U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENNY NGUYEN and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

Docket No. 99-2332; Submitted on the Record;
Issued September 27, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on December 31, 1998; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record.

On December 31, 1998 appellant, a 44-year-old mailhandler, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he sustained a head injury in the performance of duty that same day. Appellant explained that a bar came loose from its moorings and struck him on the head. He immediately sought medical attention and was diagnosed as having sustained a scalp contusion. In a letter dated January 5, 1999, the employing establishment indicated that just a few hours prior to appellant's alleged injury, he was advised that his temporary appointment had expired. It was further noted that appellant was working alone at the time of his claimed injury and upon investigating the site of the alleged incident, the bar which purportedly fell "could hardly be removed from its apparatus." The employing establishment further indicated that, when asked to demonstrate how the incident occurred, appellant "could not get the bar out."

By letter dated January 22, 1999, the Office requested that appellant submit additional factual and medical information. The Office specifically requested that appellant provide a detailed description of how the alleged incident of December 31, 1998 occurred. Appellant was further advised that the case would remain open for 30 days in order to submit the requested information. While appellant subsequently provided additional medical evidence regarding the treatment he received for his claimed head injury, he did not provide any further details concerning the alleged incident of December 31, 1998.

In a decision dated March 1, 1999, the Office denied appellant's claim on the basis that he failed to establish that his injury occurred as alleged. With the assistance of counsel, appellant subsequently requested a review of the written record, which was postmarked April 23, 1999.

By decision dated June 9, 1999, the Office found that appellant did not submit his request for review of the written record within 30 days of the Office's March 1, 1999 decision and, therefore, he was not entitled to a review as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether he sustained a work-related injury on December 31, 1998 could equally well be addressed through the reconsideration process. Appellant subsequently filed an appeal with the Board on July 8, 1999.[1]

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty on December 31, 1998.

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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury.[3] This latter component generally can be established only by medical evidence.[4]

The Office denied appellant's claim based on his failure to establish that he actually experienced the employment incident that is alleged to have occurred on December 31, 1998. 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.[5] An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action.[6] Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements concerning the alleged incident.[7]

In the instant case, appellant provided a vague description of the alleged incident of December 31, 1998. Furthermore, the employing establishment questioned the accuracy of

[1] The record on appeal includes additional evidence that was not submitted to the Office prior to the issuance of its March 1, 1999 decision denying compensation. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

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

[3] *Id.*

[4] *See* 20 C.F.R. §§ 10.115 and 10.330; *John M. Tornello*, 35 ECAB 234 (1983).

[5] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[6] *Id.*; *Gene A. McCracken*, 46 ECAB 593, 596-97 (1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[7] *Constance G. Patterson*, 42 ECAB 206 (1989).

appellant's account of the incident based on the fact that the bar which purportedly struck appellant "could hardly be removed from its apparatus" and because appellant, when asked to demonstrate what had occurred, could not remove the bar himself. While the Office provided appellant an opportunity to submit further information regarding the alleged incident, appellant did not respond to the Office's request in a timely fashion. The lack of specificity regarding what actually occurred on December 31, 1998 and the employing establishment's indication that the bar "could hardly be removed" from its location casts doubt on appellant's statement that he sustained a blow to the head when the bar "apparently came loose from its moorings." Accordingly, the Office properly concluded that appellant failed to establish that he sustained an injury as alleged.

The Board also finds that the Office properly denied appellant's request for review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of issuance of the decision.[8] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[9] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[10]

As previously noted, the Office denied appellant's claim for compensation in a decision dated March 1, 1999. Appellant's request for review of the written record was postmarked April 23, 1999, which is more than 30 days after the Office's March 1, 1999 decision.[11] As such, appellant is not entitled to a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he sustained a work-related injury on December 31, 1998 could equally well be addressed by requesting reconsideration.[12] Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.

[8] 20 C.F.R. § 10.616(a).

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

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

[11] While the record includes earlier correspondence dated March 20, 1999 from Alexandra T. Manbeck, Esq. requesting that the Branch of Hearings and Review consider a recent affidavit from appellant, the Office properly advised Ms. Manbeck on April 16, 1999 that there was no record of appellant having authorized her representation. The Office further advised Ms. Manbeck that it was not clear from her correspondence what type of relief was being sought.

[12] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated June 9 and March 1, 1999 are hereby affirmed.

Dated, Washington, DC
September 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member