U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES W. ROBINSON and DEPARTMENT OF DEFENSE, DEFENSE DISTRIBUTION DEPOT, San Diego, Calif.

*Docket No. 97-899; Submitted on the Record;*
*Issued January 13, 1999*

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DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a bilateral knee condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On April 23, 1996 appellant, then a 61-year-old material handler, filed a notice of occupational disease (Form CA-2) for a bilateral knee condition which he attributed to driving a forklift in the performance of his duties. Appellant stated that he first realized the condition on January 30, 1995 when at the end of his shift driving the forklift his legs would be stiff and his knees would hurt. On the reverse side of the CA-2 form, the employing establishment indicated that appellant stopped work on January 16, 1996.

In support of his claim, appellant submitted a treatment note from Dr. Vell R. Wyatt, a general practitioner, dated April 1, 1996. He noted that appellant had "progressive pain and instability in both knees and pain in lower back for years." Dr. Wyatt indicated that appellant was evaluated on January 11, 1996 and found to have "marked edema in both legs, marked bow-leggedness, inability to stand and walk well, inability to lift, stoop, bend or twist with any degree of comfort." He diagnosed severe degenerative joint disease, hypertensive cardiovascular disease with congestive heart failure, chronic obstructive pulmonary disease, and marked obesity. Dr. Wyatt noted that appellant's diseases are progressive and that appellant has become totally disabled for any gainful employment. He recommended that appellant retire.

In a treatment note dated April 23, 1996, Dr. Wyatt stated that "[appellant's] joint disease may be work related."

Appellant also submitted a personal statement. He advised that in 1995 he went to the Naval Dispensary, where he was told by a nurse that he suffered from mild arthritis. Appellant noted that by 1995 after driving the forklift, at the end of the day, his legs and knees felt stiff and would hurt. He further noted that on October 7, 1995 he was "hit from behind by two cars"

which worsened his knee problems, such that he can not bend at all since the wreck. Appellant stressed that he had no problem bending his knees until January 1995 and he attributed his knee condition to his employment.

On May 5, 1996 the Office advised appellant that he needed to provide a copy of the accident report for the October 7, 1995 car wreck. The Office further directed appellant to submit a physician's opinion, supported by medical reasoning, which addressed whether his federal employment caused or contributed to his knee condition.

Appellant's supervisor submitted a statement dated July 3, 1996, indicating that he had observed appellant demonstrate difficulty in "walking, standing, bending and climbing for several years, but particularly during the previous year and a half. The supervisor also noted that appellant's car accident was not work related.

On July 31, 1996 the Office issued a decision denying appellant's claim because the medical evidence was insufficient to establish that he had a bilateral knee condition causally related to his federal employment.

Appellant subsequently requested a hearing in a September 9, 1996 letter that was received on September 19, 1996.

In an October 10, 1996 decision, the Office informed appellant that his hearing request was untimely because it was not filed within 30 days of the July 31, 1996 decision. The Office, however, advised that appellant's request for further review could be equally well addressed through the reconsideration process.

The Board finds that appellant failed to carry his burden in establishing that he sustained a bilateral knee condition in the performance of duty.[1]

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 timely 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

[1] Appellant submitted new evidence on appeal. The Board, however, may only consider evidence that was in the case record at the time the Office rendered its decision; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from seeking to have the Office to consider such evidence pursuant to a reconsideration request filed with the Office.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

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

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[5]

The medical evidence required to establish causation, generally, is rationalized medical opinion evidence. 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.[6]

In the instant case, the Office found that appellant did not provide rationalized medical evidence that his back condition was caused by factors of his employment. In support of his claim, appellant submitted medical treatment notes from Dr. Wyatt. He, however, was only able to speculate that appellant's knee condition "may be due to his employment." Dr. Wyatt did not submit an unequivocal opinion explaining why specific work factors would cause or aggravate a diagnosed condition. With regard to speculative opinions, the Board has held that such evidence has limited probative value in determining the issue of causal relationship.[7] Because Dr. Wyatt's opinion is speculative as to the issue of causation in this case, appellant failed to carry his burden of proof.

Neither the fact that appellant's knee conditions became apparent during a period of employment, nor the belief of appellant that his conditions were caused or aggravated by employment conditions, is sufficient to establish causal relationship.[8] Although appellant was advised by the Office to submit a rationalized medical opinion to support his claim, appellant failed to submit any additional medical evidence regarding the causal relationship between his bilateral knee condition and his employment. The Office, therefore, properly denied his claim for compensation.

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides:

[5] *Woodhams, supra* note 4.

[6] *Id.*

[7] *Arthur Vilet*, 31 ECAB 366 (1979).

[8] *Woodhams, supra* note 4.

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[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]

Appellant's request for an oral hearing dated September 9, 1996 was received by the Office on September 19, 1996, more than 30 days after the Office's July 31, 1996 decision. For this reason, appellant is not entitled to a hearing as a matter of right. The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved, and correctly advised appellant that he could pursue the issue involved through the reconsideration process. As appellant may in fact pursue his claim by submitting to the appropriate regional Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[13]

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.131(a)-(b).

[11] *Herbert C. Holley*, 33 ECAB 140 (1981).

[12] *Rudolph Bermann*, 26 ECAB 354 (1975).

[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).

The decisions of the Office of Workers' Compensation Program dated July 31 and October 10, 1996 are affirmed.

Dated, Washington, D.C.
January 13, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member