U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDERICK J. HUDAK and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 03-949; Submitted on the Record;
Issued June 4, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on March 31, 2000, as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On March 16, 2001 appellant, then a 55-year-old custodian, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on March 31, 2000 a colleague put his hands around his head and neck and shook it and that as a result, thereof, he sustained a detached retina. The employing establishment controverted the claim.

In a February 8, 2001 medical note, Dr. John Graham, an ophthalmologist, stated: "[t]rauma such as jolting and shaking can induce a retinal detachment in someone who is predisposed." In an April 5, 2001 attending physician's report (Form CA-20), Dr. Graham diagnosed retinal detachment. He listed appellant's date of injury as April 7, 2000 and indicated that he believed that appellant's condition was caused or aggravated by the employment activity because "[t]rauma can *possibly* trigger retinal detachment." (Emphasis in the original.) On April 8, 2000 Dr. Graham responded to questions propounded by the Office by reiterating that appellant sustained a retinal detachment.

By decision dated May 10, 2001, the Office denied appellant's claim as it found that he did not establish that he sustained an injury as alleged. Specifically, the Office found that appellant failed to establish that he experienced the claimed event at the time, place and in the manner alleged because he did not answer questions from the Office with regard to the circumstances of the alleged incident.

By letter dated May 29, 2001, appellant requested an oral hearing.

As new evidence, appellant submitted a March 17, 2000 report by Dr. Brandon Wolsey, a family physician, indicating that appellant was seen on that date complaining of visual disturbance. Dr. Wolsey noted:

> "This patient may have a small vitreous detachment or retinal detachment which, at this point, does not appear to be affecting him. He does, however, have what appears to be a cataract which may be the bigger problem with his decreased vision."

Appellant also submitted a January 30, 2002 report by Dr. Graham wherein he stated:

> "[Appellant] began having light flashes in the right eye in March of 2000.
>
> "On March 17, 2000 he was seen and examined and found to not have a problem. He was seen again on March 18, 2000 and also found not to have a problem. On March 31, 2000 he suffered a shaking incident with a coworker. The next day, April 1, 2000, he began noticing a curtain in the field of vision on the right eye that was beginning superiorly and tending to move down. He was then seen by me on April 7, 2000 with an inferior retinal detachment which extended into the mascular area.
>
> "Due to the time course of the symptoms and the fairly immediate onset of curtain symptoms the day after a shaking incident, it would appear this shaking incident aggravated the vitreous detachment condition and likely precipitated the retinal detachment."

Appellant also submitted progress notes indicating that he had his eyes examined on March 18, 2000, but no physician's name is given.

At the hearing, held on February 26, 2002, appellant testified that he went to the emergency room on March 17, 2000 because he had "right-eye flashing," that the doctor said he had a cataract, that he saw Dr. Jurnelson the next day who concurred, and that he was scheduled to see a doctor on April 10, 2000 for an evaluation for cataract surgery. Appellant then testified that on March 31, 2000 a coworker shook his head, that on April 1, 2000 he first noticed a slight darkness at the top of his right eye and that he initially was not concerned because he had seen two doctors and they told him that he had no problem other than the cataract. However, he noted that between April 2 and 7, 2000, the darkness increased in his right eye, so he went to the eye clinic where he was told that he had a detached retina with three tears. He noted that he had surgery the following Monday. Appellant also discussed the date of the incident. He indicated that the coworker put one hand behind his head and the other in front of his face and shook it about three times. He stated that, at the time, he did not notice any change in his vision, but that his neck started to hurt within a half an hour.

After the hearing, appellant submitted a March 7, 2002 report by Dr. Graham, which was marked received by the Office on March 26, 2002, wherein he quoted liberally from his report of January 30, 2002. However, Dr. Graham added a more detailed description of the injury, *i.e.*, he indicated that appellant "describes this incident as the coworker using both hands on his head and significantly shaking him." In a March 20, 2002 report, marked received by the Office on

March 27, 2002, Dr. Graham indicated that appellant required a prism to correct diplopia, and that it was his feeling that the prismatic need was probably induced by the surgery to repair the retinal detachment.

By decision dated May 3, 2002, the hearing representative affirmed the Office's May 10, 2001 decision. The hearing representative found that, although appellant established that the employment incident occurred as described, the opinion of Dr. Graham with regard to causation was equivocal and, therefore, insufficient to establish entitlement to compensation benefits. It is noted that, in the decision, the hearing representative indicated that no evidence had been submitted in a timely manner after the hearing.

By letter dated November 7, 2002, appellant noted that, although he had submitted evidence after the hearing, the hearing representative noted that he had not received any evidence. Accordingly, appellant resubmitted Dr. Graham's reports of March 7 and 20, 2002 and asked for reconsideration.

On December 2, 2002 the Office denied merit review as it found that the aforementioned reports of Dr. Graham were in the case file at the time of the decision and that, therefore, appellant had not submitted new relevant evidence requiring merit review.

The Board finds that this case is not in posture for decision.

An employee who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence.[2] 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 one in conjunction with the other. The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.[3] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[4] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[5] The evidence required to establish causal relationship is rationalized medical opinion evidence, based on a complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[6] The belief of the

[1] 5 U.S.C. §§ 8101-8193.

[2] *William Sircovitch*, 38 ECAB 756 (1987).

[3] *Earl David Seal*, 49 ECAB 152 (1997).

[4] *Charles B. Ward*, 38 ECAB 667 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175 (1984).

[5] *John J. Carlone*, 41 ECAB 354 (1989); 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).

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

claimant that a condition was caused or aggravated by employment is not sufficient to establish a causal relationship.[7]

In the instant case, Dr. Graham indicated, "Due to the time course of the symptoms and the fairly immediate onset of curtain symptoms the day after a shaking incident, it appears this shaking incident aggravated the vitreous detachment condition and likely precipitated the retinal detachment." This opinion is too equivocal to establish a relationship between the March 31, 2000 incident and appellant's detached retina.[8]

However, proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[9] In the instant case, Dr. Graham's opinion, although somewhat speculative, supports appellant's claim and raises an uncontroverted inference of causal relationship between appellant's treated condition and the March 31, 2000 incident sufficient to require further development of the case record by the Office.[10]

Consequently, the decisions of the Office of Workers' Compensation Programs dated December 2 and May 3, 2002 are hereby set aside and the case remanded for further development in accordance with this decision.[11]

Dated, Washington, DC
June 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Manuel Garcia*, 37 ECAB 767 (1979).

[8] *See Philip J. Deroo*, 39 ECAB 1294 (1988).

[9] *William J. Cantrell*, 34 ECAB 1223 (1983).

[10] *John J. Carlone*, *supra* note 5; *Horace Langhorne*, 29 ECAB 820 (1978).

[11] Based on this disposition, the Office's denial of appellant's petition for reconsideration is moot.