U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CLARENCE G. ARMSTRONG and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Huntsville, AL

*Docket No. 02-565; Submitted on the Record;*
*Issued August 16, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS

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

On September 19, 1999 appellant, then a 39-year-old automation clerk, filed a traumatic injury claim alleging that he pulled a muscle in his lower back while leaning over to lift a tray of mail. In a report dated September 29, 1999, Dr. Frank P. Haws, Board-certified in neurological surgery, diagnosed a lumbar disc disorder. He performed a laminectomy at L5-S1 on October 12, 1999. The employing establishment controverted the claim on the grounds that appellant had requested time off twice to finish rebuilding his house and had returned to work for only a week before reporting his injury.

By letter dated December 3, 1999, the Office requested further factual and medical information from appellant, specifying that his treating physician needed to explain how he herniated a disc just from leaning over. On March 6, 2000 the Office denied appellant's claim on the grounds that he had failed to sustain an injury while in the performance of duty.

Appellant timely requested a hearing, which was held on August 1, 2000. On October 25, 2000 the hearing representative remanded the claim for further medical development. The hearing representative found that the work incident had occurred as alleged, but that the medical evidence was insufficient to establish a causal relationship between his herniated disc and the work incident.

On November 15, 2000 the Office informed appellant that he needed to submit medical evidence from his physician establishing the requisite causal relationship. On January 4, 2001 the Office denied appellant's claim on the grounds that the November 22, 2000 letter from Dr. Robert L. Hash II, a Board-certified neurological surgeon, was insufficient to establish a causal relationship.

On February 7, 2001 appellant requested an oral hearing. On April 5, 2001 the Office denied appellant's request as untimely.

The Board finds that appellant has failed to meet his burden of proof to establish that his back injury was causally related to the September 16, 1999 work incident.

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 limitation period of the Act,[4] that an injury was sustained in the performance of duty as alleged and that any disability or condition for which compensation is claimed is causally related to the employment injury.[5] These elements must be established regardless of whether the claim is for a traumatic injury or an occupational disease.[6]

To determine whether an employee has sustained a traumatic injury in the performance of duty, "fact of injury" must first be established.[7] The employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9] An employee may establish that an injury occurred in the performance of duty but fail to establish that his or her disability or resulting condition was causally related to the injury.[10]

Causal relationship is a medical issue[11] and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[12] The opinion of the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Irene St. John*, 50 ECAB 521, 522 (1999).

[3] *Barbara L. Riggs*, 50 ECAB 133, 137 (1998).

[4] *Albert K. Tsutsui*, 44 ECAB 1004, 1007 (1993).

[5] *David M. Ibarra*, 48 ECAB 218 (1996); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Ruth Seuell*, 48 ECAB 188, 192 (1996).

[7] *Neal C. Evins*, 48 ECAB 252 (1996).

[8] *Michael W. Hicks*, 50 ECAB 325, 328 (1999).

[9] *See* 5 U.S.C. § 8101(5); 20 C.F.R. § 10.5(ee) (1999) (defining injury).

[10] *Earl David Seal*, 49 ECAB 152, 153 (1997); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

[11] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[12] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13]

In this case, the hearing representative accepted that the work incident occurred as alleged and remanded the case for further development of the medical evidence. Appellant submitted a report from Dr. Hash, who took over appellant's treatment when Dr. Haws retired.

Dr. Hash stated on November 20, 2000 that appellant injured his back while lifting a heavy weight in July 1999 and had had previous lumbar spine surgery in 1994, while in the military. He noted that appellant herniated a disc which Dr. Haws removed on October 12, 1999. Dr. Hash added that appellant reinjured the same disc and had another operation. He then opined: "This appears to me to be a work-related injury."

In an August 8, 2000 report, Dr. Hash stated that appellant was lifting a tray of mail in September and had an acute onset of pain in his back and leg. Dr. Haws removed a disc herniation and operated again on June 20, 2000. Dr. Hash opined: "I do believe this injury caused his symptoms."

In a November 4, 1999 report, Dr. Haws stated that he saw appellant on September 29, 1999 after he had gone to the emergency room on September 23, 1999. Appellant complained of low back pain radiating to his right hip and leg and "reported this was a result of performing duties at work as a mail processor." Dr. Haws did not offer his own opinion of the cause of appellant's back pain.

The reports of Drs. Hash and Haws are insufficient to establish a causal relationship between appellant's herniated disc and the September 16, 1999 work incident because neither physician explained how the act of leaning over to pick up a tray of mail resulted in a herniated disc. Such a rationalized explanation is necessary because appellant had a preexisting back condition that required surgery in 1994 and apparently also hurt his back in July 1999.

The Office informed appellant of the need to provide a rationalized medical report and the hearing representative explained what was required in such a report. However, appellant failed to submit a report in which the physician reviewed appellant's factors of employment and stated whether and how these work factors caused or aggravated appellant's diagnosed condition. Inasmuch as appellant failed to meet his burden of proof to establish a causal relationship between his back condition and the September 16, 1999 incident, the Board finds that he is not entitled to compensation.[14]

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

[14] *See Michael E. Smith*, 50 ECAB 313, 316 (1999) (finding that appellant failed to submit a rationalized medical opinion on causal relationship).

The Board also finds that appellant is not entitled to an oral hearing because his request was not timely filed.[15]

Section 8124(b)(1) of the Act[16] 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."[17]

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 exercise this discretionary authority in deciding whether to grant a hearing.[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[19]

In this case, appellant's request for a hearing was dated February 7, 2001, which was beyond the 30-day limitation of section 8124(b)(1) and its implementing regulation.[20] Because appellant failed to request an oral hearing within 30 days of the Office's January 4, 2001 decision he is not entitled to an oral hearing as a matter of right.

While the Office 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 April 5, 2001 decision, stated that it had reviewed appellant's request and determined that whether appellant's back condition was causally related to the September 16, 1999 incident could be equally well resolved with a request for reconsideration and presentation of medical evidence showing that the lifting incident at work resulted in a herniated disc.

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.[21]

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[15] Appellant did not specifically appeal the decision denying his request for a hearing as untimely, but he filed his appeal on May 21, 2001 and the Board has jurisdiction of final Office decisions issued within one year of the date of the filing of an appeal. *John Reese*, 49 ECAB 397, 400 (1998).

[16] 5 U.S.C. §§ 8101-8193.

[17] 5 U.S.C. § 8124(b)(1).

[18] *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

[19] *Martha A. McConnell*, 50 ECAB 129, 130 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

[20] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[21] *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

The record does not indicate that the Office acted in any manner in denying appellant's request for a hearing that could be found to be an abuse of discretion.[22]

The April 5 and January 4, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.[23]

Dated, Washington, DC
August 16, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

[22] *See Khambandith Vorapanya*, 50 ECAB 490, 492 (1999) (finding that appellant failed to demonstrate that the Office abused its discretion in denying his request for reconsideration).

[23] Appellant submitted extensive medical evidence, some of which duplicates evidence already in the record, on appeal to the Board. Because parts of this evidence, which was also date stamped as received by the Office on May 21, 2001, were not before the Office when its January April 5, 2001 decision was issued, the Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *Thomas W. Stevens*, 50 ECAB 288, 289 n.2 (1999). Appellant may wish to submit this evidence with a request for reconsideration to the Office.