U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE M. ALBERT and DEPARTMENT OF THE ARMY, WINN ARMY COMMUNITY HOSPITAL, Fort Stewart, GA

Docket No. 00-922; Submitted on the Record;
Issued March 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained tardy ulnar palsy in the performance of duty on July 22, 1996, causally related to his federal employment; (2) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay as untimely; and (3) whether the Office abused its discretion in denying appellant's oral hearing request as untimely filed.

On April 8, 1999 appellant, then a 55-year-old medical clerk, filed a traumatic injury claim alleging that on July 22, 1996 he jammed his right elbow on a filing cabinet. Appellant stopped work on July 22, 1996, received emergency room treatment and returned on July 23, 1996.

By letter dated May 28, 1999, the Office requested additional factual and medical evidence, including responses to a list of questions, to support appellant's claim.

Appellant submitted a July 22, 1996 x-ray report in which Dr. Samir Farra, a diagnostic radiologist, found degenerative elbow changes, a small spur at the base of the head of the radial bone and a bony spur above the olecranon fossa. Appellant also submitted progress notes dated April 15, 1999 in which Dr. Edward D. Arrington, a Board-certified orthopedic surgeon, provided a history of appellant's July 22, 1996 employment injury and noted that a 1996 x-ray showed early degenerative changes.

Based on an April 21, 1999 electromyogram (EMG), Dr. Joel A. Greenberg, a Board-certified neurologist, diagnosed right ulnar neuropathy and mildly delayed right dorsal ulnar sensory response. In a May 6, 1999 report, Dr. Greenberg diagnosed tardy ulnar palsy of the

right elbow and local muscle swelling following the flexor carpi ulnaris insertion at appellant's EMG two weeks prior to the examination. Dr. Greenberg discussed appellant's symptoms and treatment. He stated:

> "I feel that [appellant's] history of striking his elbow in 1996 is fully consistent with the EMG findings and his complaints relating to this. I reviewed the [emergency room] sheet that [appellant] had with him, and I do feel that there is a causal relationship between the injury and the tardy ulnar palsy. I think that a statement that this event was not causative based on the fact that he was felt to stroke [sic] the radial versus the ulnar side of the elbow is a very tenuous position to take. Quite honestly, I am not sure how [appellant] would know which side of the elbow he struck, and I think we are really splitting hairs here. As a result, I find myself in concurrence with [appellant] that his tardy ulnar palsy is related to this injury since he has no other injury to explain this."

Appellant also submitted an April 23, 1999 report in which Dr. Andrew R. Wiesen, Board-certified in internal medicine, provided a history of appellant's July 22, 1999 employment injury. Regarding the issue of whether appellant's condition was causally related to his July 22, 1996 employment injury, Dr. Wiesen stated:

> "Direct trauma to the ulnar nerve can cause subsequent ulnar neuropathy, even years later. However, the [emergency room] records indicate the trauma was to the radial side of the elbow, not the ulnar area. Therefore, the likelihood of this particular injury causing ulnar neuropathy is very small. It is my medical opinion there is no relationship between the July 22, 1999 injury and [appellant's] current condition of ulnar neuropathy."

Appellant also submitted a statement dated April 29, 1999 in which he described his symptoms and treatment and a May 2, 1999 letter describing the July 22, 1996 employment incident and his symptoms.

On June 17, 1999 the Office referred a statement of accepted facts, list of questions and the case record to an Office medical adviser. He opined that one could not sustain a minor elbow injury and one year later develop ulnar neuropathy due to the original injury because "injuries get better over time, not worse." He concluded that a July 22, 1996 emergency room report indicated that appellant struck the radial aspect of his elbow and that his ulnar palsy was not related to the July 22, 1996 employment incident.

The Office accepted appellant's claim for a right elbow radial head fracture.

By decision dated September 2, 1999, the Office denied appellant's claim for tardy ulnar palsy on the grounds that the medical evidence of record was insufficient to establish that his condition was causally related to the July 22, 1996 employment incident.

By a second decision dated September 2, 1999, the Office denied appellant's claim for continuation of pay on the grounds that he did not file his claim within 30 days of July 22, 1996, the date of his alleged injury.

By letter dated October 4, 1999, appellant requested an oral hearing before an Office hearing representative.

By decision dated November 15, 1999, the Office denied appellant's oral hearing request as untimely filed. The Office further denied appellant's request on the grounds that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.[1]

The Board finds that this case is not in posture for decision on whether appellant sustained tardy ulnar palsy causally related to his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his 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.[3] Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[4]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[6]

An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident. As the Office accepted that the July 22, 1996 employment incident occurred at the time, place and in the

[1] On November 22, 1999 appellant filed the current appeal with the Board. By decision dated December 10, 1999, the Office found that the evidence of record was insufficient to warrant modification of its prior decision dated September 2, 1999. The Office decision dated December 10, 1999 is null and void as the Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed is null and void. *Jimmy W. Galetka*, 43 ECAB 432, 433-44 (1992).

