U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD N. BELL and U.S. POSTAL SERVICE,
BRYANT STREET ANNEX, San Francisco, CA

Docket No. 98-772; Submitted on the Record;
Issued May 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on May 31, 1997 as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On June 12, 1997 appellant, then a 55-year-old custodian, filed a notice of traumatic injury and claim for compensation alleging that at 8:00 a.m. on May 31, 1997, he injured his back when Fred Boldware, his manager, grabbed his shirt and pushed him down during an altercation at work. Appellant did not provide that there were any witnesses to the incident. Sammie Porter, supervisor of customer services, indicated on the reverse side of appellant's claim form that appellant was not in the performance of duty when the alleged injury occurred because he was not on the clock at the time. Mr. Porter further noted that appellant had been instructed the day before the alleged altercation not to be in the building prior to his normal reporting time of 9:00 a.m.

Appellant submitted an undated form report of a June 2, 1997 office visit taken by Dr. Linda H. Morse, a Board-certified physician in occupational medicine, who diagnosed appellant with acute upper and low back spasm. The report indicated that appellant had been grabbed and pushed to the ground at work. Dr. Morse further noted that appellant had sustained a chronic back injury in 1995.

On June 30, 1997 the Office received a more detailed report of appellant's June 2, 1997 office visit with Dr. Morse where she further stated:

> "[Appellant] works at [the employing establishment] as custodian. On Saturday [May 31, 1997] his manager was told [appellant] was absent [May 30, 1997], Friday. [Appellant] states he was n[o]t so [he] went to [his] manager's office to explain he was in the building. Entered the office to explain to manager who [appellant] states told him to 'get out' and then got up and grabbed him by shirt and pushed him out causing him to fall on back. State two people saw him on the floor. 'Yolanda' and another carrier. [Appellant] left and went to Kaiser emergency dep[artment] because low back hurt and broke fall with elbows.…"

On July 9, 1997 the Office received a Kaiser Permanente industrial visit questionnaire that had been completed by appellant during his June 2, 1997 visit to Dr. Morse's office. When asked to explain how his injury occurred appellant related that, after a discussion with Mr. Boldware at the canteen regarding his absenteeism, appellant followed Mr. Boldware to his office to explain, where Mr. Boldware jumped up and grabbed appellant and then pushed him out of his office where appellant fell backwards on the floor.

Also on July 9, 1997 the Office received a controversion letter dated June 9, 1997 from Judy Ortiz, a representative from appellant's employing establishment, who noted that appellant has had a history of nonwork-related back problems and has had claims denied in the past. Ms. Ortiz stated that in appellant's previous compensation claim he alleged that, while stripping the floor, he slipped and landed on his butt at 4:00 a.m., although his reporting time was 9:00 a.m. Ms. Ortiz relayed Mr. Boldware's version of the facts that, on the day of the alleged assault, appellant was instructed to leave his office when appellant laid on the floor and began to shout in a rage that he was being assaulted.

In a letter dated July 9, 1997, the Office requested additional information from appellant and enclosed a list of questions to be answered so that the Office could make a determination regarding his claim. The Office received appellant's letter response on July 21, 1997 which had been signed and certified on July 15, 1997 as a true account of the facts and circumstances of his case. Appellant stated the following:

> "I was assaulted by Mr. Boldware on May 31, 1997, sometime after 8:00 a.m. I came into contact with Mr. Boldware that morning on the way to the Canteen truck, we discussed my absence the day before but [I] was not absent and denied his statement. Mr. Boldware continued to walk to the truck leaving me behind. I later met Mr. Boldware at his office only he and I were present at the time of the assault. Mr. Boldware violently grabbed me and pushed me to the floor. I yelled as I hit the floor. Yolanda Maskins and another employee … heard my yell and came running, only to see me on the floor outraged and hurt…. Prior to the attack I was being treated for my lower back, an injury I received at Bryant Station."

The Office received a second letter on July 21, 1997 dated July 10, 1997 from Mr. Boldware who stated:

> "[Appellant] was in the facility, not on the clock arguing about his being AWOL [absent without leave] on May 29, 1997. [Appellant] was instructed by me to leave the office, when he laid on the floor and began to shout in a rage that he was being assaulted…. There were no other employees in the front office at the time of the alleged assault and the general reason for [appellant] being in the building, after being instructed prior to the alleged accident still has not been explained."

