U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL BRUMMETT and DEPARTMENT OF THE ARMY, U.S. ARMY RESERVE, Fort McCoy, WI

Docket No. 01-1047; Submitted on the Record;
Issued December 18, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained an injury on March 22, 2000 causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On March 30, 2000 appellant, then a 48-year-old mobile equipment inspector, filed a traumatic injury claim alleging that, while at work on March 22, 2000, he suffered lower back pain, which radiated into the left leg while unloading nine large tires. Appellant stopped work on March 28, 2000 and has not returned.

In support of the claim, appellant submitted disability slips, which reported that he was disabled from work until approximately June 15, 2000 and treatment notes from Dr. Steven Brenner, a Board-certified neurologist, dated April 4 through June 9, 2000. In a report dated April 4, 2000, Dr. Brenner indicated that he had treated appellant for a few years for a large herniated disc for which he previously underwent surgery in 1993. He reported that appellant had back problems since 1969 when he injured his back in Vietnam and that in 1994 he was determined medically disqualified for reserve military duty. Dr. Brenner indicated that appellant's pain had primarily been in the low back region and left leg, which persisted since 1969, however, that it worsened after his back surgery. Appellant related to the physician that he had recently hurt his back after 15 minutes of unloading 9 heavy tires in a motor pool and that although he experienced some pain he continued to work that day. Dr. Brenner concluded that appellant appeared to have increased low back pain after performing lifting work at his place of employment, after helping unload heavy nine, 100-pound tires.

In a letter dated October 12, 2000, the Office advised appellant that additional evidence was necessary in order to establish the claim. The Office advised that the medical evidence submitted indicated that appellant had a preexisting back condition. The Office then requested that appellant submit a physician's report including dates of examination and treatment; the history of injury given by him; a detailed description of the findings and diagnosis and a

physician's opinion as to how the reported work incident caused or aggravated the claimed injury.

In response, appellant submitted some duplicate reports and others dated from April 4 through July 22, 2000. In a report dated May 15, 2000, Dr. Brenner reported that he saw appellant again for conditions including continued back pain, left leg numbness and tingling in his foot and that he could not lift his 13-pound daughter nor do any other heavy lifting. In a July 22, 2000 report, Dr. Brenner outlined the information related in his report dated April 4, 2000 regarding appellant's medical and employment history. He further indicated that a lumbar myelogram performed around June 1, 2000 showed no evidence of recurrent or residual disc herniation, mild spondylolisthesis at L5-S1 and evidence of his prior surgery at L5-S1 levels with laminectomy on the left.

By decision dated December 6, 2000, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that the claimed conditions were caused by the employment event.

In a letter postmarked January 11, 2001, appellant requested an oral hearing. By decision dated February 13, 2001, the Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act.

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained an injury while in the performance of his duties on March 22, 2000, as alleged.

An employee seeking benefits under the Act[1] has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The Office accepted that the work incident occurred as alleged. The question for determination, then, is whether the incident of March 22, 2000 caused or aggravated appellant's diagnosed back condition.

Causal relationship is a medical issue[2] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[3] must be one of reasonable medical certainty[4]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Mary J. Briggs*, 37 ECAB 578 (1986).

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

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

and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[5]

In this case, the medical evidence accompanying appellant's claim lacks probative value. Dr. Brenner's opinion is generally supportive of appellant's claim, but it is of diminished probative value because he has not provided sound medical rationale explaining how the incident of March 22, 2000 caused or aggravated appellant's back condition. Dr. Brenner discussed appellant's long history of back pain, including knowledge of an injury in 1969 and a 1993 back surgery along with his three-year treatment of appellant's back symptoms. After relating appellant's medical background, Dr. Brenner did not explain from an orthopedic or neurological point of view how unloading tires in a motor pool at work on or about March 22, 2000 caused or aggravated appellant's diagnosed condition. In the absence of rationalized medical opinion evidence diagnosing a condition causally related to appellant's employment factors, appellant has failed to demonstrate that he sustained an injury in the performance of duty.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."[6] 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.[7]

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.[8]

In this case, the Office issued its decision denying appellant's claim for a traumatic injury causally related to employment factors on December 6, 2000. Subsequently, appellant requested an oral hearing by letter dated January 9, 2001, which was postmarked January 11, 2001. The

[5] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[6] 5 U.S.C. § 8124(b)(1).

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

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

Board finds that the hearing request was made more than 30 days after the Office's decision, and thus, it was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

In its decision dated February 13, 2001, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was also denied on the grounds that he could address the issue equally well on reconsideration, by submitting new medical evidence establishing causal relationship. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[9] The Board finds that in this case, there is no evidence that the Office abused its discretion in denying appellant's request for a hearing. Consequently, the Office properly denied appellant's hearing request.

The February 13, 2001 and December 6, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.[10]

Dated, Washington, DC
December 18, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

[10] With appellant's request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from having the Office consider this evidence as part of a reconsideration request.