U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL D. CONTE and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, San Diego, CA

Docket No. 99-1737; Submitted on the Record;
Issued October 16, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (2) whether appellant established that his left ankle condition is causally related to factors of his federal employment.

On July 1, 1998 appellant, then a 38-year-old supervisory immigration inspector, filed a claim for an occupational disease, Form CA-2, alleging that he injured his left ankle while participating in the obstacle course at the Border Patrol Academy on December 21, 1987 and subsequently had recurrences of disability due to that injury. Appellant underwent surgery consisting of left ankle stabilization on June 2, 1998.

In his report dated May 6, 1998, Dr. James S. Sarkisian, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed x-rays. He diagnosed laxity left lateral ankle with early degenerative changes secondary to injury at the Border Patrol Academy. In considering appellant's history of injury, Dr. Sarkisian stated that appellant severely sprained his left ankle in a boot camp training program on December 21, 1987, sought medical care and was sent home. Five months later, he returned to the Border Patrol Academy. He stated that, since that time, appellant had two occasions of significant pain and lateral laxity in the left ankle area, one in July 1994 during "Bortac" training in Texas and the other inspecting an aircraft on duty at the San Diego Airport in 1995. Dr. Sarkisian stated that appellant sought his assistance, stating that he had multiple recurrences of a multiple lateral ligament laxity followed by moderate to severe swelling, a significant amount of pain in the lateral and anterior joint line and the inability to walk for several days.

Dr. Sarkisian concluded that appellant's current symptoms and disability were directly related to the December 21, 1987 employment injury and there was aggravation of his left ankle condition from continued trauma as a Border Patrol agent.

In a statement dated July 1, 1998, appellant described the December 21, 1987 incident stating that he landed wrong exiting a 10-foot rope obstacle and sprained his left ankle. He stated that, as a result of that injury, his left ankle deteriorated to the point that surgical intervention was required.

By letter dated September 25, 1998, the Office requested additional information from appellant including a report from his treating physician as to how his current condition was causally related to his federal employment. The Office also stated that it had no records of a 1987 employment injury.

By letter dated October 18, 1998, appellant stated that he filed a claim with the Office in 1987, for which he received a receipt. He stated that, at the time of the injury, a doctor stated that he might have cracked a part of his foot and that, when the surgery was performed nearly 11 years after the 1987 incident, a "hole" in his bone was found. Appellant stated that his ankle was "always loose and unstable" because of the 1987 injury and his physical activities had been somewhat restricted.

By decision dated November 19, 1998, the Office denied the claim, stating that the medical evidence failed to establish a causal relationship between the current condition and the injury reported.

By letter dated December 27, 1998, appellant requested an oral hearing before an Office hearing representative.

By decision dated January 25, 1999, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked December 27, 1998, more than 30 days after the Office issued the November 19, 1998 decision and that, therefore, appellant's request was untimely. The Branch informed appellant that he could request reconsideration by the Office and submit additional evidence.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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."[1] 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.[2] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. § 10.615.

Section 10.616(a) of the Office's regulations[3] provides in pertinent part that the hearing request must be sent within 30 days of the date of issuance of the decision (as determined by the postmark or other carriers 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 in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4] 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,[5] when the request is made after the 30-day period for requesting a hearing,[6] and when the request is for a second hearing on the same issue.[7]

In this case, the postmark date of appellant's letter requesting an oral hearing is not in the record, but since the letter is dated December 27, 1998, more than 30 days after the Office issued the November 19, 1998 decision, the Office was correct in stating that appellant was not entitled to a hearing. The Office exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The Board finds that appellant has not established that his left ankle condition is causally related to factors of federal employment.

To establish that an injury was sustained in the performance of duty, an appellant must submit the following: (1) medical evidence establishing the presence or existence of the condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical evidence. 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 appellant'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

[3] 20 C.F.R. § 10.131(a).

[4] *Henry Moreno*, 39 ECAB 475, 482 (1988).

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

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

[7] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the appellant.[8]

The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[9]

In this case, the only medical evidence which addresses causation is the May 6, 1998 medical report of appellant's treating physician, Dr. Sarkisian. In that report, referring to the December 21, 1987 employment injury, he stated that appellant injured his left ankle in the Border Academy training program and had significant pain in July 1994 and in 1995. Dr. Sarkisian concluded at the end of his report that appellant's current symptoms and disability were directly related to the December 21, 1987 employment injury and that appellant's condition was aggravated from continued trauma as a Border Patrol agent.

Dr. Sarkisian's report is insufficiently rationalized, however, to establish the requisite causal connection between appellant's current left ankle condition and his federal employment. Dr. Sarkisian did not specifically explain how appellant's current condition was related to the December 21, 1987 employment injury. He also referred to two incidents of significant pain in 1994 and 1995 but did not relate the details of those incidents and how they affected appellant's condition. Further, while he stated that appellant's condition was aggravated by continued trauma as a Border Patrol agent, he did not explain the specific nature of the trauma which aggravated appellant's condition and how appellant's left ankle condition was aggravated. The Board has held that mere conclusions unsupported by rationale are of diminished probative value.[10] Although the Office advised appellant of the evidence that was necessary for him to submit to establish his claim, appellant did not submit the requisite evidence. He, therefore, has failed to establish his claim.

[8] *See Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *Lucrecia M. Nielsen*, 42 ECAB 583, 593 (1991); *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

[10] *Jacquelyn L. Oliver*, 48 ECAB 232, 236 (1996).

The decisions of the Office of Workers' Compensation Programs dated January 25, 1999 and November 19, 1998 are hereby affirmed.

Dated, Washington, DC
October 16, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member