U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LA SHEA C. WALKER and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Detroit, MI

Docket No. 97-2712; Submitted on the Record;
Issued September 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely filed.

Appellant, then a 39-year-old distribution clerk, filed a notice of traumatic injury on January 17, 1996, claiming that she hit her head on a defective steel bar, resulting in swelling, pain and subsequent migraine headaches. Appellant filed a notice of recurrence of disability on November 11, 1996, claiming that intense noise exacerbated her migraines on October 25, 1996 and prevented her from working.[1]

Appellant, who had been on light duty because of a hip condition for which she filed a claim in July 1996, stated that she had experienced constant headaches since the January 1996 incident. Appellant worked in a quiet area and the headaches were controlled with medication. Appellant explained that on October 25, 1996 she was reassigned "as a form of punishment" from a quiet area to one "with an enormous amount of noise." The noise caused her migraine headaches to resurface and resulted in dizziness and vomiting as well as trembling hands and light sensitivity.

The employing establishment controverted the October incident on the grounds that there were no noisy machines in the area to which appellant was reassigned and there was no evidence that her migraines were work related.

On April 18, 1997 the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that appellant's condition was caused by work factors. On

[1] The Office treated the recurrence claim as a new injury and doubled the files under A9-411583.

August 12, 1997 appellant wrote to the Branch of Hearings and Review, requesting a review of "all material" and reconsideration of new and existing evidence.[2]

On September 17, 1997 the Office denied appellant's request for a written review of the record as untimely filed. The Office added that the issue in the case could be equally well addressed by requesting reconsideration and submitting medical evidence establishing a causal relationship between appellant's condition and her employment.

On October 18, 1997 appellant requested reconsideration and submitted a medical report from Dr. Richard J. Martocci, an osteopathic practitioner Board-certified in neurology. On November 12, 1997 the Office denied appellant's request on the grounds that the evidence was insufficient to warrant review of the prior decision.

Initially, the Board finds that the Office properly denied appellant's request for a written review of the record as untimely filed.

The Federal Employees' Compensation Act[3] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing before a representative of the Office.[4] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[5] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[6]

The regulation implementing section 8124(b)(1) provides that a claimant may request a review of the written record in lieu of the oral hearing, but the same rules apply.[7] The regulation is clear that a claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of issuance of the decision.[8] Section 10.131(b) is equally clear that

[2] Appellant initially sent a copy of her August 12, 1997 letter seeking review of the record to the Board, which responded in a letter dated September 5, 1997. On December 26, 1997 appellant completed an appeal application requesting review of the September 5, 1997 decision. There is no such decision in the record. Inasmuch as appellant's appeal was docketed on January 8, 1998, the Board has jurisdiction of the Office decisions dated November 12 and April 18, 1997. 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193 (1974).

[4] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

[5] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[6] W*illiam F. Osborne*, 46 ECAB 198, 202 (1994).

[7] 20 C.F.R. § 10.131(b).

[8] *Coral Falcon*, 43 ECAB 915, 918 (1992).

the date on which the request is deemed "made" should be "determined by the postmark of the request," rather than any other date.[9]

In this case, the Office included with its April 18, 1997 decision, a copy of appellant's appeal rights, including the instruction that any request for a review of the written record "must be postmarked within 30 days of the date of this decision." By letter dated May 14, 1997, the Office reminded appellant that she needed to choose which appeal right she wished to pursue in submitting a January 3, 1997 medical report. Appellant's request for a written review was dated August 12, 1997, almost four months after the April 18, 1997 decision and therefore untimely.

Nonetheless, even when the request for a written review is not timely, the Office has the discretion to grant such review and must exercise that discretion.[10] Here, the Office informed appellant in its September 17, 1997 decision, that it had considered the matter in relation to the issue involved and denied a written review on the basis that she could request reconsideration and submit medical evidence in support of her claim.

