U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINERVA E. SLATER and DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, Atlanta, Ga.

Docket No. 96-2520; Submitted on the Record;
Issued August 6, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that her asthma attack was caused by factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay on the grounds that she failed to give written notice within 30 days, the time specified by the Federal Employees' Compensation Act.[1]

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to establish that her asthma attack was caused by factors of her federal employment.

On January 18, 1996 appellant, then a program assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 6, 1995 her upper respiratory area was immediately affected when an insecticide was sprayed in her office while she was present at her desk. Appellant stated that she informed the man who sprayed the pesticide about her allergy to pesticides and that he replied that he had an order to spray the pesticide. Appellant stopped work on December 11, 1995 and returned to work on January 17, 1996. Appellant stopped work on March 1, 1996 and retired on that date due to her respiratory condition. On the reverse of the claim, Bruce Bohanon, appellant's supervisor, stated that appellant did not become sick until several days after the pesticide was sprayed and that appellant had been treated often for asthma/sinusitis allergies because she had a chronic condition. Mr. Bohanon also stated that appellant had worked in the same building for several years and that she never had a reaction or informed her supervisor that she was allergic to pesticides. Mr. Bohanon further stated that appellant's claim was untimely filed.

By letter dated January 30, 1996, the Office advised appellant to submit additional factual and medical evidence supportive of her claim. The Office also advised the employing establishment to provide additional factual evidence regarding the spraying incident.

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[1] 5 U.S.C. §§ 8101-8193.

By decision dated March 5, 1996, the Office found the evidence of record insufficient to establish that the claimed medical condition or disability was causally related to the December 5, 1995 employment incident.[2] In an accompanying memorandum, the Office found that appellant's acute asthma attack occurred in the performance of duty. The Office, however, found the medical evidence of record insufficient to establish a causal relationship between appellant's condition and factors of her federal employment. In addition, the Office denied appellant's claim for continuation of pay because she failed to give written notice of injury on a form approved by the Secretary within 30 days of her exposure to the pesticide.

In an April 12, 1996 letter, appellant requested reconsideration of the Office's decision. By decision dated July 15, 1996, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum, the Office found the medical evidence of record insufficient to establish a causal relationship between appellant's asthma attack and factors of her federal employment.

A person who claims benefits under the Act[3] has the burden of establishing the essential elements of her claim. Appellant has the burden of establishing by reliable, probative and substantial evidence that her medical condition was causally related to a specific employment incident or to specific conditions of employment.[4] As part of such burden of proof, rationalized medical opinion evidence showing causal relation must be submitted.[5] The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.[6] Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.[7]

In the present case, appellant has alleged that her asthma attack was caused by her exposure to pesticides on December 5 and December 12, 1996. The medical evidence of record, however, does not support appellant's allegation. In a September 16, 1991 letter to appellant, Dr. Earnest C. Simmons, a Board-certified family practitioner, indicated that he had been treating appellant for allergic contact dermatitis and sinusitis since February 1990 and appellant's medical treatment. Dr. Simmons further indicated that appellant's prognosis was not good because she lived in the Atlanta area and that appellant would probably continue to have problems in the future. Dr. Simmons' May 8, 1995 medical report provided a history of appellant's respiratory conditions, diagnoses of fibromyalgia syndrome, chronic allergic

[2] The Board notes that the employing establishment stated that the spraying incident took place on December 5, 1995 rather than December 6, 1995 as alleged by appellant.

[3] *Id.*

[4] *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

[5] *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

[6] *Juanita Rogers*, 34 ECAB 544, 546 (1983).

[7] *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

sinusitis, chronic bronchitis and asthma, and appellant's physical restrictions. Dr. Simmons stated that appellant was not expected to recover from any of these conditions. In a January 10, 1995 letter to the employing establishment, Dr. Simmons stated that appellant had chronic sinusitis and chronic pain in the right arm and hand, and requested that appellant be allowed to participate in the leave donor program because she had used all her leave. In his November 20, 1995 medical report, Dr. Simmons noted a history of appellant's respiratory conditions and his findings on physical examination. Dr. Simmons stated that appellant's current status was stable, but that appellant was subject to sinus and asthma attacks at anytime and that appellant was not expected to have a full recovery because her symptoms were chronic. Dr. Simmons further stated that appellant's condition had not stabilized because her sinus condition was both seasonal and allergy related. Dr. Simmons also stated that since appellant's asthma and sinusitis were allergy related, appellant may develop an asthma or sinus attack suddenly and may have to leave work at any time. Dr. Simmons' letters and medical reports are insufficient to establish appellant's burden inasmuch as they failed to address how the spraying of pesticide caused appellant's asthma attack or any aggravation of appellant's preexisting respiratory conditions.

In a December 13, 1995 letter, Dr. Simmons advised the employing establishment that appellant was hospitalized from December 11 through December 13, 1995 and that appellant's hospitalization was due to an acute asthma attack brought on by exposure to insecticide spray on the job. Dr. Simmons noted appellant's medical treatment and that appellant may return to work on December 18, 1995. Dr. Simmons' letter is insufficient to establish appellant's burden because it failed to provide any medical rationale to support his opinion that appellant's asthma attack was caused by her exposure to insecticide spray.

