U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS J. SHORE and DEPARTMENT OF THE ARMY, SCHOEFIELD BARRACKS DPW, Fort Shafter, HI

Docket No. 99-675; Submitted on the Record;
Issued May 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on September 29, 1997, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely.

On September 30, 1997 appellant, then a 42-year-old maintenance mechanic, filed a notice of traumatic injury (Form CA-1) alleging that he was climbing stairs on the morning of September 29, 1997 and experienced pain in his left hip and lower back. He stopped work at approximately 2:00 p.m. and was seen at the Waianae Comprehensive Health Clinic the same day. A witness statement from Richard Tamaru indicated that on September 29, 1997 appellant told him that something was wrong with his back, but he did not know how he hurt it. Appellant's supervisor, Alphonse M. Domingo, indicated when he asked appellant whether he injured his back on the job or whether his injury was work related, appellant related that he did not know.

The emergency room report dated September 30, 1997 diagnosed an acute low back strain. The onset of left hip pain was related as having begun yesterday … "went to work, nothing happened at work … no trauma, but was slow onset beginning at 10:30 a.m. yesterday. (Job description by appellant). Climbs ladders, changes light bulb, light maintenance. No heavy lifting. Past medical history -- herniated nucleus pulposus. Past -- surgical history -- none. Previous work[ers'] comp[ensation] claim." Medical reports dated October 2, 8 and 9, 1997 described the history of injury as appellant was climbing or walking up a flight of stairs on September 29, 1997 and experiencing pain approximately 2 hours later.

In an October 25, 1997 report, the employing establishment indicated that it was informed of appellant's claim on September 30, 1997. It related that Palani at the Waianae Comprehensive Health Clinic had indicated that he was injured either getting on or off his

vehicle. The employing establishment also indicated that appellant requested two hours of sick leave on September 29, 1997.

In a November 26, 1997 letter, the Office requested that appellant explain how the claimed injury occurred.

In a December 22, 1997 letter, appellant stated that he had a job on the third floor of one of the quads repairing an electrical outlet. He stated that, after he returned to the shop, he felt the first twinge of noticeable pain and mentioned it to Mr. Tamara. Appellant stated that he was not sure of the exact time of the injury. He stated "at the time I had returned to the shop, it was shortly before the lunch time and I had been in the work environment for at least two or more hours. Because the pain was more irritating, I let it go and went back to work. By 1400 hours, the pain got so bad, I could barely walk." Appellant stated that he took two hours of sick leave on September 29, 1997 due to his pain. He also indicated that, when he was at the emergency room the following day, he had stated that there was no direct impact and the only time there was any form of twisting to his body was while he was going up or down the stairs with his tool pouch, which weighed approximately 10 to 15 pounds.

In a decision dated January 14, 1998, the Office denied appellant's claim because fact of injury was not established. The Office found that there was conflicting evidence whether the claimed injury occurred in the manner alleged as there was conflicting histories of the nature of the circumstances to which the injury was attributed.

In a letter dated February 12, 1998 and postmarked February 17, 1998, which was received by the Office on February 20, 1998, appellant requested a hearing.

In a decision dated March 18, 1998, the Office denied appellant's request for a hearing as untimely and found that the matter could be further pursued through the reconsideration process.

In an April 8, 1998 letter, appellant requested reconsideration. A copy of appellant's time card showing that he worked on September 29, 1997 was submitted along with copies of magnetic resonance imaging (MRI) scans of the lumbosacral spine from April 1996, a radiologic examination report from January 20, 1998, a copy of his job description, a copy of the Office's January 14, 1998 decision with appellant's comments and an April 8, 1998 letter addressed to the Branch of Hearings and Review reflecting appellant's disagreement with his request for a hearing being untimely.

By decision dated July 14, 1998, the Office reviewed the merits of the claim but denied modification of its previous decision on the grounds that the inconsistencies described in the previous decision remained.

Appellant again requested reconsideration on October 5, 1998. In a September 25, 1998 report, David H. Messer, a physician's assistant, advised that he was the primary provider who saw appellant in the emergency department on September 30, 1997 for acute back strain and left hip pain. He noted that there was no mention specifically of how this injury occurred. Mr. Messer stated that he verified with the receptionist, Mr. Palanier, who was on duty that day that appellant was making a workers' compensation claim and a note in the computer stated that

he (Mr. Palanier) spoke with appellant's supervisor, Mr. Domingo, regarding the insurance carrier of the company and was to receive a return call with the information. A copy of the emergency room report and a computer verification of the call from Mr. Palanier to Mr. Domingo was attached.

An October 31, 1997 note related that Greathia R. Acosta, management assistant, administrative office, called Mr. Palanier at the Waianae Comprehensive Health Clinic and was informed that appellant was injured either getting on or off his vehicle.

Also enclosed was an e-mail from Ms. Acosta stating "[appellant] -- [the Office] denied [his] [t]raumatic [i]njury due to many inconsistencies with regard to the mechanics of the injury. Thanks to Mr. Domingo and Stephaine Change (CPAC workers' compensation program administrator) we all worked very hard on this case, but it paid off. The federal government has saved approximately over $1 million dollars ($915,689.00 in compensation [plus] medical costs [plus] cost of living adjustment) if the case was approved."

By decision dated October 16, 1998, the Office reviewed the merits of the claim and denied modification of its previous decision on the grounds that none of the documents submitted provided the necessary factual or medical information necessary to accept the case as work related.

The Board finds that appellant has failed to establish that he sustained an employment injury on September 29, 1997, as alleged.

