U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALEX F. FARIA and DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, San Antonio, TX

Docket No. 97-2525; Submitted on the Record;
Issued September 3, 1999

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty on April 30, 1996 as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On May 10, 1996 appellant filed a claim for pain in the arch of his right foot which he attributed to his running in a physical fitness test for the employing establishment. By decision dated July 30, 1996, the Office found that the April 30, 1996 incident occurred as alleged, but that a medical condition resulting from this incident was not supported by the medical evidence. By letter dated May 12, 1997, appellant requested a review of the written record. By decision dated July 17, 1997, the Office found that appellant was not entitled to a review of the written record on the basis that his request was not made within 30 days of the Office's decision. The Office also found that the issue in appellant's case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered. By letter dated July 28, 1997, appellant requested reconsideration and the Office, by decision dated August 6, 1997, refused to modify its prior decision.

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

[1] 5 U.S.C. §§ 8101-8193.

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

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

[4] 5 U.S.C. § 8122.

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]

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.[6] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[7]

In the present case, the evidence establishes, and the Office found, that appellant was an employee of the United States, that he timely filed a claim for compensation and that the April 30, 1996 incident occurred as alleged. The Board finds, however, that the medical evidence does not establish that the April 30, 1996 incident caused a personal injury.

In a report dated July 31, 1996, Dr. Walter W. Strash, a podiatrist, noted the following history: "[Appellant] states that his pain started when he was trying to perform a fitness test while working as an F.B.I. agent. He states that he also runs daily and is having discomfort at the end of the day." This report, which is the only medical report in the case record that mentions the April 30, 1996 incident,[8] is not sufficient to meet appellant's burden of proof. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[9]

The Board further finds that the Office properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Act[10] provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of

[5] *See Daniel R. Hickman, supra* note 2

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

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

[8] On appeal appellant submitted a report dated August 22, 1997 from Dr. Strash. However, as the Board's review is limited by 20 C.F.R. § 501.2(c) to "the evidence in the case record which was before the Office at the time of its final decision," the Board cannot consider this report.

[9] *Froilan Negron Marrero*, 33 ECAB 796 (1982).

[10] 5 U.S.C. § 8124(b)(1).

the issuance of the decision, to a hearing on his claim before a representative of the Secretary." Section 10.131 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary and that the request for a review of the written record must be made within 30 days of the date of the issuance of the Office's decision.[11]

In the present case, appellant requested a review of the written record by an Office representative by letter dated May 12, 1997. As this was more than 30 days after the issuance of the Office's decision on July 30, 1996, appellant is not entitled to a review of the written record as a matter of right.

Although there is no right to a review of the written record if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[12] In the present case, the Office properly exercised its discretion by advising appellant that the issue in appellant's case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

The decisions of the Office of Workers' Compensation Programs dated August 6 and July 17, 1997 are affirmed.

Dated, Washington, D.C.
September 3, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] 20 C.F.R. § 10.131.

[12] *Cora L. Falcon*, 43 ECAB 915 (1992).