U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL R. JOHNSON and DEPARTMENT OF THE AIR FORCE, CIVILIAN PERSONNEL OFFICE, KEESLER AIR FORCE BASE, MS

Docket No. 99-1228; Submitted on the Record;
Issued August 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

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

On March 8, 1998 appellant, then a 44-year-old training manager, filed a claim for a traumatic injury, Form CA-1, alleging that on March 8, 1998 at 5:25 p.m. he sustained severe pain in both knees, although mainly in the left knee, when he slipped and fell while in the employing establishment's bowling alley.

On April 7, 1998 the employing establishment submitted responses to a series of questions indicating that appellant's participation in the bowling was voluntary, that he was not paid for participating and that a civilian would be required to take leave to participate in bowling during scheduled work hours. The employing establishment also stated that the recreational activity was for the morale of the employees, that the employer did not accrue any benefit from the employee's participation and that all squadron members were invited to participate if they wished. The employing establishment further indicated that appellant participated in the bowling league, after duty hours, that the employer provided the facilities, *i.e.*, Keesler Air Force Base's Guade Lanes and that the activity was a squadron bowling team event at the base bowling alley. The employing establishment stated that it did not provide any funds for payment of uniforms or equipment and that the employer did not have any control over the activity or organization or funds sponsoring the event.

In a statement dated May 22, 1998, appellant stated that the 332nd Squadron Bowling Team was an organized, on base bowling league whose purpose was "to build interactively and morale," that no one was required or persuaded to participate but everyone in the squadron was encouraged to support all the 332nd Squadron Sports Teams. Appellant stated that the injury occurred after his duty hours at the Guade Lanes on base. Appellant submitted medical evidence to support his claim.

By decision dated July 27, 1998, the Office denied the claim, stating that appellant did not establish that he was injured in the performance of duty since he was participating in a voluntary bowling team when injured.

By letter dated August 30, 1998, appellant requested an oral hearing before an Office hearing representative.

By decision dated January 12, 1999, the Office's Branch of Hearing and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked September 3, 1998, more than 30 days after the Office issued the July 27, 1998 decision and that, therefore, appellant's request was untimely. The Branch informed appellant that he could request reconsideration by the Office and submit additional evidence.

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

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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."[1] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[2] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.616(a) of the Office's regulations[3] provides in pertinent part that "the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. § 10.615 (1999).

[3] 20 C.F.R. § 10.616(a) (1999).

[4] *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,[5] when the request is made after the 30-day period for requesting a hearing[6] and when the request is for a second hearing on the same issue.[7]

In the present case, appellant's August 30, 1998 hearing request, which was postmarked September 3, 1998, was made more than 30 days after the date of the issuance of the Office's July 27, 1998 decision and, therefore, the Branch was correct in stating in its January 12, 1999 decision that appellant was not entitled to a hearing. The Branch exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty, as alleged.

The Act[8] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[9] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[10] "Arising out of the employment" tests the causal relationship between the employment and the injury; "arising in the course of employment" tests work connection as to time, place and activity.[11] For the purposes of determining entitlement to compensation benefits under the Act, "arising in the course of employment," *i.e.*, performance of duty, must be established before "arising out of the employment," *i.e.*, causal relationship, can be addressed.

In determining when an injury arises in the performance of duty, Larson's treatise on workers' compensation law states that recreational or social activities are within the course of employment when:

> "(1) They occur on the premises during a lunch or recreational period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or

[5] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[6] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[7] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Id*. at 8102(a).

[10] *See Arthur J. Berte*, 48 ECAB 296, 298-99 (1997); *Michael A. Vestuto*, 47 ECAB 632, 636 (1996).

[11] *See Arthur J. Berte*, *supra* note 10; *Robert J. Eglinton*, 40 ECAB 195 (1988).

(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."[12]

These are three independent links by which recreation can be tied to the employment and, if one is found, the absence of the others is not fatal.[13] Accordingly, when an employee is injured in a recreational activity, he or she must meet one of these three tests to establish performance of duty.

Appellant meets none of the above criteria in establishing that his injury, which occurred while he was bowling on the Squadron Bowling Team after work hours on the employing establishment's premises, arose out of the course of his employment. Although the injury occurred on the employing establishment's premises at the Guade Lanes on base, the bowling did not occur during a lunch or recreational period as a regular incident of employment but occurred after appellant's work hours. According to the employing establishment and appellant, participation was voluntary and the employing establishment indicated in its April 7, 1998 responses that the bowling was for the morale of the employees. Additionally, the employing establishment indicated that no funds were provided to pay for uniforms and equipment and the employer did not have control over the activity or organization or funds sponsoring the event. Since appellant has not established the requisite links between the recreational activity and his employment, he has not established that his injury, which occurred while bowling, arose in the course of employment.

[12] A. Larson, *The Law of Workers' Compensation* § 22.00 (1993); *see Lindsay A.C. Moulton*, 39 ECAB 424 (1988).

[13] *Michael A. Vestuto, supra* note 3 at 637; *Archie L. Ransey*, 40 ECAB 1251 (1989).

The decisions of the Office of Workers' Compensation Programs dated January 12, 1999 and July 27, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 1, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member