U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELSIE C. NOWINSKI and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Palo Alto, CA

Docket No. 01-366; Submitted on the Record;
Issued September 24, 2001

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an injury while in the performance of duty on July 14, 2000; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On July 17, 2000 appellant, then a 35-year-old food service worker, filed a traumatic injury claim alleging that on July 14, 2000 part of her ear was bitten off during a fight with a coworker. Appellant stopped work on July 14, 2000 and returned to work on July 29, 2000. Medical evidence and a document indicating appellant's leave status and receipt of compensation following the alleged incident accompanied her claim.

By letter dated August 18, 2000, the Office advised appellant to submit factual evidence in support of her claim. Appellant did not respond.

In a September 28, 2000 decision, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. In a letter dated October 28, 2000, appellant requested an oral hearing before an Office representative. The letter was postmarked November 1, 2000.

By decision dated November 9, 2000, the Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act.[1]

[1] 5 U.S.C. §§ 8101-8193.

The Board finds that appellant failed to establish that she sustained an injury while in the performance of duty on July 14, 2000.[2]

The Act provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation law, namely, "arising out of and in the course of employment."[4] "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her master's business, at a place where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to compensation. The employee must also establish the concurrent requirement of an injury "arising out of the employment." "Arising out of the employment" requires that a factor of employment caused the injury.[5] Larson, in addressing assaults arising out of employment, states the following:

> "Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor...."[6]

In this case, appellant's sole allegation is that part of her ear was bitten or torn off during a fight with a coworker on July 14, 2000. Appellant, however, failed to submit any details such as the name of the coworker and the time, place and manner of the assault. In addition, appellant failed to submit any corroborative evidence of the fight such as witness statements. Therefore, the Board finds that appellant has failed to satisfy her burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of

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[2] On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. § 8102.

[4] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *Veleria Minus*, 46 ECAB 799 (1995); *Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury).

[6] A. Larson, *The Law of Workers' Compensation* § 8.00 (1999).

the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[7] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[8]

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[9] Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.[10]

In this case, the Office issued its decision on September 28, 2000. In a letter dated October 28, 2000, but postmarked November 1, 2000, appellant requested a hearing. The Board finds that the hearing request was made more than 30 days after the Office's decision and thus was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

The November 9 and September 28, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 24, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[7] 5 U.S.C. § 8124(b)(1).

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[9] *Tammy J. Kenow*, 44 ECAB 619 (1993).

[10] *Id.*