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

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

[6] *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *Elaine Pendleton, supra* note 3 at 1145.

manner alleged, the remaining issue is whether appellant's tardy ulnar palsy was caused by the employment incident.

In order to satisfy his burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[7] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's alleged injury and the employment incident. The physician's opinion must be based on a complete factual and medical history of the employee, must be of reasonable certainty, and must rationally explain the relationship between the diagnosed injury and the employment incident as alleged by the employee.[8] A medical opinion which is equivocal in nature lacks adequate medical rationale and is of limited probative value.[9]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[11]

The Board finds that there is a conflict in the medical evidence between Dr. Greenberg, appellant's attending Board-certified internist, and the Board-certified orthopedic surgeon to whom the Office referred the case for a second opinion, on whether appellant's tardy ulnar palsy is causally related to the accepted employment incident. In his May 6, 1999 comprehensive report, Dr. Greenberg stated: "a statement that [the July 22, 1996 employment incident] was not causative based on the fact that [appellant] was felt to stroke [sic] the radial versus the ulnar side of the elbow is a very tenuous position to take. Quite honestly, I am not sure how the patient would know which side of the elbow he struck."

However, in his June 17, 1999 report, the Office medical adviser opined that appellant's claimed condition was not causally related to the accepted employment incident. He concluded that one could not sustain a minor injury and one year later develop ulnar neuropathy. Further, the Office medical adviser stated that because appellant struck the radial aspect of his elbow rather than the ulnar area his ulnar condition was not caused by the accepted employment incident.

On remand, the Office should refer the case, including the case file and the statement of accepted facts, to an appropriate specialist for a rationalized opinion on whether appellant's tardy

[7] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[8] *See Shirley R. Haywood*, 48 ECAB 404, 407 (1997).

[9] *Betty M. Regan*, 49 ECAB 496, 502 (1998).

[10] 5 U.S.C. § 8123(a).

[11] *Gertrude T. Zakrajsek*, 47 ECAB 770, 773 (1996); *William C. Bush*, 40 ECAB 1064, 1075 (1989).

ulnar palsy is causally related to the accepted employment incident. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

The Board further finds that appellant is not entitled to receive continuation of pay.

Section 8118 of the Act[12] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."[13] Section 8122 provides that written notice of the injury shall be given within 30 days as specified in section 8119.[14] Section 8119[15] requires, in pertinent part, that written notice of the injury shall be given to the employee's immediate superior within 30 days after the injury.

The Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provisions for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay.[16] The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*[17] There is, therefore, no provision under the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury.[18]

In this case, appellant filed his notice of injury on April 8, 1999, more than two years after his July 22, 1996 employment incident. Although appellant is not entitled to continuation of pay, his claim was timely filed. He is, therefore, eligible for consideration of other compensation under the Act.

The Board further finds that the Office acted within its discretion in denying appellant's oral hearing request as untimely filed.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office hearing representative when a request is made within 30 days after issuance of a final Office decision.[19]

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[12] 5 U.S.C. § 8118.

[13] *See* 5 U.S.C. § 8118(a); *see also* 20 C.F.R. § 10.205(a)(2).

[14] *See* 5 U.S.C. § 8122(a)(2).

[15] 5 U.S.C. § 8119.

[16] *See William E. Ostertag*, 33 ECAB 1925, 1932 (1982); *see also Robert E. Kimzey*, 40 ECAB 762, 764 (1989); *Sylvia P. Blackwell*, 35 ECAB 811, 813 n. 7 (1984); *Patricia J. Kelsesky*, 35 ECAB 549, 551 (1984).

[17] *Id*.

[18] *Robert E. Kimzey*, *supra* note 16 at 765; *Patricia J. Kelsesky*, *supra* note 16 at 551-52.

[19] 5 U.S.C. § 8124.

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[20] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[21]

Appellant's October 5, 1999 hearing request was made more than 30 days after the date of issuance of the Office's September 2, 1999 decision and, thus, he was not entitled to a hearing as a matter of right.

The Office, in its November 15, 1999 decision, properly exercised its discretion by considering the matter of appellant's hearing request in relation to the issue involved and further denied his request on the basis that it could be addressed through a reconsideration application. 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 judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[22] The evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion.

[20] *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

[21] *Id.*; *see Michael J. Welsh*, 40 ECAB 994 (1989).

[22] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The September 2, 1999 decision of the Office of Workers' Compensation Programs denying appellant's claim for tardy ulnar palsy is set aside and the case is remanded for proceedings consistent with this opinion. The decisions of the Office dated November 15 and September 2, 1999 are hereby affirmed.[23]

Dated, Washington, DC
March 26, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[23] The Board notes that appellant submitted factual and medical evidence to the Office subsequent to the filing of this appeal. However, pursuant to 20 C.F.R. § 501.2(c), the Board's review of this case is limited to the evidence in the case record which was before the Office at the time of its final decision dated November 15, 1999. The Board further notes that appellant may present new evidence to the Office pursuant to a request for reconsideration. 20 C.F.R. § 10.606(a)-(b).