U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALAN BRICKMAN and DEPARTMENT OF THE ARMY, MILITARY TRAFFIC MANAGEMENT COMMAND, OAKLAND ARMY BASE, Oakland, CA

Docket No. 99-1956; Submitted on the Record;
Issued August 24, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a broken bone in his right foot on February 11, 1999 in the performance of duty causally related to factors of his federal employment.

On February 17, 1999 appellant, then a 52-year-old computer specialist, filed a claim alleging that on February 11, 1999 as he was walking from his vehicle to a conference room at the Hilton Hotel in Santa Rosa, California, where he was attending a Microsoft demonstration, he stepped off a curb and his foot turned under. Appellant claimed that he did not think that it was serious at the time, but that two days later his foot swelled and he was in pain. Appellant noted the nature of his injury as "broke bone in my right foot." On the reverse of the claim form appellant's supervisor checked "yes" to the question as to whether appellant was injured in the performance of duty. The supervisor, however, also checked both "yes" and "no" to the question of whether the employing establishment controverted continuation of pay and marked "?" and checked "no" to the question of whether the injury was caused by appellant's willful misconduct.

Appellant stopped work on February 12, 1999 sought medical treatment. In support of his claim, appellant submitted a February 12, 1999 Novato Community Hospital emergency services follow-up instruction sheet completed by Dr. Peter B. Barry, a Board-certified orthopedic surgeon, which noted a diagnosis of "fracture basil [fifth] metatarsal right foot," and which listed follow-up instructions.

On a Form CA-16 authorization for examination and/or treatment dated March 2, 1999, Dr. W. Whiteley, a Board-certified orthopedic surgeon, noted history of injury as "inversion injury [right] foot," noted his findings as "[fracture] [fifth] metatarsal [right] foot" and his diagnosis as "[fracture] [fifth] [metatarsal]," and checked "no" to the question of whether the condition found was caused or aggravated by the employment activity described. Dr. Whiteley noted that he first saw appellant on February 16, 1999 and that Dr. Whiteley put a cast on appellant's foot; he indicated that appellant was totally disabled until March 16, 1999 when he

could return to light work. A March 2, 1999 disability certificate signed by Dr. Whiteley was also submitted.

By letter dated March 23, 1999, the Office of Workers' Compensation Programs advised appellant that further medical evidence was necessary to establish his claim, including a history of injury and a physician's rationalized medical opinion supporting the causal relationship between the alleged employment injury and the diagnosed condition. The Office requested that appellant submit the requested information within 30 days and advised that failure to provide such information might result in denial of his claim.

By letter that date, the Office also requested that the employing establishment advise whether the Microsoft demonstration held at the Hilton Hotel in Santa Rosa on February 11, 1999 was a required activity of his employment. The Office requested that the employing establishment submit the requested information within 30 days.

Nothing further was received from appellant or the employing establishment within the 30-day time period.

By decision dated April 23, 1999, the Office rejected appellant's claim finding that he had failed to submit medical evidence to support that the implicated incident caused a work-related condition. The Office further noted that evidence had not been received from the employing establishment, which established whether or not the activity engaged in on February 11, 1999 was a work-sanctioned activity, such that any injury occurring during that activity would come under the coverage of Federal Employees' Compensation Act.

The Board finds that appellant has failed to establish that he sustained a broken bone in his right foot on February 11, 1999 in the performance of duty, causally related to factors of his federal employment.

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, 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 essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In the instant case, appellant has not established that he was injured while in the performance of duty.

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989); *Delores C. Ellyett*, 41 ECAB 992 (1990).

The Act[4] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[5] The phrase "sustained while in the performance of his duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[6] "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with her employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to compensation. The employee must also establish the concurrent requirement of an injury "arising out of the employment." "Arising out of employment" requires that a factor of employment caused the injury.[7]

The Board has recognized the rule that the Act covers an employee 24 hours a day when he or she is on travel status, a temporary duty assignment, or a special mission and engaged in activities essential or reasonably incidental to such duties. However, when the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[8]

In the instant case, although appellant's supervisor checked "yes" to the question of whether appellant was injured in the performance of duty, the additional clarifying evidence requested by the Office to establish whether appellant had been injured "in the performance of duty" was not submitted. Therefore, the issue of whether appellant was injured while engaged in activities essential to or reasonably incidental to his required duties remains unresolved.

Further, appellant has not established fact of injury. 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.[9] This component can be established by an employee's uncontroverted

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id*. at § 8102(a).

[6] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[7] *Eugene G. Chin*, 39 ECAB 598 (1988); *see Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); *see also Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[8] *Lawrence J. Kolodzi*, 44 ECAB 818 (1993); *Kenneth R. McCabe*, 39 ECAB 1108 (1988) (maintenance on temporary quarters not covered); *Richard Michael Landry*, 39 ECAB 232 (1987) (thrown from bed of truck while on personal errand).

[9] For a detailed discussion of the components of an appellant's burden of proof in establishing fact of injury, see

statement on the Form CA-1. A consistent history of the injury as reported on medical records, to the claimant's supervisor and on the notice of injury, can also be evidence of the occurrence of the incident. However, in this case none of the medical evidence submitted to the record by appellant contains such a history of injury.

The second component is whether the employment incident caused a personal injury and can generally be established only by medical evidence. To establish a causal relationship between the condition and any attendant disability claimed and the 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. The medical evidence of record fails to provide a consistent history of injury such that the occurrence of an employment-related incident occurred in the performance of duty.[10]

As appellant failed to submit the evidence necessary to establish his employment injury, he has failed to meet his burden of proof to establish his claim.[11]

Elaine Pendleton, 40 ECAB 1143 (1989).

[10] As the March 2, 1999 report from Dr. Whiteley noted as history only "inversion injury [right] foot," without noting any history of employment relation or description of employment activity and as he checked "no" to the question of whether he believed the condition found was caused or aggravated by the employment activity described where none had been described, this report does not support appellant's claim of employment relationship.

[11] Following the Office's issuance of its April 23, 1999 decision, on May 11, 1999 the Office received further information from appellant and his employing establishment. The Board notes that its review of a case is limited to the evidence in the case record, which was before the Office at the time of its final decision and that since this evidence was not before the Office at the time of its April 23, 1999 final decision, it is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 23, 1999 is hereby affirmed.

Dated, Washington, D.C.
August 24, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member