U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANA SISNEROS and U.S. POSTAL SERVICE,
POST OFFICE, Antonito, CO

Docket No. 02-2125; Submitted on the Record;
Issued January 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant sustained an injury while in the performance of duty on October 13, 200l; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

On November 28, 2002 appellant, then a 50-year-old clerk, filed a traumatic injury claim, alleging that on October 13, 2001 she tripped over a small parcel on the floor and fell on her knees causing injury. The employing establishment stated that appellant did not stop work.

Accompanying the claim was a December 7, 2001 letter from the employing establishment challenging appellant's claim.

By letter dated January 29, 2002, the Office requested detailed factual and medical information. Specifically, how the injury occurred, the identity of any witnesses, an explanation of why she delayed seeking medical attention and a narrative report from her attending physician, which included a history of injury, examination findings, test results, a diagnosis, treatment provided and an opinion on the relationship between a diagnosed condition and her federal employment.

The record was supplemented with November 15, 2001, January 24, February 11 and March 1, 2002 office notes by a physician's assistant and appellant's response to the Office's request for additional factual evidence.

By decision dated March 19, 2002, the Office denied appellant's claim, finding that the claimed incident occurred as alleged, but that the medical evidence failed to establish that appellant sustained an injury as a result of the incident.

By letter dated April 16, 2002 but postmarked April 19, 2002, appellant requested a review of the written record.

On May 23, 2002 the hearing representative denied appellant's request for a review of the written record, finding that the request was filed more than 30 days after the issuance of the March 19, 2002 decision. The hearing representative also found that the case could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that a diagnosed condition was causally related to the October 13, 2001 employment incident.

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on October 13, 2001.

An employee seeking benefits under the Act[1] 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 and that the claim was filed within the applicable time limitation of the Act.[2] An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,[3] that the injury was sustained while in the performance of duty[4] and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[6]

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.[7] In this case, the Office found that the claimed event, incident or exposure occurred at the time, place and in the manner alleged, but that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

The second component of fact of injury, whether the employment incident caused a personal injury, generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *Robert A. Gregory*, 40 ECAB 478 (1989).

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Steven R. Piper*, 39 ECAB 312 (1987).

[6] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *Elaine Pendleton*, *supra* note 2.

employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[8]

In this case, the only medical evidence submitted were November 15, 2001 and January 24, February 11 and March 1, 2002 reports, all of which were completed by a physician's assistant. The notes are of no probative value because a physician's assistant is not considered a physician under the Act and not competent to give a medical opinion.[9] Therefore, the record contains no rationalized medical opinion evidence supporting a causal relationship between the October 13, 2001 employment incident and a physician's diagnosed condition.

By letter dated January 29, 2002, the Office advised appellant of the type of evidence needed to establish her claim, but such evidence has not been submitted. Therefore, the Board finds that the evidence of record is insufficient to meet appellant's burden of proof.[10]

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

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 [her] claim, or a review of the written record, before a representative of the Secretary."[11] 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, or a review of the written record as a matter of right unless the request is made within the requisite 30 days.[12]

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

[8] *Kathryn Haggerty*, 45 ECAB 383 (1994); *see* 20 C.F.R. § 10.110(a).

[9] 5 U.S.C. § 8101(2); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[10] Appellant submitted additional evidence to the Office after the decision dated May 23, 2002. However, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting additional evidence to the Office along with a request for reconsideration.

[11] 5 U.S.C. § 8124(b)(1).

[12] *Ella M. Garner*, 36 ECAB 238, 241-42(1984).

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

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

In the present 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 March 19, 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 letter postmarked April 19, 2002. Therefore, the Office was correct in finding in its May 23, 2002 decision that appellant was not entitled to a review of the written record as a matter of right because her request was not made within 30 days of the Office's March 19, 2002 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its May 23, 2002 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the case could be resolved by submitting additional evidence to establish that a diagnosed condition was causally related to the October 13, 2001 employment incident. The Board has held that, as the only limitation on the Office's authority is reasonableness, 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 deduction from established facts.[16] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a review of the written record under section 8124 of the Act.

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

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

[16] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The May 23 and March 19, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.[17]

Dated, Washington, DC
January 28, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[17] The Board notes that subsequent to the Office's issuance of its May 23, 2002 decision and on appeal appellant submitted new medical evidence. The Board has no jurisdiction to review evidence that was not before the Office at the time of its decision. 20 C.F.R. § 501.2(c). Appellant may submit this evidence to the Office with a request for reconsideration pursuant to 20 C.F.R. § 10.606(b).