U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELGA CHRISTENSEN and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, GIFFORD PINCHOT NATIONAL FOREST, Vancouver, WA

Docket No. 00-2729; Submitted on the Record;
Issued July 18, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury to her left shoulder in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On August 13, 1999 appellant, then a 39-year-old cartographer, filed a notice of occupational disease and claim for compensation, alleging that she sustained left shoulder sprain/strain as a result of working on her computer in the course of her employment.

Appellant submitted a billing statement from M.W. Rehabilitation and Physical Therapy, and a duty status report dated August 26, 1999 by Dr. Rohit Desai, an internist, referring appellant to physical therapy. Dr. Desai found appellant had a left acromioclavicular strain and further noted: "We were not informed of possible work connection."

By letter dated September 8, 1999, the Office requested further information. In response thereto, appellant noted that she worked as a cartographer at a computer, that she developed a pain in her shoulder and that her doctor referred her to a physical therapist who stated that he "sees many 'computer' related cases such as [hers]." In a note dated November 21, 1999, appellant wrote that she had tried to contact the Office and that, if she did not hear further, she would assume that the information she provided would be sufficient.

In a decision dated November 30, 1999, the Office denied appellant's claim, finding that the evidence was insufficient to establish the relationship between the employment factor and the medical condition, because no medical opinion had been submitted which indicated the cause of appellant's left shoulder condition.

By letter dated January 1, 2000 and postmarked January 3, 2000, appellant requested an oral hearing. This request was denied by the Office on January 18, 2000 as it was untimely filed.

By letter dated January 28, 2000, appellant requested reconsideration and submitted a note from Dr. Desai, who stated:

> "The above named was seen in clinic for left shoulder pain on April 13, 1999. There was no history of any definite precipitating event/injury. Any physical activity involving use of left shoulder (repeatedly) may possibly have caused/aggravated it."

Appellant also submitted a letter from her physical therapist dated December 20, 1999 who indicated that she treated appellant from April 14 through 23, 1999 for an inflammatory response or muscle strain, and that the possibility of the injury occurring at work was strong. It was noted that appellant used her upper extremities repetitively during her workday which could contribute to increased left shoulder pain.

By decision dated May 24, 2000, the Office denied modification, as the evidence submitted in support of reconsideration was not sufficient to warrant modification of the prior decision.

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

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim,[2] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[3] that the claim was timely filed within the applicable time limitation period of the Act,[4] 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 are causally related to the employment injury.[5] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6] However, proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[7]

In order to determine whether an injury was sustained in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, "fact

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Louise F. Garnett,* 47 ECAB 639, 643 (1996); *Daniel R. Hickman*, 34 ECAB 1220 (1983).

[3] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101.

[4] 5 U.S.C. § 8122.

[5] *Louise F. Garnett, supra* note 2.

[6] *See Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

of injury" consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally can only be established by medical evidence.[8] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.[9]

The medical evidence submitted by appellant is of limited probative value. Initially, the Board notes that a physical therapist is not a physician under the Act and is therefore not competent to give a medical opinion.[10] Accordingly, the reports of appellant's physical therapist are of no probative value in establishing that appellant sustained a medical condition causally related to working on her computer.

Dr. Desai noted in his duty status report that he was not informed of a possible work connection pertaining to appellant's left shoulder complaints. In his report of December 30, 1999, he did not provide a rationalized medical opinion relating appellant's work duties to her diagnosed condition. Rather, he noted that there "was no history of any definite precipitating event/injury." An award of compensation may not be made on the basis of surmise, conjecture or speculation, or on appellant's unsupported belief of causal relation.[11] Accordingly, appellant failed to establish an injury in the performance of duty.

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

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[2]

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request. The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[12] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[13]

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[8] *Id.; Linda S. Christian*, 46 ECAB 598 (1995).

[9] *Louise F. Garnett, supra* note 2.

[10] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[11] *Alfredo Rodriguez*, 47 ECAB 437, 441 (1996).

[12] *Herbert C. Holley*, 33 ECAB 140 (1981).

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

In this case, appellant's request for a hearing was postmarked January 3, 2000. The decision of the Office was dated November 30, 1999. As more than 30 days had elapsed, the request for oral hearing was not timely filed. The Office reviewed appellant's request under its discretion and denied appellant's request for the reason that the case could equally well be addressed by requesting reconsideration from the district office and submitting new evidence in support of her claim. 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 deductions from know facts.[14] There is no evidence in this case that the Office abused its discretion.

The decisions of the Office of Workers' Compensation Programs dated May 24 and January 18, 2000, and November 30, 1999 are affirmed.

Dated, Washington, DC
July 18, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[14] *Donald J. Perea*, 42 ECAB 214 (1990).