U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNARD E. TUCK and DEPARTMENT OF THE TREASURY, BUREAU OF THE MINT, Philadelphia, PA

Docket No. 99-509; Submitted on the Record;
Issued December 19, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an injury while in the performance of duty on February 21, 1997; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On February 24, 1997 appellant, then a 42-year-old production machinist mechanic, filed a traumatic injury claim (Form CA-1) assigned number A3-225086 alleging that on February 21, 1997 he sustained contusions to the face and a ligamentous sprain of the neck. He stated that he was hit on the left side of his face by a fist. Appellant's claim was accompanied by factual and medical evidence.

By decision dated April 10, 1997, the Office found the evidence of record insufficient to establish that appellant's emotional condition arose out of and in the course of his employment. In an undated letter, appellant requested an oral hearing before an Office representative.

In an April 23, 1998 decision, the hearing representative affirmed the Office's April 10, 1997 decision. In an undated letter, appellant requested reconsideration of the hearing representative's decision.

In a decision dated September 25, 1998, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was irrelevant, and thus, insufficient to warrant a review of the prior decision.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that he sustained an injury while in the performance of duty on February 21, 1997.

The Federal Employees' Compensation Act[1] provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation law, namely, "arising out of and in the course of employment."[3] "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to compensation. The employee must also establish the concurrent requirement of an injury "arising out of the employment." "Arising out of the employment" requires that a factor of employment caused the injury.[4] Larson, in addressing assaults arising out of employment, states the following:

> "Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor...."[5]

In this case, appellant's sole allegation is that he sustained an injury on February 21, 1997 as a result of a physical altercation with Robert Carr, his coworker. In a February 21, 1997 police statement, he provided that on the previous date, Mr. Carr made a comment that he could not wear his leather jacket in appellant's neighborhood. Appellant stated that he did not respond to Mr. Carr's comment. He stated that, on February 21, 1997 Mr. Carr made a derogatory statement and blocked his exit from the breakroom. Appellant further stated that Mr. Carr grabbed him by both arms. He commented that as he broke away from Mr. Carr, he hit him on the left side of his face. Appellant also commented that Mr. Carr then pushed him against the refrigerator. He noted that when Mr. Carr sat down, he picked up a metal waste paper basket and was going to hit Mr. Carr, but he had second thoughts and walked out of the room to report the incident to his supervisor, George Hirth. Appellant stated that he neither threatened nor shoved Mr. Carr. He concluded that he received medical treatment at the hospital following the incident with Mr. Carr.

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[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8102.

[3] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Veleria Minus*, 46 ECAB 799 (1995); *Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury).

[5] A. Larson, *The Law of Workers' Compensation* § 8.00 (1999).

Mr. Hirth's February 21, 1997 narrative statement revealed that appellant came to his office on that date and stated that Mr. Carr had hit him. He stated that appellant told him that he wanted to go to the dispensary and to see someone in security. Mr. Hirth further stated that when he left his office with appellant, they saw Mr. Carr and stares were exchanged between appellant and Mr. Carr. He then stated that he sent appellant to the dispensary and that Mr. Carr told him that words were exchanged between appellant and himself, that appellant lost his temper, pushing and shoving took place and appellant broke his glasses. Mr. Hirth also stated that Mr. Carr told him that he used his hands to push or shove appellant away and caught him in the face.

At the December 17, 1997 hearing, appellant testified about what happened on February 20, 1997 and on the following day, February 21, 1997. Regarding the February 21, 1997 incident, he testified that he had been working and he went to the breakroom to get some water.[6] Appellant further testified that he was talking to Bob Fry, a coworker, about the government when Mr. Carr made a derogatory racial comment about him not belonging at the employing establishment. He then testified that he attempted to leave the room to tell Mr. Hirth what was going on, but before he could leave the room Mr. Carr hit him in the face with his fist. Appellant testified that he picked up a trashcan, but that he decided not to throw it at Mr. Carr. He denied any prior or subsequent relationship with Mr. Carr outside of their joint work assignments.

In a February 21, 1997 police statement, Mr. Carr provided that appellant made the comment that he may be robbed of his leather jacket as they were leaving their shift on February 20, 1997. He further provided his response that he may get robbed in appellant's neighborhood. Regarding the February 21, 1997 incident, Mr. Carr stated that appellant was upset about his response and wanted them to go outside to fight. He responded that it was not worth it and that appellant continued to threaten him. Mr. Carr stated that appellant shoved and pushed him with his chest. He also stated that he considered getting his supervisor to stop the confrontation. Mr. Carr further stated that when he tried to leave the breakroom, appellant threatened to hit him with a trashcan, but decided against it. He stated that appellant commented that he was going to get something else. Mr. Carr concluded that when appellant shoved him with his chest he bent his glasses.

