U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NASSER ROMAN and DEPARTMENT OF THE ARMY, MILITARY OCEAN TERMINAL, Bayonne, NJ

Docket No. 99-1824; Oral Argument Held July 11, 2000; Issued September 7, 2000

Appearances: *Brook L. Beesley*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for subpoenas; and (2) whether appellant met his burden of proof to establish that he sustained an emotional condition causally related to factors of employment.

On December 17, 1997 appellant, then a 40-year-old police officer, filed a traumatic injury claim, alleging that he sustained employment-related stress and a possible neck injury when involved in an altercation at work on October 12, 1997. He stopped work that day and returned to limited duty on October 30, 1997. Following further development, by decision dated April 28, 1998, the Office found that appellant failed to establish that he sustained an injury in the performance of duty. On May 7, 1998 appellant, through his representative, requested a hearing and, in a motion dated December 10, 1998, requested that subpoenas be issued to German D. Torres and Jesus M. Otero.

At the hearing that was held on December 31, 1998 appellant testified regarding the events of October 12, 1997 and submitted additional evidence. In a decision dated February 2, 1999, an Office hearing representative found that appellant established that a verbal altercation occurred in the performance of duty on October 12, 1997 but that the medical evidence of record was insufficient to establish that appellant's emotional condition was causally related to this factor of employment. The hearing representative also denied appellant's request for subpoenas. The instant appeal follows.

Initially, the Board finds that the Office did not abuse its discretion by refusing to issue subpoenas.

Section 8126 of the Federal Employees' Compensation Act[1] provides, in relevant part, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles...."[2] Federal regulations in effect at the time of February 2, 1999 decision clearly state that, while a claimant may request a subpoena, the decision to grant or deny such a request is within the discretion of the hearing representative.[3]

To establish that the Office abused its discretion, appellant must show manifest error, prejudice, partiality, intentional wrong, an unreasonable exercise of judgment, illogical action or action that would not be taken by a conscientious person acting intelligently. The mere showing that the evidence should support a contrary conclusion is insufficient to prove an abuse of discretion.[4]

The issue to be determined at the hearing was whether appellant established that he sustained an emotional condition causally related to employment factors. The record in this case contains statements from both Mr. Torres and Mr. Otero concerning the events of October 12, 1997. The hearing representative, in a proper exercise of his discretion, denied appellant's request for subpoenas on the grounds that the request was unnecessary because the factual record established that a verbal altercation did in fact occur and that none of the witnesses observed any physical violence. He further noted that appellant testified that there was no corroboration that physical contact had occurred. Appellant failed to demonstrate that testimony of Mr. Torres and Mr. Otero concerning the events of October 12, 1997 could not be obtained by means other than the issuance of a subpoena. The Board, therefore, finds that the hearing representative's denial of appellant's request for subpoenas did not reflect manifest error or an unreasonable exercise of judgment.

The Board further finds that this case is not in posture for decision regarding whether appellant established that he sustained an emotional condition causally related to factors of employment.

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[5] Workers' compensation law is not applicable to each and every injury or illness that is somehow related to employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8126.

[3] 20 C.F.R. § 10.619 (1999).

[4] *See Darlene Menke (James G. Menke, Sr.)*, 43 ECAB 173 (1992).

[5] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Act. On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.[6]

In the instant case, the Office accepted that appellant established that a verbal altercation occurred in the performance of duty on October 12, 1997. Appellant also alleged that a physical altercation took place that day. Physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award of compensation.[7] The record here is replete with witness statements but none corroborated appellant's contention that a physical altercation took place. The Board, therefore, finds that appellant did not establish that a physical altercation took place.

The medical evidence relevant to appellant's emotional condition includes reports from his treating psychiatrist, Dr. Scott Aftel, who submitted an October 21, 1997 Office form report[8] in which he diagnosed adjustment disorder with anxious mood. In a second report of the same date, Dr. Aftel noted that appellant provided information regarding events leading up to the incident, the incident itself, afterwards and repercussions of the incident. He stated that appellant was worried about losing his job as a result of the incident which created his anxiety. In an April 21, 1998 report, Dr. Aftel stated:

> "[Appellant] is still unable to cope with the past incident on October 12, 1997. His symptoms have become increasingly worse since reading the investigative report approximately five weeks ago. It is in my professional opinion that his current condition, which now requires medication, is a direct correlation to the incident on October 12, 1997."

Dr. Aftel continued to submit reports in which he advised that appellant's condition was due to the October 12, 1997 incident. On September 24, 1998 he advised that appellant could return to full duty and was no longer on medication.

Employing establishment clinic notes submitted by Dr. Gerard R. Tiffault indicated that he examined appellant on October 15, 1997 when he diagnosed neck sprain and advised that appellant could return to full duty. In reports dated October 30, 1997 and April 24 and May 7, 1998, Dr. Tiffault noted Dr. Aftel's diagnosis.

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[6] *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *See Alton L. White*, 42 ECAB 666 (1991).

[8] The Board notes that, in form reports submitted to Dr. Aftel in October 1997 and May 1998, the employing establishment provided a history that appellant was involved in a physical altercation on October 12, 1997.

The Office did not inform appellant of the type of evidence needed to support his claim.[9] In addition, although the medical evidence submitted is not sufficient to meet appellant's burden of proof, it gives some support to his claim. Dr. Aftel continually advised that appellant's emotional condition was caused by the October 12, 1997 incident. His opinion thus raises an uncontroverted inference of causal relationship between appellant's condition and the compensable employment factors and is sufficient to require further development of the case by the Office.[10]

On remand, the Office should further develop the medical evidence by referring appellant and a statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's emotional condition is causally related to the accepted employment factor and, if so, whether there is any disability therefrom.[11]

[9] Office procedures require that the Office must inform a claimant of the procedures involved in establishing a claim, including detailed instructions for developing the required evidence; *see* Federal (FECA) Procedure Manual, Part 2, -- Claims, *Development of Claims*, 2.800.3(c)(1) (April 1993).

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

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(6) (June 1995) (a claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted).

The decision of the Office of Workers' Compensation Programs dated February 2, 1999 is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, D.C.
September 7, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member