By decision dated August 8, 1997, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury on May 31, 1997 as alleged. The Office noted in its decision that appellant's supervisor denied that the incident took place and no witness statements were submitted in support of the claim. The Office further noted that the medical evidence of record revealed that appellant had a back condition prior to the alleged May 31, 1997 incident.

Appellant requested an oral hearing before an Office representative in an undated letter postmarked on September 10, 1997.

By decision dated November 12, 1997, the Office denied appellant's request for a hearing on the grounds that the request was not made within 30 days after issuance of the August 8, 1997 final decision.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury on May 31, 1997 in the performance of duty as alleged.

An employee seeking benefits under the Act 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 filed within the applicable time limitation 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.[1] 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.[2]

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place and in the manner alleged.[3] Second, the employee must submit sufficient evidence generally only in the form of medical evidence, to establish that

[1] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[2] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[3] *See John J. Carlone*, 41 ECAB 354 (1989).

the employment incident caused a personal injury.[4] An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and the specific condition for which compensation is claimed is causally related to the injury.[5]

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.[6] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. 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, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[7]

In this case, appellant has submitted medical evidence diagnosing his condition of acute upper and low back spasm, however, he has not established fact of injury because inconsistencies in the evidence cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged.[8] Appellant offered several statements to the case record given at various times, to the Office, his physician and treating health facility that contain two different accounts of the alleged May 31, 1997 incident. Appellant, on his claim form, described that he was "pushed down." Similarly, in his certified statement to the Office dated July 15, 1997, appellant explained that Mr. Boldware violently grabbed him and pushed him to the floor. In his account of the facts in his questionnaire from Kaiser Permanente and to Dr. Morse during his June 2, 1997 office visit, appellant stated that Mr. Boldware physically pushed him out of his office where he fell backward onto the floor. The inconsistent statements offered in support of appellant's claim are insufficient to establish that the incident occurred as alleged.

In addition, if the incident had occurred as alleged, it is reasonable to surmise that appellant would have provided witness statements from the two employees he claimed heard him yelling after his manager assaulted him. Mr. Boldware stated that, after appellant was instructed to leave his office that day, he laid on the floor and began to shout in a rage that he was being assaulted. Mr. Boldware acknowledged that appellant yelled out that he had been assaulted but did not indicate that Ms. Maskins and another carrier came running to appellant's aide. In fact, Mr. Boldware indicated that there were no other employee's in the area at the time of the alleged assault. Without corroborating testimony of some type, appellant's statements are not strong and persuasive enough to meet his burden of proof, given his supervisor's statements which contradict appellant's allegations.

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[4] *Id.*

[5] *See Frazier V. Nichol*, 37 ECAB 528 (1986).

[6] *Elaine Pendleton, supra* note 1.

[7] *See Gene A. McCracken*, 46 ECAB 593 (1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[8] *Id.*

Given the inconsistencies in the factual record and the fact that appellant did not provide any corroborating evidence to substantiate the allegations made in his claim, appellant has failed to meet his burden of proof in establishing that the incident occurred as alleged.

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

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] 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 as a matter of right unless the request is made within the requisite 30 days.[10]

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 1966 amendments to the Act which provided the right to a hearing,[11] when the request is made after the 30-day period established for requesting a hearing,[12] or when the request is for a second hearing on the same issue.[13] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[14]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated August 8, 1997 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter postmarked September 10, 1997. Therefore, the Office was correct in stating in its November 12, 1997 decision, that appellant was not entitled to a hearing as a matter of right because the hearing request was not made within 30 days of the Office's August 8, 1997 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its November 12, 1997 decision,

[9] 5 U.S.C. § 8124 (b)(1).

[10] *Frederick D. Richardson*, 45 ECAB 454 (1994).

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

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

[13] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[14] *Sandra F. Powell*, 45 ECAB 877 (1994).

properly exercised its discretion by stating that it had considered appellant's request and had denied it on the basis that the issue in this case could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which established that an injury was sustained as alleged. 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 judgement, or actions taken which are contrary to both logic and probable deduction from established facts.[15] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated November 12 and August 8, 1997 are hereby affirmed.

Dated, Washington, D.C.
May 15, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

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