U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHERINE SULLIVAN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

Docket No. 00-947; Submitted on the record;
Issued November 28, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On September 28, 1998 appellant, then a 39-year-old revenue officer filed a notice of traumatic injury and claim for continuation of pay/compensation, Form CA-1, alleging that while in the course of her employment, she injured her right hand, arm and shoulder. Appellant alleged that she was injured on July 22, 1998 when a filing cabinet drawer she was opening lost a ball bearing, causing it to shift to the right. This caused her right hand, arm and shoulder to be jerked. On the reverse of the form, appellant's supervisor indicated that appellant had not stopped working.

Evidence of record includes a progress note from Dr. Frank Kotzur, a Board-certified family practitioner, dated August 4, 1998, indicating findings consistent with carpal tunnel syndrome. Additionally, appellant forwarded several therapy notes from Steve Ary, a physical therapist.

In a February 1, 1999 letter, the Office advised appellant of the factual and medical evidence needed to determine whether she was eligible for benefits under the Federal Employees' Compensation Act.[1] In particular, appellant was asked to provide a comprehensive medical report and a physician's opinion, with medical reasons for such opinion, as to how the work incident caused or aggravated the claimed injury.

By decision dated March 9, 1999, the Office denied appellant's claim on the grounds that the evidence of record failed to support the fact that an injury was sustained as alleged.

[1] 5 U.S.C. §§ 8101-8103.

Subsequent to the Office's March 9, 1999 decision, appellant submitted two radiology reports. The first, dated December 17, 1998, is signed by Dr. G.M. Padron, a Board-certified radiologist. Dr. Padron performed a magnetic resonance imaging of appellant's cervical spine and found that the test indicated a mild intervertebral disc space narrowing at the C5-6 level. Dr. Padron also indicated that appellant had a moderate Grade II posterior central disc bulge weighted towards the right at the C5-6 and C6-7 levels.

The second radiology report, dated December 1, 1998, signed by Dr. Arthur Smith, a Board-certified radiologist, revealed a straightening of the normal lordortic cervical curvature.

Appellant also submitted a copy of Dr. Kotzur's August 4, 1998 medical report and medical reports from Dr. Kotzur dated October 22, November 11 and December 1, 1998, in which he diagnosed appellant as having a cervical sprain.

Finally, appellant submitted a narrative report from Dr. Ian F. Angel, a Board-certified neurosurgeon, dated September 28, 1998. Dr. Angel diagnosed mild carpal tunnel syndrome on the right, as well as chronic right C5-6 radiculopathy.

By letter dated June 23, 1999, appellant requested a hearing before an Office hearing representative.

On July 30, 1999 the Office found that appellant was not entitled to a hearing as a matter of right as her request was not made within 30 days of the date of the Office's March 9, 1999 decision. Additionally, the Office determined that the matter could be further pursued through the reconsideration process. The instant appeal follows.

Initially, the Board finds that appellant failed to establish that she sustained an injury in the performance of duty.

An employee seeking benefits under the Act has the burden of establishing that the essential elements of his or her 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 are causally related to the employment injury.[2] These are essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered, in conjunction

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

[3] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

with one another. The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred.[4]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as an attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[5]

There is no dispute that appellant is an employee, or that she would have opened a file cabinet drawer in September 1998 when she claimed to have been injured. However, there is insufficient medical evidence to establish that opening a file cabinet drawer caused or aggravated a medical condition.

In the instant case, the medical report from Dr. Kotzur notes that appellant is complaining of pain in the right arm, but does not specifically address an injury to appellant's hand, arm and shoulder, or address the cause of any injury. The only additional evidence submitted prior to the Office's March 9, 1999 decision,[6] consists of physical therapy reports.[7]

As noted above, part of appellant's burden of proof includes the submission of probative medical evidence establishing that the claimed condition is causally related to employment factors. As appellant has not submitted such evidence, she has not met her burden of proof in establishing her claim.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a hearing as untimely.

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 certain circumstances where no legal provision was made for such hearings and that the Office must exercised this discretionary authority in deciding whether to grant a hearing.[8] In the present case, appellant's request for a hearing on June 23, 1999 was made more than 30 days after the issuance of the Office's prior decision dated March 9, 1999. Hence, the Office was correct in stating in its July 30, 1999

[4] *Elaine Pendleton, supra* note 2.

[5] *John M. Tornello,* 35 ECAB 234 (1983).

[6] Appellant submitted several medical reports after the Office's March 9, 1999 decision. The Board's jurisdiction is limited to evidence which was before the Office at the time it rendered the final decision. Inasmuch as the Office did not consider this evidence, it cannot be considered on review by the Board. 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting such evidence to the Office as part of a reconsideration request.

[7] A physical therapist is not considered to be a physician under the provisions of the Act and is not competent to render a medical opinion, therefore, the reports from Steve Ary are of no probative value. *Charley V.B. Harley,* 2 ECAB 208, 211 (1949).

[8] *Henry Moreno,* 39 ECAB 475, 482 (1988).

decision, that appellant was not entitled to a hearing as a matter of right because his request was not made within 30 days of the Office's March 9, 1999 decision.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its July 30, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issued in question could be addressed through a reconsideration application. 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.[9] In the present 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.

The July 30 and March 9, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 28, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

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