U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VANESSA L. SHORES and DEPARTMENT OF THE ARMY, ARMY RESERVE PERSONNEL CENTER, St. Louis, Mo.

Docket No. 96-1642; Submitted on the Record;
Issued May 4, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing and whether appellant established that she sustained an injury in the performance of duty.

On October 24, 1995 appellant, then a 42-year-old personnel clerk, filed a notice of traumatic injury, claiming that while lifting a coffeepot off the floor, she sustained severe pain in her back, which immobilized her. Appellant was treated by Dr. David S. Raskas, an orthopedic practitioner who diagnosed degenerative disc disease and noted that appellant was "very over-reactive."

On November 6, 1995 appellant filed a second notice of traumatic injury, claiming that upon her return to work on October 31, 1995 she experienced such severe pain in her back with any movement that she cried. Appellant was treated by Dr. Bernard C. Randolph, Jr., Board-certified in preventive medicine and rehabilitation who stated that appellant could return to work on November 22, 1995 but should avoid repetitive bending or twisting.

On December 26, 1995 the Office informed appellant that she needed to submit a factual statement and medical evidence regarding the back injury. Dr. Randolph stated in a report dated December 22, 1995 that appellant had experienced disabling low back pain intermittently over the past month and that she was advised to seek further treatment if the painful episodes became so severe that she could not work.

On February 5, 1996 the Office denied the claim on the grounds that the evidence failed to establish that appellant sustained an injury as alleged. The Office noted that none of the various forms and reports constituted a rationalized medical opinion.

On March 14, 1996 appellant requested an oral hearing. Her request was denied on April 10, 1996 because it was made more than 30 days from the date of the February 5, 1996

decision. The Office informed appellant that she could request reconsideration if she had additional evidence to submit.

The Board finds that appellant's request for a hearing was untimely filed.

The Federal Employees' Compensation Act[1] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.[2] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[3] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[4]

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.[5] The Board has held that the only limitation on the Office's authority is reasonableness,[6] and that 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 deductions from known facts.[7]

In this case, appellant requested a hearing on March 14, 1996, more than a month after the February 5, 1996 decision of the Office denying her claim. Attached to the decision was a statement outlining appellant's options regarding appeal and explaining clearly that the request for a hearing must be made within 30 days of the date of the decision. While appellant argues on appeal that she did not see the decision until March 11, 1996, the record reveals that the Office mailed the decision to her proper address.

Inasmuch as the Board has held that, absent evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that

[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

[3] *Eileen A. Nelson*, 46 ECAB ___ (Docket No. 93-1384, issued December 27, 1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[4] W*illiam F. Osborne*, 46 ECAB 198, 202 (1994).

[5] *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b.(3) (October 1992).

[6] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[7] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

individual,[8] the Board finds that appellant received the February 5, 1996 decision in a timely manner. Therefore, appellant was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing, and must exercise that discretion.[9] Here, the Office informed appellant in its April 10, 1996 decision that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on whether appellant had sustained an injury in the performance of duty could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's hearing request which could be found to be an abuse of discretion. Further, appellant was advised that she could request reconsideration and submit additional medical evidence. Finally, appellant offered no argument to justify further discretionary review by the Office.[10] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty.

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[11] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[12]

In a claim for compensation based on a traumatic injury, the employee must establish fact of injury by submitting proof that he or she actually experienced the employment accident or event in the performance of duty and that such accident or event caused an injury as defined in the Act and its regulations.[13] The Office's regulations define traumatic injury as a wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected.[14]

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[8] *Charles R. Hibbs*, 43 ECAB 700-01 (1992).

[9] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

[10] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

[11] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[12] *Id*.

[13] *Gene A. McCracken*, 46 ECAB 593, 596 (1995).

[14] 20 C.F.R. § 10.5(15).

The injury must be caused by a specific event or incident or series of events of incidents within a single workday or shift.[15]

In determining whether an employee sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components considered in conjunction with one another.[16] The first component to be established is that the employee actually experienced the employment incident at the time, place and manner alleged. In some cases, this first component can be established by an employee's uncontroverted statement that is consistent with the surrounding facts and circumstances and his subsequent course of action.[17] The second component, whether the employment incident caused a personal injury, generally must be established by medical evidence.[18]

In this case, appellant first alleged that she experienced severe pain in lifting a coffeepot off the floor on October 13, 1995. While this incident may have occurred, appellant has failed to establish that the incident caused an injury. Dr. Raskas, who initially treated appellant in August 1995 for degenerative disc disease at L4-5 and L5-S1, stated in his October 23, 1995 report that he did not think the incident of lifting the coffeepot exacerbated her condition at all.

Subsequently, Dr. Raskas reviewed the results of a magnetic resonance imaging (MRI) scan, which showed no spinal stenosis, no herniated disc and no evidence of any pars fractures. He concluded that there was no reason, based on any objective evidence, why appellant could not return to her sedentary job because neither the MRI scan nor his physical examination showed any reason for the amount of pain appellant was claiming. Dr. Raskas added that when he informed appellant of his conclusion on October 30, 1995, she stated that she would find another doctor who would get her off work.

On October 31, 1995 appellant claimed that she was in too much pain to work. While Dr. Randolph stated that appellant had experienced incapacitating pain, he offered no opinion that any employment factors were the cause of appellant's distress.[19] Nor did he provide any diagnostic testing or objective findings in justification of his conclusion that appellant's claim for days off work was medically necessary.

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[15] *Richard D. Wray*, 45 ECAB 758, 762 (1994).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury,* Chapter 2.803.2(a) (June 1995); *see Elaine Pendleton*, 40 ECAB 1143, 1147 (1989).

[17] *Edgar L. Colley*, 34 ECAB 1691, 1695 (1983).

[18] *John J. Carlone*, 41 ECAB 354, 357 (1989). Every injury does not necessarily cause disability for employment. *Donald Johnson*, 44 ECAB 540, 551 (1993). Whether a particular injury causes disability for employment is a medical issue which must be resolved by competent medical evidence. *Debra A. Kirk-Littleton*, 41 ECAB 703, 706 (1990).

[19] *See Rosie M. Price*, 34 ECAB 292, 294 (1982) (finding that the mere occurrence of an episode of pain during the workday is not proof of an injury having occurred at work; nor does such an occurrence raise an inference of causal relationship).

Appellant argues that the 1995 claims should have been treated as a recurrence of disability resulting from her November 23, 1993 back injury. There is nothing in the record to indicate that this injury was accepted by the Office.[20] In any event, appellant has submitted no medical evidence regarding a 1993 injury. Therefore, the Board rejects appellant's argument.

Despite being advised by the Office that she needed to submit a rationalized medical report in support of her claim, appellant did not do so.[21] Therefore, the Board finds that appellant has failed to carry her burden of proof in establishing that she sustained any injury in the performance of duty.[22]

The April 10 and February 6, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 4, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[20] *See* 20 C.F.R. § 10.121(a); *Merton J. Sills*, 39 ECAB 572. 576 (1988) (finding that appellant cannot establish a recurrence of disability having failed to establish the original injury).

[21] *See Alberta S. Williamson*, 47 ECAB ___ (Docket No. 94-1762, issued May 7, 1996) (finding that appellant failed to submit a rationalized medical report based on a complete factual and medical background explaining why her condition was contracted in the performance of duty).

[22] *See O. Paul Gregg*, 46 ECAB 624, 634 (1995) (finding that when an employee claims an injury under the Act, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time and in the place and manner alleged, and that the event, incident, or exposure caused an "injury" as defined by the Act).