U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. BENSON and DEPARTMENT OF THE ARMY, OFFICE OF THE ADJUTANT GENERAL, Columbia, SC

Docket No. 98-1017; Submitted on the Record;
Issued November 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an injury in the performance of duty on February 24, 1997; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on November 10, 1997.

On March 17, 1997 appellant, then a 40-year-old automotive mechanic, filed a notice of traumatic injury alleging that on February 24, 1997 he sustained a back injury when he fell off a truck in the performance of his federal employment.

On April 28, 1997 Christopher Gantt, appellant's supervisor, indicated that he heard a noise while working with appellant on February 10, 1997 and that appellant subsequently told him that he had fallen off the truck they were packing. Mr. Gantt further indicated that appellant had casually complained of back pain over the last few months.

On May 13, 1997 the employing establishment submitted a memorandum indicating that appellant sought treatment for back problems on April 25 and May 5, 1997. The employing establishment indicated that a Dr. Nicholson only gave appellant a note for work because of complaints of a lower back problem.

On May 27, 1997 the Office requested additional information about the alleged work incident and requested that appellant provide a rationalized medical opinion addressing the causal relationship between the work incident and appellant's medical condition. Appellant was allowed 30 days to respond.

By decision dated July 7, 1997, the Office denied appellant's claim because fact of injury was not established. The Office indicated that appellant failed to submit any factual or medical evidence to support his claim.

On August 4, 1997 appellant requested reconsideration. Appellant stated that he mixed up the date of the alleged work incident and indicated that it occurred on February 10, 1997.

By decision dated November 10, 1997, the Office declined to reopen the case for a merit review because appellant failed to raise substantive legal questions and he did not include new and relevant medical evidence.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his 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 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 evidence to establish that he 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 establish that his 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 by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements, or conditions.[10]

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[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).

[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).

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 his claim for compensation. Appellant, however, has not submitted any medical evidence to establish that he incurred an employment-related injury. Moreover, the Office explained to appellant the medical evidence that he needed to submit, but he failed to do so. Appellant, therefore, failed to meet his 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 November 10, 1997.

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

"(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 only indicated in his reconsideration request that he mistakenly identified the date of the alleged work incident as occurring on February 24, 1997 when it actually occurred on February 10, 1997. Appellant, however, failed to raise any substantive legal questions. Moreover, he also failed to submit any new relevant and pertinent evidence. Consequently, 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 November 10 and July 7, 1997 are affirmed.

[11] *See John J. Carlone, supra* note 7

[12] 5 U.S.C § 8128(a).

[13] 20 C.F.R. § 10.138(b)(1).

[14] 20 C.F.R. § 10.138(b)(2).

Dated, Washington, D.C.
November 2, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member