U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVERNE MARTIN and U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Eatontown, N.J.

Docket No. 97-1527; Submitted on the Record;
Issued January 22, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty on August 13, 1996; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's hearing request.

On August 16, 1996 appellant filed a claim alleging that on August 13, 1996 she sustained injuries from lifting trays, pulling cages, walking and standing during her work shift. Appellant stated that her legs, feet, hips, lower back, neck and right shoulder began hurting on August 13, 1996. By decision dated November 27, 1996, the Office denied the claim on the grounds that fact of injury was not established. In a decision dated March 5, 1997, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing.

The Board has reviewed the record and finds that appellant has not established an injury in the performance of duty on August 13, 1996.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that he or she sustained an injury while in the performance of duty.[2] 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 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. The second component is whether the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

employment incident caused a personal injury and generally this can be established only by medical evidence.[3]

In the present case, appellant alleged employment incidents on August 13, 1996 of lifting trays, pulling cages, standing and walking as contributing to an employment injury. The Board finds no contrary evidence and therefore appellant has established the incidents occurred as alleged. To establish her claim, however, she must submit probative medical evidence establishing causal relationship between the identified incidents and a diagnosed condition. Appellant has submitted reports from Dr. Jeffrey Rosell, a chiropractor. Section 8101(2) of the Act provides that the term '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[4] The only report diagnosing a subluxation based on x-rays is an August 30, 1996 report, which provides a history and results on examination and includes cervical subluxation as a diagnosis. Although Dr. Rosell notes in his history the employment incidents on August 13, 1996 identified by appellant, he does not offer an opinion that the cervical subluxation was causally related to the employment incidents, with supporting medical reasoning.[5] The report is therefore not sufficient to establish a subluxation causally related to appellant's federal employment.

The Board notes that the record contains a magnetic resonance imaging (MRI) scan dated September 12, 1996, revealing bulging discs at L3-4 and L4-5, but there is no opinion from a physician on causal relationship between bulging discs or any other diagnosed condition and the employment incidents of August 13, 1996. It is appellant's burden to submit medical evidence sufficient to establish her claim and the Board finds she has not met her burden in this case.

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

Section 8124(b)(1) of the Act provides in pertinent part:

> "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 title 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."[6]

A claimant requesting a hearing after the 30-day period is not entitled to a hearing as a matter of right.[7] In this case, appellant requested an oral hearing by letter postmarked

[3] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[4] 5 U.S.C. § 8101(2).

[5] The Board has held that medical evidence must be in the form of a reasoned opinion by a qualified physician based on a complete and accurate factual and medical history. *Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

[6] 5 U.S.C. § 8124(b)(1).

[7] *See Robert Lombardo*, 40 ECAB 1038 (1989).

January 28, 1997. Since this is more than 30 days after the November 27, 1996 Office decision, appellant is not entitled to a hearing as a matter of right. The Board notes that appellant did submit a letter dated December 23, 1996 to the regional Office, which was received on December 31, 1996, stating that it was her understanding that she had "one month to appeal my case. I appeal it." This letter, however, does not specifically request an oral hearing, nor was it sent to the Office's Branch of Hearings and Review. The November 27, 1996 decision provided appellant with specific appeal rights, and the December 23, 1996 letter does not clearly indicate which appeal right appellant wished to pursue, and does not constitute a valid request for an oral hearing.[8] The actual request for a hearing was not postmarked until January 28, 1997 and that request is untimely.

Although appellant's request for a hearing was untimely, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.[9] In the March 5, 1997 decision, the Office advised appellant that it had considered the matter in relation to the issue involved and the hearing was denied on the grounds that appellant could resolve the issue by requesting reconsideration and submitting relevant evidence. This is considered a proper exercise of the Office's discretionary authority.[10] There is no evidence of an abuse of discretion in this case.

The decisions of the Office of Workers' Compensation Programs dated March 5, 1997 and November 27, 1996 are affirmed.

Dated, Washington, D.C.
January 22, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[8] By letter dated January 6, 1997, the Office advised appellant to follow the instructions accompanying the Office decision in order to exercise her appeal rights.

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

[10] *Mary B. Moss*, 40 ECAB 640, 647 (1989).