U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH D. McLAIN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Phoenix, AZ

Docket No. 02-1866; Submitted on the Record;
Issued November 6, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on June 8, 2001; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for reconsideration, constituted an abuse of discretion.

On September 4, 2001 appellant, then a 45-year-old food service worker, filed a claim alleging that she sustained an injury at work on June 8, 2001. Regarding the cause of the injury, appellant stated, "I apparently fainted while working, lost consciousness, must have hit my head on table, found me at my desk, was taken to … employee health, waited there, then rushed to emergency room, and after a lengthy stay, was admitted at Good Samaritan Hospital." Regarding the nature of the injury, appellant noted, "Seizures, head and facial trauma, apparent stroke, with loss of motor skills, speaking, thinking, moving, parts of body numb."[1] Appellant stopped work on June 8, 2001 and returned to limited-duty work in early August 2001. By decision dated January 15, 2002, the Office denied appellant's claim on the grounds that she did not establish fact of injury. By decision dated May 31, 2002, the Office denied appellant's request for merit review.

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on June 8, 2001.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of 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

[1] Appellant later indicated that on June 8, 2001 she was performing paperwork at her desk. She stated, "I felt dizzy and all I can remember is that I slumped over, hit my head on the table. My coworker [Sharon McFarland] said I lost consciousness when she found me at the desk, with my head on my arms, shaking uncontrollably."

[2] 5 U.S.C. §§ 8101-8193.

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.[3] To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5] The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[6]

In the present case, appellant did not implicate any employment-related factor, element or condition as causing her medical condition on June 8, 2001. The Office requested that appellant provide additional factual history of her claimed injury but she did not adequately respond to the Office's request. As appellant has not identified any employment factor, element or condition, she has not met the factual component of establishing fact of injury. It should be noted that the current case would not appear to constitute an idiopathic fall case as appellant did not fall to the floor or immediate supporting surface on June 8, 2001.[7] The record reveals that, just prior to being taken for medical treatment, appellant rested her head on her arms on top of her desk.[8]

For these reasons, appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on June 8, 2001.

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

[4] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[5] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[6] *Elaine Pendleton*, *supra* note 3; 20 C.F.R. § 10.5(a)(14).

[7] An idiopathic fall occurs where an employee collapses and falls to the floor or immediate supporting surface due to a personal, nonoccupational pathology. When there is no intervention or contribution by any hazard or special condition of employment, such a fall is not within the coverage of the Act; *see Amrit P. Kaur*, 40 ECAB 848, 853 (1989); *Robert J. Choate*, 39 ECAB 103, 106 (1987). Moreover, it appears from the medical record that appellant's condition on June 8, 2001 was caused by her nonwork-related diabetic condition.

[8] Appellant posited that she hit her head on her desk on June 8, 2001, but several coworker statements in the record suggest that she did not in fact hit her head. Ruth Mentzer indicated that on June 8, 2001 she asked appellant about her health and appellant responded that her blood sugar was high. Ms. Mentzer noted that she asked Michael Pollock to retrieve a wheelchair and that she directed Sharon McFarland to stay with appellant while the wheelchair was retrieved. She noted that "there wasn't any harm done to this employee while in the office." Mr. Pollock indicated that when he brought the wheelchair appellant was resting her head on her arms on top of her desk and she responded in the affirmative when he asked if she was all right. He indicated that he took appellant to the employee health unit and noted that appellant did not mention hitting her head. Ms. McFarland indicated that she did not see appellant hit her head.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that a claimant must: (1) show 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) submit relevant and pertinent new evidence not previously considered by the Office.[10] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[12]

In support of her January 19, 2002 reconsideration request, appellant submitted a January 18, 2001 report in which Dr. Dean Martin, an attending Board-certified family practitioner, indicated that she had loss of consciousness and possible seizure activity on June 8, 2001. Dr. Martin stated that the episode was "probably a conversion reaction due to work stress and not seizure activity." The submission of this medical report would not require reopening of the present case for merit review as it is not relevant to the main issue of the present case which is factual in nature rather than medical.[13] The Office denied appellant's claim on the grounds that she did not submit sufficient factual evidence to establish fact of injury. The medical report of Dr. Martin would not be relevant to appellant's failure to provide factual evidence identifying specific employment factors which she felt caused her claimed injury.

In the present case, appellant has not established that the Office abused its discretion in its May 31, 2002 decision by denying her request for a review on the merits of its January 15, 2002 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

[11] 20 C.F.R. § 10.607(a).

[12] 20 C.F.R. § 10.608(b).

[13] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The May 31 and January 15, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
November 6, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member