U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP P. CORWIN and DEPARTMENT OF THE ARMY, VIRGINIA NATIONAL GUARD, Sandston, VA

Docket No. 99-1981; Submitted on the Record;
Issued September 5, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty on February 13, 1998; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On February 13, 1998 appellant, then a 36-year-old technician, filed a claim alleging that he sustained an injury to his back on that date when he removed a pallet from a building. In a decision dated March 29, 1999, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury. By letter dated April 8, 1999,[1] appellant requested reconsideration of his claim, which the Office denied in a nonmerit decision, dated April 16, 1999.

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on February 13, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 timely filed within the applicable time limitation period of the Act[3] and that an injury was

[1] Appellant dated his request for reconsideration April 8, 1998, however, this appears to be a typographical error.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron,* 41 ECAB 153 (1989).

sustained in the performance of duty.[4] These are essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

In support of his claim, appellant submitted office visit notes dated January 8 to February 9, 1999 from Dr. Steven M. Fiore, a Board-certified orthopedic surgeon. In an office visit note dated January 8, 1999, Dr. Fiore discussed appellant's complaints of back, left leg and testicular pain. Dr. Fiore noted that a magnetic resonance imaging (MRI) study revealed a herniated disc at L5-S1 impinging on the nerve roots. In an office visit note dated January 12, 1999, Dr. Fiore indicated that an MRI of appellant's thoracic spine revealed a herniated disc. In an office visit note dated February 9, 1999, Dr. Fiore recommended that appellant undergo a discectomy at L5-S1. Dr. Fiore, however, did not address the cause of appellant's condition and thus his office visit notes are insufficient to meet appellant's burden of proof.[6]

In a form report dated February 11, 1999, Dr. Fiore diagnosed a herniated disc at L5-S1 and checked "yes" that the condition was caused or aggravated by employment. The Board has held, however, that an opinion on causal relationship, which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to his employment, without any explanation or rationale for the conclusion reached, is insufficient to establish causal relationship.[7]

An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.[8] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified by appellant as causing his/her condition and, taking these factors into consideration as well as findings upon examination of appellant, state whether these employment factors caused or aggravated the diagnosed condition.[9] Appellant failed to submit such evidence and, therefore, failed to discharge his burden of proof.

The Board further finds that the Office properly denied appellant's request for reconsideration under section 8128.

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyet*, 41 ECAB 992 (1990).

[6] *Linda I. Sprague*, 48 ECAB 386 (1997) (Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

[7] *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

[8] *Willliam S. Wright*, 45 ECAB 498 (1993).

[9] *Id*.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by:

> (1) showing that the Office erroneously applied or interpreted a specific point of law; or
>
> (2) advancing a relevant legal argument not previously considered by the Office; or
>
> (3) submitting relevant and pertinent new evidence not previously considered by the Office.[10] Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[11]

In support of his request for reconsideration, appellant argued that a February 28, 1998 report from Dr. Ingram established a causal relationship between the February 13, 1998 employment incident and his back condition.[12] Appellant further contended that his physicians had informed him that continued heavy lifting after his initial injury to his back caused his herniated disc. However, the issue at hand is whether the medical evidence establishes that appellant sustained an injury on February 13, 1998 causally related to factors of his federal employment. As the issue is medical in nature, it can generally only be resolved through the submission of medical evidence.[13] Therefore, appellant's statement interpreting the medical evidence does not constitute relevant evidence sufficient to warrant a reopening of the case for merit review.

An abuse of discretion can generally only be 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.[14] Appellant has made no such showing here and thus the Board finds that the Office properly denied his application for reconsideration of his claim.[15]

[10] 20 C.F.R. § 10.606(b)(2).

[11] 20 C.F.R. § 10.608(b).

[12] Dr. Ingram's February 28, 1998 report does not appear to be in the record.

[13] *See James A. Long*, 40 ECAB 538 (1989).

[14] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

[15] The Board notes that appellant submitted additional evidence with his appeal. The Board's jurisdiction is limited to reviewing evidence, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may submit this evidence to the Office, together with a formal request for reconsideration pursuant to 20 C.F.R. § 10.606.

The decisions of the Office of Workers' Compensation Programs dated April 16 and March 29, 1999 are hereby affirmed.

Dated, Washington, D.C.
September 5, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member