U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETE VIGIL and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Denver, CO

Docket No. 00-1379; Submitted on the Record;
Issued May 18, 2001

DECISION and ORDER

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

The issues are: (1) whether appellant sustained a right hand injury on August 4, 1999, causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's requests for further merit review under 5 U.S.C. § 8128(a).

On August 5, 1999 appellant, then a 53-year-old housekeeping aide, filed a traumatic injury claim, alleging that on August 4, 1999 he sustained a cut, bruise and swelling when he placed his cleaning cart in a closet and the door slammed on his right hand. Appellant did not stop work.

To support his claim, appellant submitted progress notes dated August 6 to 9, 1999, from Dr. Loretta A. Knauf, who provided a history of appellant's injury and noted redness, swelling, difficulty gripping and pain. She diagnosed cellulitis of the right hand, which "appears older" than the past 20 to 24 hours. On August 6, 1999 she related that appellant "still insists he did not forcefully hit anything" with his right hand.

By letter dated August 25, 1999, the Office advised appellant that the evidence of record was insufficient and requested additional factual and medical evidence to support his claim.

In response, appellant submitted an August 6, 1999 report from Dr. Kavita Garg, a radiologist, stating that x-rays revealed no evidence of fracture or dislocation.

Appellant also submitted an attending physician's report dated August 16, 1999 from Dr. Steven Oboler, Board-certified in internal medicine. He noted appellant's symptoms and diagnosed cellulitis of the right hand. Dr. Oboler stated: "The scabbed and healing areas on [appellant's] hand make it unlikely that [his] injury occurred only 20 to 24 hours earlier [than August 5]." Dr. Oboler questioned whether the condition was caused or aggravated by an employment factor and stated that the injury appeared "older."

By letter dated September 29, 1999, the Office advised appellant of a conflict regarding the date of his alleged injury and requested that he provide additional information.

In response, appellant alleged that he sustained an injury on August 4, 1999 and that he first obtained medical treatment on August 5, 1999.

By decision dated October 19, 1999, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that his right-hand condition was causally related to the August 4, 1999 employment incident. The Office noted Dr. Oboler's report that appellant's wound was older than 20 to 24 hours on August 5, 1999, the date of treatment.

By letter dated December 23, 1999, appellant requested reconsideration. He argued that the Office improperly considered Dr. Oboler's August 16, 1999 report because the doctor did not examine him.

By decision dated December 9, 1999, the Office denied reconsideration on the grounds that the evidence submitted in support of the request was repetitious and insufficient to warrant review of its prior decision. The Office noted that Dr. Oboler based his observations on the clinical notes from the employing establishment's health facility.

By letter dated January 6, 2000, appellant again requested reconsideration. He argued that a nurse's note indicating that appellant's alleged injury occurred 20 to 24 hours prior to the examination was consistent with the August 4, 1999 employment incident.

By decision date January 14, 2000, the Office denied appellant's reconsideration request as insufficient to warrant merit review.[1]

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury on August 4, 1999, causally related to his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period 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.[3] Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[4]

[1] Subsequent to the Office's January 14, 2000 decision, appellant submitted additional evidence. However, the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. The Board, therefore, does not have jurisdiction to review any evidence submitted to the record after the Office's January 14, 2000 decision. *Timothy D. Douglas*, 49 ECAB 558 (1998). 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition relates to the employment incident. As the Office did not dispute that the August 4, 1999 employment incident occurred at the time, place and in the manner alleged, the remaining issue is whether the alleged injury was caused by the employment incident.

In order to satisfy his burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[7] Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's alleged injury and the employment incident. The physician's opinion must be based on a complete factual and medical history of the employee, must be of reasonable certainty and must rationally explain the relationship between the diagnosed injury and the employment incident as alleged by the employee.[8]

The medical evidence of record fails to show that appellant sustained an injury on August 4, 1999, causally related to his federal employment. The progress notes dated August 5 to 9, 1999 included a diagnosis of cellulitis of the right hand, but did not rationally explain the relationship between appellant's condition and the August 4, 1999 employment incident. Dr. Garg's August 6, 1999 report did not address the causal relationship issue.

In his August 16, 1999 report, Dr. Oboloer diagnosed cellulitis and agreed with Dr. Knauf that appellant's injury appeared to be older than 20 to 24 hours. Furthermore, prior to the August 5, 1999 date of treatment, he questioned whether the alleged injury was employment related. There is no other medical evidence of record establishing a causal relationship between appellant's hand condition and the August 4, 1999 employment incident. Therefore, the Board finds that appellant has failed to meet his burden of proof.

The Board further finds that the Office acted within its discretion in denying appellant's requests for further merit review.

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[5] *See John J. Carlone*, 41 ECAB 354 (1989).

[6] *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *Elaine Pendleton, supra* note 3 at 1145.

[7] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[8] *See Shirley R. Haywood*, 48 ECAB 404, 407 (1997).

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation previously awarded; or
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> (2) award compensation previously refused or discontinued."

To warrant granting merit review, a claimant's reconsideration request must set forth arguments and contain evidence that either, (1) shows that the Office erroneously applied or interpreted a specific point of law, (2) advance a relevant legal argument not previously considered by the Office, or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[10] Where such evidence and arguments are present, the Office must reopen a case for further merit review.[11]

Section 10.608(b) of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[12] The submission of evidence or argument that repeats or duplicates evidence or argument already considered by the Office does not constitute a basis for reopening a case for further review on the merits.[13]

In this case, the Office properly found that appellant, in his December 23, 1999 and January 6, 2000 reconsideration requests, did not submit new or relevant evidence showing that the Office erroneously applied or interpreted a specific point of law. Nor did he advance a relevant legal argument not previously considered. Appellant merely expressed his disagreement with the Office's prior decisions but did not submit any evidence addressing the threshold issue of whether his alleged injury was causally related to the August 4, 1999 employment incident. Therefore, the Office properly denied appellant's request for merit review.

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[9] *Jimmy L. Day*, 48, ECAB 654, 655 (1997). *See Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[10] 20 C.F.R. § 10.606(b)(2); *Alton L. Vann*, 48 ECAB 259, 269 (1996).

[11] *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

[12] 20 C.F.R. § 10.608(b).

[13] *David E. Newman*, 48 ECAB 305, 308 (1997)*; see Eugene F. Butler*, 36 ECAB 393, 398 (1984).

The January 14, 2000 and December 9 and October 19, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 18, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member