would be relevant to appellant's claim. Moreover, appellant made no representation to the Office hearing representative that there were no other means by which Ms. McCoy's testimony could be obtained.[12]

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 established facts and similar criteria. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[13]

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[10] 5 U.S.C. § 8126(1).

[11] 20 C.F.R. § 10.619 (1999).

[12] At the oral argument before the Board, appellant indicated that Ms. McCoy, a career employee, would not provide a statement in his case unless subpoenaed.

[13] *Dorothy Bernard*, 37 ECAB 124 (1985).

The Board finds no abuse of discretion in the Office hearing representative's denial of appellant's request for subpoenas.[14] The Board will affirm the hearing representative's August 30, 2005 decision on this issue.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides:

> "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[15]

A claimant is not entitled to an oral hearing, however, if he has already received a hearing on the same issue or set of issues.[16] Nonetheless, 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 for such hearings, and has held that the Office must exercise its discretion in such cases.[17] The Office shall determine whether a discretionary hearing should be granted and, if not, shall so advise the claimant with reasons.[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when no legal provision is made for such hearings, are a proper interpretation of the Act and of Board precedent.[19]

ANALYSIS -- ISSUE 3

Having already received an oral hearing before an Office hearing representative on August 26, 2004 on the issue of whether he sustained an injury in the performance of duty, appellant was not entitled to another hearing on the same issue as a matter of right. The Office correctly made this finding in its May 18, 2006 decision. The Office considered whether to grant a discretionary hearing but denied such a hearing on the grounds that appellant could equally well address the issue in his case -- whether the accepted factor of employment caused a

[14] Appellant explained to the Board that he really did not need a statement from Mr. Taffet and that Mr. Taffet could therefore be left out of the matter.

[15] 5 U.S.C. § 8124(b)(1).

[16] *See Charles D. Watson*, 35 ECAB 1068 (1984) (if a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office's decision, the claimant is not entitled to another hearing on that issue or set of issues even if he proffers new evidence; he may receive a second hearing only if the Office, in its discretion, grants him a second hearing).

[17] *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b(3) (June 1997).

[19] *See Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).

diagnosed medical condition -- through the reconsideration process. As appellant may indeed pursue this issue through an alternative procedure, by submitting to the Office a request for reconsideration and by supporting that request with a doctor's well-reasoned medical opinion on whether the accepted factor of employment caused a diagnosed emotional or physical condition,[20] the Board finds that the Office did not abuse its discretion in denying appellant's request for a second hearing on the same issue.[21]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty. Although the Office accepts that he has established a compensable factor of employment, there is no medical opinion in the record soundly explaining how this particular factor of employment caused an emotional or physical injury. The Board also finds that the Office hearing representative did not abuse his discretion in denying appellant's request for subpoenas. Further, the Board finds that the Office properly denied appellant's request for a second hearing on the same issue.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2006 and August 30, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 8, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[20] Appellant has one year from the date of the Board's opinion to submit such a request to the Office.

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