U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATEO GALLOUPE and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 00-2565 Submitted on the Record;
Issued August 22, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met his burden of proof to establish that he developed a low back condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On November 24, 1999 appellant, then a 44-year-old mailhandler, filed an occupational disease claim alleging that his lower back condition was employment related.[1] Appellant did not stop work.

A May 17, 1995 medical report from a physician, whose signature was illegible, indicated that appellant had low back strain in the military in 1980, a 10 percent Veterans Administration (VA) disability and a lipoma removed from the chest wall in 1989.

In a September 28, 1999 compensation and pension examination report, which was unsigned, Dr. Richard Kotomori, Board-certified in general preventive medicine, noted that appellant was an army veteran who served from 1974 to 1976 and 1978 to 1980. Dr. Kotomori indicated that appellant was seen at the VA Hospital in January 1981 for low back pain and was hospitalized twice while on active duty. He indicated that appellant was injured while digging a fox hole in 1980.

A diagnosis of possible spondylosis was made and Dr. Kotomori noted that appellant made multiple visits to the emergency room over the year for low back pain. He noted that appellant's current job as a postal worker involved lifting mailbags weighing between 60 to 80 pounds, which only served to further aggravate his back pain. Dr. Kotomori indicated that the magnetic resonance imaging results scan showed L5-S1 facet disease as well as protrusion of the disc at L5-S1 and mild disc bulge at L3-5. He diagnosed degenerative changes of the

[1] The record reflects that appellant had two other claims. A lower back injury for June 9, 1999 (number 16-335508) and a back injury for June 18, 1998 (number 16-317936).

lumbosacral spine, with chronic low back pain, sciatica and degenerative changes of the cervical spine. Dr. Kotomori stated that appellant would continue to experience problems as long as he continued to lift and swing 60 to 80 pounds of mail. He recommended a change in employment or retraining so as to avoid continuous heavy lifting.

By letter dated October 26, 1999, which was received by the Office on January 26, 2000 appellant provided information concerning the work conditions that he felt contributed to his condition.

In an October 27, 1999 report, Dr. William I. Christensen, Board-certified in internal medicine, noted appellant's history of injury and treatment and diagnosed degenerative disc disease of the intervertebral discs and lumbosacral spine and chronic low back pain. Dr. Christensen indicated that he did not feel that appellant's back disease was related to his present employment. He noted that appellant was treated intermittently since 1981 and received compensation from the VA for his condition. The evaluating physician at the VA advised that appellant should seek another job or some other position that did not require lifting. He advised that appellant lift no more than 30 pounds and undergo a formal functional capacity evaluation to determine his precise work restrictions.

On October 27, 1999 the employing establishment offered appellant a limited-duty assignment, which consisted of no lifting more than 30 pounds, commencing on October 28, 1999. Appellant accepted this assignment.

In reports dated November 18 to 24, 1999, Dr. Robert Vitek, Board-certified in occupational medicine, indicated that appellant was seen for low back pain and discomfort with a history of herniated disc. Dr. Vitek diagnosed lumbar back pain/herniated disc/degenerative disease with chronic low back pain. He also advised limited duty and advised that appellant seek a different type of job assignment.

In an undated letter received by the Office on November 30, 1999, the Department of Veterans Affairs advised appellant that it was increasing his disability to 20 percent disabling. A rating decision accompanied this letter.

In December 10, 1999 letters, the Office requested that the employing establishment submit factual evidence concerning appellant's claim and advised appellant of the type of factual and medical evidence needed to establish his claim. The Office particularly requested that appellant submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

In a December 27, 1999 progress report, Dr. Vitek ordered a functional capacity evaluation, diagnosed degenerative disc disease of long duration and continued appellant's work restrictions.

On February 3, 2000 the Office received information from the employing establishment that included appellant's position description, attendance records and his most recent limited-duty assignment dated December 28, 1999.

In a January 10, 2000 progress report, Dr. Vitek indicated that appellant completed his functional capacity evaluation and his condition remained the same.

In a January 19, 2000 duty status report (CA-17), Dr. Harry Zaenger, Board-certified in internal medicine, indicated that appellant injured his low back by lifting and his diagnosis was due to chronic lower back pain. He advised that appellant could return to work in a limited-duty capacity.

In a January 19, 2000 progress report, Dr. Zaenger diagnosed chronic low back pain and indicated that appellant was seen for the results of a functional capacity evaluation. He indicated that appellant could return to work with lifting restrictions of up to 30 pounds, overhead lifting of 25 pounds and one-hand carry/pushing of 67 pounds on the left hand.

By decision dated February 28, 2000, the Office denied appellant's claim for compensation because the medical evidence was not sufficient to establish that his medical condition was caused by employment factors.

By letters dated April 25 and May 24, 2000,[2] appellant requested a hearing.

By decision dated July 19, 2000, the Office denied appellant's request for a hearing as untimely.

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury while in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 is causally related to the employment injury."[4] 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.[5]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for

[2] The record reflects that the letters were received by the Office on May 30, 2000. The postmark is May 25, 2000.

[3] 5 U.S.C. § 8101-8193.

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

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

which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[6] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[7]

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based upon a complete factual and medical background of the claimant,[8] must be one of reasonable medical certainty[9] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.

In this case, it is not disputed that appellant has a back condition or that he had workplace exposure to conditions alleged to have aggravated his condition. However, appellant has submitted no medical evidence establishing that the diagnosed condition is causally related to employment factors or conditions.

Appellant submitted a May 17, 1995 report from a physician whose signature was illegible indicating he had low back strain in the military in 1980. This report is of little probative value because it predates his alleged injury. An unsigned September 28, 1999 report from Dr. Kotomori is also of no probative medical value.[10]

In an October 27, 1999 report, Dr. Christensen noted that appellant had preexisting degenerative disc disease, but he did not feel that it was related to his present employment. Thus, his report negates appellant's claim that his condition was employment related.

Dr. Vitek, in reports from November 18 to December 27, 1999, consistently diagnosed lumbar back pain with herniated disc and degenerative disc disease with chronic low back pain. However, the physician did not provide a rationalized medical opinion,[11] based on reasonable medical certainty, that there was a causal relationship between appellant's preexisting condition and any specific workplace factors.

An award of compensation may not be based upon surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor

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[6] *See Victor J. Woodhams,* 41 ECAB 345, 352 (1989).

[7] The Board has held that, in certain cases, where the causal connection is so obvious, expert medical testimony may be dispensed; *see Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

[8] *William Nimitz, Jr.* 30 ECAB 567, 570 (1979).

[9] *See Morris Scanlon,* 11 ECAB 384, 385 (1960).

[10] *See Merton J. Sills,* 39 ECAB 572 (1988).

[11] *Victor J. Woodhams,* 41 ECAB 345 (1989).

the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office, therefore, properly denied appellant's claim for compensation.

The Board further finds that the Office properly denied appellant's request for an oral hearing.

Section 8124(a) of the Act provides, in pertinent part, 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12] 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 the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing.

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 hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[13]

In this case, the Office issued its decision denying appellant's claim for compensation benefits on February 28, 2000. Appellant's letter requesting a hearing was dated April 25, 2000. Because appellant did not request a hearing within 30 days of the Office's February 28, 2000 decision, 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 this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that the issue could be equally well resolved by a request for reconsideration. There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

[12] 5 U.S.C. § 8124(a).

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

[14] *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

The July 19 and February 28, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 22, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member