An employee seeking benefits under the Federal Employees' Compensation 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 and/or specific condition for which compensation is claimed are causally related to the employment injury."[1] 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.[2]

In order to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another.[3]

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[4] In some traumatic injury cases, this

[1] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

[3] *John J. Carlone*, 41 ECAB 354, 356 (1989).

[4] *See Pendleton, supra* note 1.

component can be established by an employee's uncontroverted statement on the Form CA-1.[5] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[6] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[7] The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

The Office denied the claim on the grounds that the September 29, 1997 incident was not established and on the grounds that the medical evidence was insufficient to establish that employment factors caused or aggravated his claimed condition. The Office found that appellant was inconsistent in his account of the claimed injury and that there was conflicting evidence about the incident. The Board notes that appellant's statement on his September 30, 1997 CA-1 form, that he was climbing stairs and the history of the injury contained in the initial medical reports regarding stair climbing seem inconsistent with the appellant's statements to Mr. Tamaru and his supervisor, Mr. Domingo, that he did not know how he hurt his back and did not know whether the injury was work related. However, appellant subsequently indicated that he had a job on the third floor of one of the quads and, while there was no direct impact, twisting to his body occurred while he was going up or down the stairs with his tool pouch, which weighed approximately 10 to 15 pounds. He further stated that it was not until he returned to the shop that he felt pain, which progressively worsened to the point he could barely walk. Appellant's job on the third floor of one of the quads on September 29, 1997 or the possibility that it involved stair climbing is undisputed. The Office noted that appellant's statements to Mr. Tamaru and his supervisor, Mr. Domingo, that he did not know how he hurt his back or whether the injury was work related. However, this is insufficient to establish that appellant did not climb stairs that day or aggravate his preexisting back condition by wearing his tool pouch while climbing the stairs. Neither Mr. Tamaru nor Mr. Domingo purport to have observed appellant climbing or walking up a flight of stairs to go to his job on the third floor of one of the quads. Moreover, appellant reported that he experienced pain in his left hip and lower back gradually and told Mr. Tamaru that something was wrong with his back. When the pain got unbearable, appellant took two hours of sick leave. The emergency room report of the next day reflects that nothing out of the ordinary happened during appellant's workday, but a slow onset of pain beginning at approximately 10:30 a.m. This is consistent with his statement that he had a gradual onset of pain. Although the employing establishment reported that Ms. Palanier, a receptionist at the Waianae Comprehensive Health Clinic stated that appellant was injured getting on or off his vehicle, no evidence exists in the record file to support or verify that statement. Moreover, the statements from appellant, Mr. Tamaru, Mr. Domingo and Mr. Messer,

[5] *See Carlone*, *supra* note 3.

[6] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[7] *Id.* at 255-56.

the physician's assistant who saw appellant in the emergency department on September 30, 1997, support appellant's account that he was working an ordinary day as a maintenance mechanic and experienced a gradual onset of back and left hip pain. As appellant's account of the claimed incident is essentially consistent with the facts of the case and his subsequent course of action, the Board finds that there are not sufficient discrepancies in the evidence to create serious doubt that on September 29, 1997 appellant was walking up stairs to attend to his job on the third floor of the quads and started to experience the start of a gradual onset of back and left hip pain. Consequently, the Board finds that the claimed incident occurred as alleged.

However, the medical evidence of record is insufficient to establish that the September 29, 1997 incident caused an injury. The medical evidence required to establish a causal relationship between the identified employment factors alleged and the presence or occurrence of the disease or condition, generally, is rationalized medical opinion evidence.[8] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. In this case, appellant has submitted medical evidence by way of a September 30, 1997 emergency room report, CA-16 forms which was issued to an emergency medical facility, MRI scans and x-ray reports, an October 2, 1997 workers' compensation patient visit report, work status certificates, a physical therapy report and WC-2 physicians' reports. The Board notes that the physical therapy report[9] and the September 30, 1997 emergency room report, which was rendered by a physician's assistant, are of no probative value in supporting appellant's claim.[10] The MRI scans and the x-ray report along with the other medical evidence of record by physicians fail to explain how walking or climbing stairs would cause or aggravate appellant's back and hip. Moreover, it is noted that the MRI scan predates the injury date by approximately 18 months and there is no rationalized opinion by a physician on how the findings 18 months prior is causally related to appellant's current claimed condition. Inasmuch as the objective testing and the physicians of record failed to present the medical rationale necessary to support an opinion that appellant's condition was causally related to his employment factors, the medical evidence is insufficient to support appellant's claim.

For these reasons, appellant, therefore, has failed to meet his burden of proof.

The Board further finds that the Office's Branch of Hearings and Review properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act 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

[8] *See Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959).

[9] As a physical therapist is not a physician for the purposes of the Act, these notes do not constitute medical evidence and are insufficient to establish appellant's claim; *see Barbara J. Williams*, 40 ECAB 649 (1989); *see also Jane A. White*, 34 ECAB 515 (1983); 5 U.S.C. § 8101(2).

[10] *See Shiela Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992) (physician assistants are not competent to render a medical opinion).

the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[12]

In the present case, the Office issued its decision on January 13, 1998. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing although dated February 12, 1998 was postmarked February 17, 1998 and received in the Office on February 20, 1998. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[13] As appellant's hearing request was postmarked February 17, 1998, it is outside the 30-day statutory limitation for the decision. Since appellant did not request a hearing within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.[14] In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

[11] 5 U.S.C. § 8124(b)(1).

[12] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[13] 20 C.F.R. § 10.131(a).

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

The decisions of the Office of Workers' Compensation Programs dated October 16, July 13, March 18 and January 14, 1998 are affirmed as modified.

Dated, Washington, D.C.
May 15, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member