United States Department of Labor
Employees' Compensation Appeals Board

SAMY ABDELMALEK, Appellant	)	
and	)	**Docket No. 04-1594**
	)	**Issued: November 17, 2004**
DEPARTMENT OF AGRICULTURE, Tamaqua, PA, Employer	)	

Appearances:
Samy Abdelmalek, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 4, 2004 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated April 12, 2004, which denied his request for a hearing, and a merit decision dated December 8, 2003 which denied his claim for a traumatic injury. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained head and neck injuries in the performance of duty; and (2) whether the Office properly denied his request for an oral hearing by an Office hearing representative.

FACTUAL HISTORY

Appellant, a 55-year-old veterinarian, filed a claim for benefits on September 30, 2003, alleging that he was involved in an automobile accident on the morning of September 24, 2003 while he was on his way to work, resulting in injuries to his head, neck and shoulder.

Appellant's supervisor noted on the claim form that appellant's regular work hours were from 7:00 a.m. until 3:30 p.m.

Appellant submitted physical therapy reports and disability slips[1] from September through November 2003 and a police accident report dated September 24, 2003.

In a Form CA-16 dated October 16, 2003, Dr. Eugene Ganski, a physician, indicated that he treated appellant on September 27, 2003 for headache, neck and shoulder pain for an injury which occurred on September 24, 2003. Dr. Ganski diagnosed cervical spasm and checked a box indicating the injury was not causally related to appellant's employment.[2]

By letters dated November 5, 2003, the Office requested that appellant submit additional evidence to establish that he was engaged in an employment-related activity at the time of his accident. A letter pertaining to the issues of performance of duty was sent to the employing establishment but appellant was advised that he would have to ensure that the requested information was timely submitted by the employing establishment.

In a report dated October 31, 2003, Dr. Albert D. Janerich, a physician, related a history of injury from appellant that he was involved in a motor vehicle accident on September 24, 2003 in which he was driving a government car which was rear ended. Dr. Janerich stated that the etiology of appellant's neck pain, occasional headaches and radicular radiation down his right arm stemmed from injuries he sustained in the September 24, 2003 vehicular accident. He diagnosed an aggravation of preexisting degenerative joint and degenerative disc disease, a musculoligamentous strain with superimposed myofascitis, and a right cervical radiculopathy verses radiculitis at C8-T1.

On December 5, 2003 the Office received from the employing establishment the form addressing all of the performance of duty questions posed by the Office. The form was signed by appellant's supervisor.

By decision dated December 8, 2003, the Office denied the claim, finding that appellant's automobile accident and resulting injuries were not sustained while he was in the performance of duty. The Office noted that it had requested additional evidence regarding the occurrence of the accident in order to establish whether appellant was engaged in his employment at the time of the accident, but had not received such evidence.

On January 15, 2004 appellant requested an oral hearing. In a decision dated April 12, 2004, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked January 15, 2004, which was more than 30 days after the issuance of the Office's December 8, 2003 decision, and that he was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and

[1] The physician's signature on the disability slips is illegible.

[2] While a properly executed CA-16 form can obligate the employing establishment for payment of medical expenses in the absence of an accepted injury, the CA-16 form of record was not signed by an employing establishment official and was therefore not a properly issued authorization pursuant to 20 C.F.R. § 10.300.

medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.[3] Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[4]

"In the course of employment" deals with the work setting, the locale, and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury. In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or to the conditions under which the employment is performed.[5]

As a general rule, an off-premises injury sustained by an employee having fixed hours and place of work, while the employee is coming to or going from the employer's premises, is not compensable because the injury does not arise out of and in the course of employment, but out of ordinary nonemployment hazards of the journey itself, which are shared by all travelers.[6] Certain exceptions to this rule have, of course, developed, where the hazards of the travel may fairly be considered dependent upon the particular facts and related to situations: "(1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer."[7]

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[3] *George A. Fenske*, 11 ECAB 471 (1960).

[4] *Timothy K. Burns*, 44 ECAB 125 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990); *Christine Lawrence*, 36 ECAB 422 (1985).

[5] *See Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

[6] *Mary Margaret Grant*, 47 ECAB 696 (1997); *Betty R. Rutherford*, 40 ECAB 496, 499 (1989); *Robert F. Hart*, 36 ECAB 186, 191 (1984); *see generally* 1 A. Larson, *The Law of Workers' Compensation* §§ 15.00, 15.11, at 4-3 (1990) (explaining the "coming and going" rule).

[7] *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 479 (1947).

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision as to whether appellant's injury on September 24, 2003 was sustained in the performance of his federal employment. The Board notes that appellant's injury occurred at 7:05 a.m. while appellant was on his way to work in a government vehicle; however, appellant's work hours began at 7:00 a.m.

The evidence of the record pertaining to appellant's accident which the Office evaluated prior to the denial of the claim consists of the September 24, 2003 accident report and appellant's claim form which indicate that the accident occurred at 7:05 a.m. while he was driving a government car on his way to work. Although received on December 5, 2003, the Office did not consider the forms submitted by the employing establishment which addressed the Office's questions pertaining to performance of duty prior to the December 8, 2003 decision denying the claim.

Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted and received by the Office prior to issuance of its final decision.[8] This case must therefore be remanded to the Office for further evaluation of the performance of duty issue, to be followed by an appropriate decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office final decision.[9] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[10] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[11] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[12]

ANALYSIS -- ISSUE 2

In the present case, because appellant's January 15, 2004 request for a hearing was postmarked more than 30 days after the Office's December 8, 2003 decision, he is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and

[8] *William A. Couch*, 41 ECAB 548 (1990).

[9] 5 U.S.C. § 8124 (b)(1).

[10] 20 C.F.R. § 10.131(a)(b).

[11] *William E. Seare*, 47 ECAB 663 (1996).

[12] *Id.*

relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.[13]

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained head and neck injuries in the performance of duty. The Board finds that the Office properly denied appellant's request for an oral hearing by an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2004 decision of the Office of Workers' Compensation Programs is affirmed and the December 8, 2003 decision is set aside.

Issued: November 17, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

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