U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES CHOI and U.S. POSTAL SERVICE,
SURBURBAN PACKAGE & DELIVERY CENTER, Gaithersburg, Md.

*Docket No. 96-1444; Submitted on the Record;*
*Issued April 28, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on October 25, 1995; and (2) whether the Branch of Hearings and Review abused its discretion by denying appellant's request for an oral hearing.

The Board has duly reviewed the case on appeal and finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty on October 25, 1995.

Appellant filed a claim on October 25, 1995 alleging that he injured his right elbow in the performance of duty on that date. In support of his claim, appellant submitted a form report dated October 25, 1995 diagnosing possible elbow fracture. Appellant submitted a note dated October 25, 1995 repeating that diagnosis. In a note dated October 27, 1995, Dr. Seung W. Paik, a Board-certified orthopedic surgeon, noted appellant's history of injury and that appellant's x-ray was negative. He listed the findings on examination and recommended that appellant refrain from work for two weeks.

The Office of Workers' Compensation Programs requested additional factual and medical evidence from appellant on November 13, 1995. As no additional evidence was forthcoming, the Office denied appellant's claim on December 18, 1995 finding that he failed to submit sufficient medical evidence to establish that he sustained a medical condition as a result of his October 25, 1995 employment injury.[1]

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

[1] Following the Office's December 18, 1995 decision appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[2] In this case, the Office accepted that the October 25, 1995 employment incident occurred as alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[3] 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 claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[4]

In this case, the medical evidence submitted by appellant does not provide a diagnosis of any condition resulting from the employment incident. Appellant's initial diagnosis was a possible fracture, but the later report indicates that appellant's x-rays were negative without providing an alternative diagnosis. As there is no medical evidence providing a diagnosis of a condition resulting from appellant's accepted employment injury, he has failed to meet his burden of proof and the Office properly denied his claim.

The Board further finds that the Branch of Hearings and Review did not abuse its discretion by denying appellant's request for an oral hearing

Appellant requested an oral hearing on February 16, 1996. By decision dated March 25, 1996, the Branch of Hearings and Review denied appellant's request finding that it was not timely filed and that appellant's claim could be adequately reviewed through the reconsideration process.

Section 8124(b) of the Federal Employees' Compensation Act,[5] concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on

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

[3] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[4] *James Mack*, 43 ECAB 321 (1991).

[5] 5 U.S.C. §§ 8101-8193.

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."[6]

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[7] Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing, and must exercise this discretion.[8]

In the instant case, the Office properly determined appellant's February 16, 1996 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's December 18, 1995 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

The decisions of the Office of Workers' Compensation Programs dated March 25, 1996 and December 18, 1995 are hereby affirmed.

Dated, Washington, D.C.
April 28, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] 5 U.S.C. § 8124(b)(1).

[7] *Tammy J. Kenow*, 44 ECAB 619 (1993).

[8] *Id.*