U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL S. MONTUORI and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRAION MEDICAL CENTER, Boston, MA

Docket No. 01-1413; Submitted on the Record;
Issued February 5, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an injury in the performance of duty and; (2) whether the Office of Workers' Compensation Programs properly found that appellant abandoned his hearing.

On March 9, 2000 appellant, then a 67-year-old maintenance worker, filed a claim for occupational disease alleging that on February 9, 2000 his left hand and fingers became numb as he was installing replacement chairs in the dental clinic.

By letter dated June 5, 2000, the Office advised appellant that the information he had submitted was insufficient to establish that he sustained an injury as alleged. The Office requested that he submit employment-related activities that he believed contributed to his condition, noting how often he was required to lift heavy objects. The Office also asked appellant to describe the development of the condition including when he first noticed the condition, what were the symptoms and what treatment he used to control the symptoms. It further asked for all his medical records pertaining to his condition including copies of all treatment notes and test results related to his claimed condition and a comprehensive medical report from his treating physician, which describes his symptoms and the physician's opinion, with medical reasons, on the cause of his condition including an explanation if the physician feels that incidents in his federal employment contributed to his condition.

In an attending physician's report dated June 1, 2000, Dr. Charles Cassidy, a Board-certified orthopedic surgeon, stated that he saw appellant on February 9, 2000 when a chair fell on appellant's hand as he was trying to move it. He noted that appellant had a preexisting arthritis condition, but had no notes from the February 9, 2000 examination. Further, Dr. Cassidy stated in response to the question as to whether he believed that the condition found was caused or aggravated by an employment injury, that he had "insufficient information."

By decision dated August 21, 2000, the Office denied appellant's claim on the grounds that he failed to establish a causal relationship between his employment and his medical condition.

By letter dated September 13, 2000, appellant requested an oral hearing.

On November 24, 2000 the Office notified appellant that an oral hearing would be held on January 11, 2001 in Boston, MA.

By letter dated January 26, 2001, the Office notified appellant that he abandoned his request for an oral hearing. The Office included appeal rights to contest this decision.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that the essential elements of his 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 an 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.[2] 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.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or 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 the claimant.[4]

The medical evidence required to establish causal relationship is usually rationalized medical evidence.[5] 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,[6] must be

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

[4] *Id.*

[5] The Board has held that in certain cases where the causal connection is so obvious, expert medical testimony may be dispensed with to establish a claim; *see Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

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

one of reasonable medical certainty,[7] 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.[8]

In this case, the only medical evidence appellant submitted in support of his claim was the June 1, 2000 report from Dr. Cassidy stating that he saw appellant on February 9, 2000 when a chair fell on his hand and diagnosed arthritis of the right hand. Dr. Cassidy also stated that he had insufficient information upon which to determine whether appellant's condition was causally related to his employment. This report does not provide a probative, rationalized opinion that his arthritis was caused or aggravated by factors or conditions of his federal employment.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. The mere fact that a disease or condition manifests itself or worsens during a period of employment[9] or that work activities produce symptoms revelatory of an underlying condition[10] does not raise an inference of causal relation between the condition and the employment factors. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that the condition was caused, precipitated or aggravated by his employment is sufficient to establish a causal relationship.[11]

Causal relationship must be established by rationalized medical opinion evidence.[12] The Office advised appellant of the type of evidence required to establish his claim; however, appellant failed to submit such evidence.

Accordingly, as appellant failed to submit any probative, rationalized medical evidence in support of a causal relationship between his claimed conditions and factors or incidents of employment, the Office properly denied appellant's claim for compensation on the basis that he had failed to establish fact of injury.

The Board also finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

In a decision dated January 26, 2001, the Office found that appellant abandoned his September 13, 2000 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for January 11, 2001, that appellant received written

[7] *See Morris Scanlon,* 11 ECAB 384-85 (1960).

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

[9] *See supra* note 6.

[10] *Richard B. Cissel,* 32 ECAB 1910, 1917 (1981).

[11] *Robert G. Morris,* 48 ECAB 238-39 (1996).

[12] *See supra* note 3.

notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[13]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[14] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

[13] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[14] 20 C.F.R. § 10.622(b) (1999).

"Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[15]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on January 11, 2001. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.[16]

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

[16] The Board notes that this case record contains evidence which was submitted to the Board subsequent to the Office's January 26, 2001 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n. 2 (1952).

The January 26, 2001 and August 21, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 5, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member