U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BONNIE S. CONET and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Chicago, Ill.

Docket No. 96-1814; Submitted on the Record;
Issued May 15, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury in the performance of duty on September 27, 1994; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on February 23, 1996.

On September 30, 1994 appellant, then a 38-year-old file clerk, filed a claim for traumatic injury alleging that she suffered a severe allergic reaction on September 27, 1994 when toxic fumes and smoke from an outside fire entered the air units of her work station during the course of her federal employment. Appellant stated that the fumes and smoke caused severe itching, a rash, and a low grade fever. She further stated she injured the front and back of both legs. Appellant stopped working on September 30, 1994 and returned on November 14, 1994. An employing establishment supervisor indicated that he was aware of odor from a fire two or three blocks away, but that he did not think it was debilitating.

Appellant subsequently submitted an October 3, 1994 certificate signed by Dr. B.P. Atlas, a physician Board-certified in internal medicine, indicating only that appellant had been treated for an allergic reaction.

On December 2, 1994 the Office requested additional evidence, including a detailed narrative report addressing the relationship between the diagnosed condition and appellant's federal employment.

On November 12, 1994 Dr. Atlas completed a duty status report indicating only that appellant had an allergic reaction and dermatitis, and that she could return to work on November 14, 1994.

By decision dated January 24, 1995, the Office denied appellant's claim because fact of injury was not established. In an accompanying memorandum, the Office stated that there was conflicting evidence on whether the claimed event, incident or exposure occurred at the time,

place, and in the manner alleged. The Office also noted that the record was devoid of any medical evidence establishing a causal relationship between the claimed condition and the September 27, 1994 injury.

On January 24, 1996 appellant's representative requested reconsideration without offering any argument or new evidence.

By letter decision dated February 23, 1996, the Office declined to reopen the case for a merit review because the January 24, 1996 letter from appellant's representative failed to offer argument and did not include new evidence.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an injury in the performance of duty on September 27, 1994.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim[2] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[3] that the claim was timely filed within the applicable time limitation period of the Act,[4] 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.[5] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[7] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[8] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

[3] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[4] 5 U.S.C. § 8122.

[5] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

[6] *See Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

[8] *Id*. For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.[9]

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an "injury." The term "injury" as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[10] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[11]

In this case, there is no dispute that appellant was an "employee" within the meaning of the Act, nor that appellant timely filed her claim for compensation. Appellant's statement that on September 27, 1994 odor from an outside fire entered the air units of her work station is corroborated by her supervisor who indicated that "he was aware of odor from a fire two or three blocks away." It is, therefore, established that a work incident occurred when the odor of a fire permeated appellant's work space. Appellant, however, has not submitted medical evidence to establish that she incurred an employment-related injury. Dr. Atlas, a Board-certified internist, provided the only medical evidence of record. He indicated, without any elaboration, that he treated appellant for an allergic reaction and dermatitis. Dr. Atlas did not relate these conditions in any way to appellant's employment or to any exposure to smoke odors on that date. Appellant, therefore, failed to meet her burden of establishing an employment-related injury.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on February 23, 1996.

Under section 8128(a) of the Act,[12] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[13] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

[9] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

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

[11] *See Carlone*, *supra* note 8.

[12] 5 U.S.C § 8128(a).

[13] 20 C.F.R. § 10.138(b)(1).

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[14]

In the instant case, appellant failed to offer any argument or submit any evidence in support of her request for reconsideration. The letter submitted by appellant's representative simply requested reconsideration. As appellant failed to submit any new relevant and pertinent evidence, the Office did not abuse its discretion by refusing to reopen appellant's claim for a review of the merits.

The decisions of the Office of Workers' Compensation Programs dated February 23, 1996 and January 24, 1995 are affirmed.

Dated, Washington, D.C.
May 15, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] 20 C.F.R. § 10.138(b)(2).