The record reveals hospital records regarding the medical treatment of appellant's respiratory conditions, disability certificates of Dr. Frank Cook, an internist and objective test results. The Board finds that the hospital records, disability certificates and objective test results are insufficient to establish appellant's burden because they failed to address a causal relationship between appellant's asthma attack and her exposure to pesticide spray. In a March 21, 1996 medical report, Dr. Cook indicated a history of appellant's medical treatment and opined that appellant's bronchospastic problems were worsened and accelerated by the residual fumes and odors associated with the spraying of pesticides. This report, however, is insufficient to establish appellant's burden because Dr. Cook failed to provide any medical rationale to support his opinion.

The Board, therefore, finds that the medical evidence of record is insufficient to establish that appellant's asthma attack was causally related to factors of her employment. As a result, appellant has not met her burden of proof.

The Board further finds that the Office properly denied appellant's claim for continuation of pay on the grounds that she failed to give written notice within 30 days, the time specified by the Act.

Section 8118 of the Act[8] authorizes the 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 her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this [t]itle."[9] The context of section 8122 makes clear that this means within 30 days of the date of injury.[10] Section 10.201(a)(3) of the implementing federal regulations[11] provides that "(a) An employee is not entitled to continuation of pay unless: ... (3) the employee files a claim for a period of wage loss, as required by 5 U.S.C. § 8118(a), within 30 days of the injury on a form approved by the Secretary. (Form CA-1 may be used for this purpose)." Therefore, to be entitled to continuation of pay, an employee must file a claim on an appropriate form within 30 days after the injury.[12]

In a January 18, 1996 memorandum to Mr. Bohanon, appellant responded to the employing establishment's December 15, 1995 memorandum concerning the submission of her Form CA-1 and claim for continuation of pay. Appellant stated that this response was due to a shutdown of the federal government and her hospitalization. Appellant further stated that she informed Ms. Gaudin, the employing establishment's regional director, that the pesticide used in her office had caused an exacerbation of an existing condition of upper respiratory problems/asthma. Appellant also stated that her request for advance sick leave due to her hospitalization was denied by Ms. Gaudin. Appellant noted occasions where she had advised Mr. Bohanon of her allergic reaction to specific conditions at the employing establishment. Appellant stated that to her detriment, she did not complain about her respiratory problems which were caused by pesticide exposure because she believed that her medication would stop the reaction. In a January 22, 1996 letter, appellant stated that the regional director was informed of the employment incident on December 14, 1995 when she was released from the hospital and when she requested advanced sick leave. Appellant also stated that Mr. Bohanon was advised of the hospitalization, the reason for the hospitalization and the all pertinent details about inhaling pesticides on December 11, 1995. Appellant further stated that she did not know about her right to continuation of pay until a union representative informed her about this right upon her return to work on January 17, 1996. Appellant then stated that she understood that normal business was not being conducted by the government during the shutdown.

Oral notification to the employing establishment of an employment-related injury within 30 days of the injury is not sufficient to constitute notice of injury within the statutory requirements of section 8118 of the Act.[13] The context of this section makes clear that in order

[8] 5 U.S.C. § 8118.

[9] 5 U.S.C. § 8122(a)(2).

[10] *Bobby W. Anderson*, 41 ECAB 833, 836 (1990); *Myra Lenburg*, 36 ECAB 487, 489 (1995); *see* 20 C.F.R. § 10.201(a)(3).

[11] 20 C.F.R. § 10.201(a)(3).

[12] *Bobby W. Anderson*, *supra* note 10 at 836; *Robert E. Kimzey*, 40 ECAB 762, 765 (1989); *William E. Ostertag*, 33 ECAB 1925, 1926-27 (1989).

[13] *Nicholas A. Dalo*, 39 ECAB 506, 508 (1988); *Russell P. Chambers*, 32 ECAB 550, 552 (1981); *Lois M. Townsend*, 29 ECAB 470, 471 (1978).

to benefit from its continuation of pay provision, an employee must file *written* notice of the injury and words of claim must be included in such notice.[14] The only document in the case record which constitutes a claim is the Form CA-1, notice of traumatic injury and claim for continuation of pay-compensation, filed by appellant on January 18, 1996. Inasmuch as this claim was filed more than 30 days after the December 5, 1995 employment incident, the claim for continuation of pay is barred by the applicable time limitation provision of the Act.

Further, the Board has held that section 8122(d)(3)[15] of the Act, allowing 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] Thus, there is no provision under the Act excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury.[17] In addition, it is a well-settled principle of workers' compensation law that ignorance of statutory requirements will not be an excuse for noncompliance with those regulations.[18] Accordingly, the Board finds that appellant's contention that the shutdown of the federal government and her hospitalization prevented her from timely filing a Form CA-1 subsequent to the December 5, 1995 employment incident will not be considered as an excuse for not conforming with the statute.

[14] 5 U.S.C. § 8118.

[15] 5 U.S.C. § 8122(d)(3).

[16] *See William E. Ostertag*, *supra* note 12 (explaining why section 8122(d)(3) is inapplicable); *see also Robert E. Kimzey*, *supra* note 12; *Sylvia P. Blackwell*, 33 ECAB 811, 813 n.7 (1984); *Patricia J. Kelsesky*, 35 ECAB 549, 551 (1984).

[17] *William E. Ostertag*, *supra* note 12*; Robert E. Kimzey*, *supra* note 12*; Patricia J. Kelsesky*, *supra* note 16.

[18] *Robert E. Kimzey*, *supra* note 12; *Peter J. Nevin*, 6 ECAB 839 (1954).

The July 15 and March 5, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 6, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member