U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN J. BARNES and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH

Docket No. 00-866; Submitted on the Record;
Issued February 13, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury in the performance of duty on January 15, 1999; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

On January 22, 1999 appellant, a 41-year-old police officer, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that she was involved in a motor vehicle accident on January 15, 1999 while in the performance of duty. Appellant sustained a fractured right pelvis and a broken rib on her left side. She attributed the accident, in which her personal vehicle was totaled, to driving under hazardous road conditions. The employing establishment challenged appellant's claim on the basis that she sustained her injuries while en route to work at a time when she was not engaged in any off-premises employment duties.

After further development of the record, the Office denied appellant's claim by decision dated May 27, 1999. The Office explained that, because appellant was traveling from her home en route to work at the time of her injury, she was not covered under the Federal Employees' Compensation Act.[1]

Appellant subsequently requested reconsideration on August 6, 1999. In a decision dated August 16, 1999, the Office denied appellant's request without reviewing the merits of her claim.

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty on January 15, 1999.

In the present case, appellant was injured off-premises while commuting to work.[2] The Board has recognized, as a general rule, that off-premises injuries sustained by employees having

[1] 5 U.S.C. §§ 8101-8193.

[2] On the date of her injury, appellant was scheduled to work from 6:00 a.m. to 6:00 p.m. and she was involved in a motor vehicle accident at approximately 5:40 a.m. while en route to work.

fixed hours and places of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself that are shared by all travelers. There are, however, recognized exceptions that are dependent upon the particular facts relative to each claim. These pertain to the following instances: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.[3]

Appellant has not demonstrated that the circumstances surrounding her January 15, 1999 injury satisfy any of the above-noted exceptions to the "going and coming" rule. Appellant's only contention is that, but for a recent change in her work schedule from an 8-hour shift to a 12-hour shift, she would not have been on the Interstate highway at the time of her January 15, 1999 motor vehicle accident. Having been unfairly "forced" to work this extended schedule, appellant argued that the employing establishment should be held accountable for the injuries she sustained while attempting to arrive at work by 6:00 a.m. on January 15, 1999.[4]

As noted in the record, the employing establishment implemented a change in work schedule in November 1998, whereby the effected employees, including appellant, were required to work 12-hour shifts instead of their prior 8-hour shifts. The schedule change met with some opposition and the record indicates that the employing establishment was subsequently deemed to have violated certain contract provisions with respect to the implementation of a compressed work schedule. Nonetheless, whether appellant's fixed tour of duty had been inappropriately changed in the weeks preceding her injury is not a relevant factor in determining whether appellant's off-premises injury occurred while in the performance of duty on January 15, 1999. Appellant's theory of liability on the part of the employing establishment does not satisfy any of the noted exceptions to the "going and coming" rule. Accordingly, the Office properly denied appellant's claim based upon her failure to demonstrate that she sustained an injury while in the performance of duty.

The Board also finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (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.[5] Section 10.608(b) provides that, when an

[3] *Marthell T. Adams*, 49 ECAB 410, 414 (1998).

[4] Appellant indicated that had her schedule not been changed to a 12-hour shift, she would have been required to work from 3:00 p.m. to 11:00 p.m. on January 15, 1999. As such, appellant argued that had she not been "forced" to work a 12-hour shift, she would not likely have been subjected to the hazardous driving conditions she encountered at 5:40 a.m. on January 15, 1999, when the Interstate highway had yet to be cleared of accumulated ice and snow. The record indicates that appellant and her fellow coworkers had regularly worked 12-hour shifts for approximately seven weeks prior to appellant's injury on January 15, 1999.

[5] 20 C.F.R. § 10.606(b)(2) (1999).

application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

Appellant's August 6, 1999 request for reconsideration, neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant provided a number of additional documents regarding her change in work schedule. As previously discussed, the propriety of the November 1998 change in work schedule is not relevant to the determination of whether appellant's January 15, 1999 injury occurred while in the performance of duty.[7] Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's August 6, 1999 request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 16 and May 27, 1999 are hereby affirmed.

Dated, Washington, DC
February 13, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] 20 C.F.R. § 10.608(b) (1999).

[7] Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).