U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERTO A. TOSCANO and U.S. POSTAL SERVICE,
ARCADIA POST OFFICE, Phoenix, AZ

Docket No. 00-762; Submitted on the Record;
Issued January 2, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an employment injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a written review of the record as untimely.

On March 2, 1999 appellant, then a 25-year-old mail carrier, filed a notice of traumatic injury, alleging that he hurt his right shoulder on November 1, 1998 while lifting a heavy tub of mail. The employing establishment controverted the claim on the basis that appellant gave varying histories of the injury.

In a March 1, 1999 report, Dr. Daniel H. Heller, an attending Board-certified orthopedic surgeon, diagnosed a right acromioclavicular joint internal derangement and noted that appellant indicated the injury occurred on or near November 1, 1998 when he was picking up a tub of mail. He related that appellant told him he had informed his supervisor about his shoulder and continued to work.

In a March 3, 1999 statement, Catherine Mondragon, a customer service supervisor, related that appellant complained to her of pain in his right shoulder on February 22, 1999 and told her he had hurt himself when he fell off his motorbike. She added that appellant indicated that his shoulder had been hurting previously but that she could not recall his reporting of any work-related shoulder injury.

In a statement dated March 9, 1999, appellant stated that he injured his shoulder sometime in early November 1998 while loading a tub of mail. He stated that he heard a pop and had pain at the time, but did not go to have it checked out until February 23, 1999. Appellant also noted that he told Sherri P. about incident at the time it occurred as she noticed that he was holding his shoulder. He also noted he told Ms. Mondragon that he was going to

have his shoulder checked out on February 23, 1999 as he had fallen off his dirt bike the previous day onto his right side, but that his "shoulder was still popping out of joint before that."

By letter dated March 26, 1999, the Office advised appellant that the information submitted was insufficient to establish his claim and that additional documentation was required.

In a March 26, 1999 magnetic resonance imaging scan, Dr. Arthur B. Radow, a Board-certified diagnostic radiologist, noted normal alignment and signal intensity of the bony structures. He stated that the test did not identify a definite rotator tear and that "[t]he possibility of impingement syndrome should be ascertained clinically."

By decision dated May 24, 1999, the Office determined that fact of injury had not been established and denied appellant's claim.

By letter dated June 27, 1999, appellant requested a written review of the record.

By decision dated September 24, 1999, the Office denied appellant's request for a written review of the record on the basis that his request was untimely and that the issue would be better addressed by a request for reconsideration and submitting additional evidence.

The Board finds appellant has not established that he sustained an employment injury in the performance of duty.

To determine whether an employee satisfied his or her burden of proof, the Office first considers whether the employment incident occurred at the time, place and in the manner alleged.[1] Second, the Office must determine whether there is a causal relationship between the employment incident and the disability and/or condition for which compensation is claimed.[2] An employee has the burden of establishing the occurrence of the event at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence.[3] Thus, an employee may satisfy the burden of proof establishing that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition is related to that incident.

In this case, appellant has submitted insufficient factual evidence to establish that the alleged November 1, 1998 incident occurred as claimed. In the March 2, 1999 claim form, he noted a cause of injury, but could not specifically identify the date in November when it occurred. Also, appellant did not seek medical treatment until February 23, 1999, more than three months following the claimed early November 1998 injury. Moreover, he sought medical treatment because he had fallen off his dirt bike onto his right shoulder the day before. Ms. Mondragon, his supervisor, does not recall him reporting an employment-related shoulder

[1] *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *Elaine Pendleton*, 40 ECAB 1145 (1989).

[2] *Calvin E. King*, 51 ECAB ___ (Docket No. 98-922, issued March 24, 2000); *see Elaine Pendleton*, *supra* note 1 at 1147.

[3] *Sherman Howard*, 51 ECAB ___ (Docket No. 98-599, issued March 24, 2000); *Brian H. Derrick*, 51 ECAB ___ (Docket No. 98-119, issued March 29, 2000).

injury in November 1998. Lastly, appellant identified Sheri P. as being present when he allegedly injured his shoulder, but did not submit a statement from her.

Although appellant was advised in detail of the evidence needed to establish his claim for traumatic injury, he did not submit this information. There is insufficient factual evidence of record to establish that the alleged November 1, 1998 incident occurred at the time, place and in the manner alleged. Appellant has therefore failed to meet the first, threshold element of his burden of proof. In view of the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.[4]

Next, the Board finds that the Office properly denied appellant's request for a written review of the record as untimely

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant … is entitled, on request made within 30 days after the date of the issue of the decision, to a hearing on his claim before a representative of the Secretary."[5] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[6] Thus, a claimant has a choice of requesting an oral argument or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulations.

Section 10.616(a) of the Office's regulations[7] provides in pertinent part that "the hearing request must be sent within 30 days as determined by postmark or other carrier's date of marking of the date of the decision for which a hearing is sought."

The Board has held that the Office in its broad discretionary authority in the administration of the Act, has the power to hold hearings in circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[8] 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,[9] when the request is made after the 30-day period for requesting a hearing[10] and when the request

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[4] *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in a claimant's statements describing the injury created serious doubt that the injury was sustained in the performance of duty).

[5] 20 C.F.R. § 8124(b)(1).

[6] 20 C.F.R. § 10.615 (1999).

[7] 20 C.F.R. § 10.616(a) (1999).

[8] *Samuel R. Johnson*, 51 ECAB ___ (Docket No. 99-1228, August 1, 2000).

[9] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[10] *Herbert C. Holley*, 33 ECAB 140-42 (1981).

is for a second hearing on the same issue.[11] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[12]

In this case, appellant's June 27, 1999 request for a review of the written record, which was postmarked June 28, 1999, was made more than 30 days after the date of issuance of the Office's May 24, 1999 decision. Therefore, the Office was correct in stating in its September 24, 1999 decision that appellant was not entitled to a review of the written record.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its November 27, 1995 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by the submission of additional evidence.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[13] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

[11] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[12] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[13] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated September 24 and May 24, 1999 are affirmed.

Dated, Washington, DC
January 2, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member