The Board has held that the only limitation on the Office's authority is reasonableness[11] and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[12]

In this case, nothing in the record indicates that the Office committed any abuse of discretion in denying appellant's request for a review of the record. Appellant was fully advised that she could request reconsideration and submit evidence in support and appellant has offered no argument to justify further discretionary review by the Office.[13] Thus, the Board finds that the Office properly denied appellant's request for a written review of the record.

The Board also finds that while appellant has failed to establish that her migraine headaches were causally related to work factors or to the initial head injury on January 16, 1996, this case must be remanded for further evidentiary development.

An employee seeking benefits under the Act 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 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 or specific condition for which compensation is claimed is causally related to the

[9] *Leo F. Barrett*, 40 ECAB 892, 895 (1989).

[10] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

[11] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[12] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

[13] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

employment injury.[14] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.

While appellant has the burden to establish entitlement to compensation, proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter, but rather shares responsibility in the development of the evidence.[15] The Board has stated that once the Office has begun investigation of a claim, it must pursue the evidence as far as reasonably possible.[16]

In administering the Act, the Office must obtain any evidence necessary for the adjudication of the case which is not received when the notice or claim is submitted. Thus, the Office is responsible for advising the claimant about the procedures involved in establishing a claim and requesting all evidence necessary to adjudicate the case.[17]

In this case, the Office accepted appellant's January 1996 claim for a head contusion.[18] On June 4, 1996 the Office authorized appellant's referral to a Board-certified neurologist, Dr. John Gilroy, who examined appellant on April 25, 1996. He concluded that appellant had post-traumatic headaches of the migraine type, adding that appellant gave a typical history of migraine, which was "not an unusual event after a relatively minor head injury. In fact, her head injury was so minor that she was not even concussed, since there was no loss of consciousness."

In support of her October 1996 claim, appellant submitted a January 3, 1997 report from Dr. David L. Gaston, Board-certified in neurology, who provided a history of appellant's injury and treatment and noted that her migraine headaches were not present prior to January 1996. He diagnosed post-concussion syndrome, myofascial pain syndrome and traumatic headache and recommended further testing. In response to an Office inquiry, Dr. Gaston stated that appellant had headaches since the January 6, 1996 injury, that the headaches increased when she was working in a noisy or stressful environment and the cause of her headaches was due to a head injury "where a steel bar struck her head."

In support of reconsideration, appellant submitted a May 8, 1997 report from Dr. Martocci, who concluded that appellant sustained, "at most, a very mild cerebral concussion" and that her symptoms could be classified as post-concussion syndrome. While appellant's neurological examination was entirely normal, he recommended further testing to determine whether a slight defect in the left posterior frontal region, as shown by x-ray, was an osseous anomaly, an arteriovenous malformation or neoplasia.

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[14] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

[15] *Richard Kendall*, 43 ECAB 790, 799 (1992) and cases cited therein.

[16] *Leon C. Collier*, 37 ECAB 378, 379 (1986).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c)(1)-(2) (April 1993).

[18] The record does not contain a copy of the Office's acceptance of the head injury as work related, but the April 18, 1997 Office decision notes the acceptance.

Here, the Board finds that the Office failed to develop appellant's claim fully, particularly in light of the lack of contrary medical evidence in the record.[19] While Dr. Gaston's report is not sufficiently rationalized to establish the requisite causal relationship, his conclusion that appellant's post-concussion headaches were related to the January 6, 1996 injury is uncontradicted.[20]

Therefore, the Board will remand the claim for the Office to refer appellant for a second opinion evaluation. Following such further development as it deems necessary, the Office shall issue a *de novo* decision.

The September 17, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed; the April 18, 1997 decision is set aside and the case is remanded for further proceedings consistent with this decision.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[19] *See John J. Carlone*, 41 ECAB 354, 358 (1989) (finding that medical evidence submitted by appellant is sufficient, absent any opposing medical evidence, to require further development of the record).

[20] *See Udella Billups*, 41 ECAB 260, 269 (1989) (finding that a physician's unrefuted testimony in a state claim was sufficiently probative to require the Office to develop the record further).