A February 27, 1997 investigative report from Joseph C. Kedziora, an employing establishment police detective, revealed that appellant made an initial statement to officer George McDaniel, an employing establishment police officer, that he was hit on the left side of his face and pushed by Mr. Carr. The report further revealed that officer McDaniel took a statement from Mr. Carr indicating that appellant seemed annoyed about his response that maybe he would be robbed of his leather jacket in appellant's neighborhood and that appellant threatened him with bodily harm on the following day. Detective Kedziora indicated that he reinterviewed Mr. Carr on February 21, 1997 and Mr. Carr stated that appellant did not hit him, rather he bumped into him with his chest. He admitted that he shoved appellant, but denied hitting him and provided that appellant bent his glasses when he bumped him with his chest. Detective Kedziora noted his interview of Mr. Hirth, which provided that appellant told him that

[6] Appellant testified at the hearing that he was authorized to go to the breakroom.

Mr. Carr had hit him in the face and that Mr. Carr told him that appellant lost his temper which led to pushing and the breaking of his glasses. Mr. Hirth stated that Mr. Carr told him that he used his hands to push or shove appellant away and caught him in the face. Detective Keziora noted that Mr. Fry told Mr. Hirth that he did overhear loud talk, but that he did not pay any attention to it. Detective Keziora also noted that when he reinterviewed appellant, he denied initiating the confrontation on February 21, 1997 and provided that he changed his mind about hitting Mr. Carr with a trashcan. Detective Keziora stated that the results of the investigation revealed that an alleged assault took place out of view of the employing establishment police and witnesses. He further stated that the incident appeared to be no more than disorderly conduct on the part of appellant and Mr. Carr.

The physical altercation between appellant and Mr. Carr arose in the course of appellant's employment, that is, at a time when appellant was engaged in his master's business, at a place where appellant was expected to be in connection with his employment and while he was fulfilling the duties of his employment or engaged in doing something incidental thereto.[7] Such physical contact by a coworker may give rise to a compensable employment factor of employment under the Act.[8]

The Board finds that the February 21, 1997 incident constitutes a compensable factor of employment. Although there is some discrepancy as to the nature and extent of the physical contact in the instant case, the evidence firmly establishes that physical contact was made in the course of employment. The corroborating statements from Mr. Carr and Detective Keziora substantiate appellant's allegation that he was involved in a physical altercation with Mr. Carr on February 21, 1997. However, appellant's burden of proof is not discharged by the fact that he has merely identified an employment factor, which may give rise to a compensable disability under the Act. Appellant also has the burden of submitting sufficient rationalized, probative medical evidence to support his allegation that he sustained a specific injury due to the accepted physical altercation/injury, which occurred on February 21, 1997.[9]

The Board finds that appellant failed to submit medical evidence sufficient to establish that he sustained a specific injury causally related to the accepted physical altercation/injury which occurred on February 21, 1997. In this case, appellant submitted medical evidence regarding his neck and back conditions. However, none of the medical evidence submitted by appellant addresses whether these conditions were caused by the February 21, 1997 employment incident. Therefore, appellant has failed to establish that he sustained an injury while in the performance of duty on February 21, 1997.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

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[7] *Josie P. Waters*, 45 ECAB 513 (1994); *Monica M. Lenart*, 44 ECAB 772 (1993).

[8] *Helen Casillas*, 46 ECAB 1044, 1052 (1995).

[9] *Chester R. Henderson*, 42 ECAB 352 (1991); *Elaine Pendleton*, 40 ECAB 1143 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[13]

In this case, appellant failed to show that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; neither did he advance a point of law not previously considered by the Office. In support of his request for reconsideration of the hearing representative's April 23, 1998 decision, appellant submitted an employment record indicating that he worked three hours and spent five hours at the hospital on February 21, 1997. This document is not relevant to the issue of whether appellant sustained an injury while in the performance of duty on February 21, 1997. Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[14]

Because appellant has failed to submit any new relevant and pertinent evidence not previously reviewed by the Office, and further failed to raise any substantive legal questions, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

[10] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. §§ 10.138(b)(1)-(2).

[12] *Id*. at § 10.138(b)(2).

[13] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[14] *Daniel Deparini*, 44 ECAB 657 (1993).

The April 23, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified. The Office's September 25, 1998 decision is hereby affirmed.

Dated, Washington, DC
December 19, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member