U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENTON A. BURBANK and DEPARTMENT OF THE ARMY, SIERRA ARMY DEPOT, Herlong, CA

Docket No. 00-2017; Submitted on the Record;
Issued January 3, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained an emotional condition arising in the performance of duty on September 13, 1999; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for an oral hearing before an Office hearing representative under 5 U.S.C. § 8124.

On September 14, 1999 appellant, then a 29-year-old preservation packer, filed a claim alleging that he sustained physical and emotional injury on September 13, 1999 arising from an altercation with a coworker. He claimed that he was knocked down by Rudy Garcia, co-employee, and kicked in the chest, back and head area.

By letter dated September 30, 1999, the Office requested further information describing the altercation, appellant's relationship with Mr. Garcia, its immediate effects and a rationalized medical report discussing causal relation between the assault and his symptoms.

In response appellant submitted several medical reports diagnosing post-traumatic stress disorder (PTSD), contusion of the abdomen and contusion of the neck and throat.

The employing establishment controverted appellant's claim, contending that appellant's emotional injuries arose from a private confrontation that was imported to the workplace. It did not controvert the original claim for medical transportation and emergency medical treatment since the assault occurred on employing establishment property, but did controvert it for the subsequent disability for work and medical costs due to his claimed consequential emotional injury, PTSD.[1]

By decision dated November 1, 1999, the Office rejected appellant's claim finding that appellant's PTSD did not arise out of and in the course of his employment. The Office found

[1] The employing establishment did advise appellant of his rights under the California Victim/Witness Assistance Office in pursuing a civil action against his assailant.

that the injuries sustained and the consequential PTSD arose out of a private dispute which was imported into the workplace.[2]

On November 10, 1999 the Office received appellant's statement about the altercation. Appellant claimed that he was driving back to the employing establishment after lunch when Mr. Garcia drove behind him and rode his bumper all the way back to his work area. Appellant claimed that Mr. Garcia "gave him the bird," that they both got out of their cars and that Mr. Garcia called him a profane name. He stated that he replied with another profanity and told Mr. Garcia he was going the speed limit. Mr. Garcia then replied with more profanity which was returned by appellant. Appellant alleged that, as he was walking away from Mr. Garcia, he saw that Mr. Garcia was swinging his fist, so he dodged and fell in the sand. Mr. Garcia kicked him in the stomach several times and, as he struggled to get up, Mr. Garcia knocked him down again and struck him in his head and ear. As he again tried to rise, Mr. Garcia grabbed him by the throat and choked him. Mr. Garcia hit appellant in the throat and chased after him, yelling profanities as he tried to escape. Appellant claimed that this altercation was witnessed by a man who could have done something but did not. Appellant went to his team leader and told him what happened.

By letter to the district Office dated November 29, 1999, David A. Tallant, an attorney, requested an oral hearing on behalf of appellant. However, by letter dated January 13, 2000, Mr. Tallant wrote the Office stating, "Effective immediately, I am no longer representing [appellant]."

By letter dated January 14, 2000, the Office advised Mr. Tallant that his November 29, 1999 oral hearing request had been incorrectly addressed and mailed to the district Office. The district Office returned the November 29, 1999 letter to Mr. Tallant and provided the address of the Branch of Hearings and Review.

By letter dated January 21, 2000, Mr. Tallant requested that the Branch of Hearings and Review consider his letter as a timely request for an oral hearing on behalf of appellant. Enclosed was the original November 29, 1999 letter and the January 14, 2000 Office response.

By decision dated February 28, 2000, the Office Branch of Hearings and Review denied the oral hearing request, noting that it was untimely made and finding that appellant could equally well address the issue by requesting reconsideration and submitting evidence to support his duty status at the time of the assault.

The Board finds that appellant has failed to establish that he sustained an emotional condition due to injury in the performance of duty.

The Federal Employees' Compensation Act[3] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the

[2] With his appeal appellant submitted additional evidence, however this evidence was not before the Office and may not be reviewed for the first time by the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. §§ 8101-8193.

performance of duty.[4] 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."[5] "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 his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his 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.[6] 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...."[7]

The Board has held that when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment.[8] The evidence of record indicates that the altercation on September 13, 1999 arose out of a traffic dispute while on the way to work following appellant's lunchtime. As appellant had fixed hours and a fixed place of work, his travel to work was not a factor of his employment.[9] The battery resulting from the traffic dispute concerned a purely personal dispute which was imported onto the premises of the employing establishment. Appellant's employment was not a causative factor, consequently his injury does not arise in the performance of duty.[10]

On appeal appellant contends that he should be compensated for lost work and PTSD because the assault took place in a parking area of the employing establishment, and hence occurred on government property. However, as noted above, the evidence of record supports that the assault arose out of a personal traffic dispute which occurred away from the employing

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[4] 5 U.S.C. § 8102.

[5] 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).

[6] *Veleria Minuss*, 46 ECAB 799 (1995); *Janet Hudson-Dailey*, 45 ECAB 435 (1994); *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).

[7] A. Larson, *The Law of Workers' Compensation* § 11.00 (1990).

[8] *See Janet Hudson-Dailey, supra* note 7; *Agnes V. Blackwell*, 44 ECAB 200 (1992).

[9] *See Lester O. Rich*, 32 ECAB 1178 (1981).

[10] *Id.*

establishment premises and was carried onto the employing establishment's premises without any factor of appellant's employment constituting a causative factor of the dispute. Therefore, the assault does not arise in the performance of duty, and the Office properly denied appellant's claim.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

> "Before review under § 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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11]

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.616(a). This paragraph notes as follows:

> "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."

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.[12] In this case, the November 29, 1999 letter requesting an oral hearing was submitted by Mr. Tallant, who mailed the request to the incorrect address. However, the record does not establish that, at the time the letter was sent to the Office, Mr. Tallant was authorized to represent appellant.[13] Thereafter Mr. Tallant disavowed any representation of appellant, but subsequently resubmitted a hearing request on appellant's behalf dated January 21, 2000, which was postmarked more than 30 days after the November 1, 1999 decision. As this request also lacked proper representation authorization and was untimely

[11] 5 U.S.C. § 8124(b)(1)

[12] *Rebel L. Cantrell*, 44 ECAB 660 (1993) (untimely); *Mary B. Moss*, 40 ECAB 640 (1989) (untimely); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982) (request for a second hearing).

[13] The Office's implementing regulations provide that the appointment of a representative must be in writing. 20 C.F.R. § 10.700(a).

submitted, the Office properly found appellant was not entitled to a hearing under section 8124 as a matter of right.[14]

The Office, however, considered appellant's hearing request in its February 28, 2000 decision and denied the request on the basis that appellant could pursue his claim by requesting reconsideration before the Office and by submitting additional evidence supporting that he sustained an emotional injury arising in the performance of duty.

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 known facts.[15] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 28, 2000 and November 1, 1999 are hereby affirmed.

Dated, Washington, DC
January 3, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

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

[15] *Daniel J. Perea*, 42 ECAB 214 (1990).