U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN K. MANNING and DEPARTMENT OF THE AIR FORCE, ALTUS AIR FORCE BASE, OK

Docket No. 02-1259; Submitted on the Record;
Issued October 4, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established a left shoulder injury in the performance of duty on December 10, 1998; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On January 4, 2001 appellant, then a 36-year-old manufacturing supervisor, filed a traumatic injury claim (Form CA-1), alleging that on December 10, 1998 he injured his left shoulder while moving metal from a table. In a decision dated February 23, 2001, the Office denied the claim. By letter dated April 5, 2001, appellant requested reconsideration of his claim. In a decision dated June 12, 2001, the Office reviewed the case on its merits and denied modification.

In a letter dated July 17, 2001, appellant again requested reconsideration. By decision dated January 30, 2002, the Office determined that the request was insufficient to warrant further review of the claim.

The Board finds that appellant did not establish an injury in the performance of duty on December 10, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that he or she sustained an injury while in the performance of duty.[2] In order to determine whether an employee actually 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 with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

employment incident caused a personal injury and generally this can be established only by medical evidence.[3]

As the June 12, 2001 decision discussed only the medical evidence, the Office has apparently accepted that an incident occurred as alleged on December 10, 1998. Appellant indicated that he told his supervisor of the incident on the following day, but did not file a claim form at that time.

With respect to the medical evidence, appellant did not submit a report providing a reasoned opinion on causal relationship between a diagnosed condition and the employment incident. Appellant received treatment on December 11, 1998, but the treatment note of record does not appear to have been prepared by a "physician" as recognized under the Federal Employees' Compensation Act. Section 8101(2) of the Act provides that a physician includes, "surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law."[4] A physician's assistant is not a physician under the Act and therefore a report from a physician's assistant is of no probative value to the medical issue presented.[5]

In a report dated February 8, 1999, Dr. Kevin Hargrove, an orthopedic surgeon, diagnosed a suprascapular nerve palsy, opining that "the exact etiology of this problem has been undetermined." Dr. Hargrove did not discuss the December 10, 1998 employment incident. He performed left shoulder surgery on March 9, 1999, but did not provide any medical reports discussing causal relationship with a December 10, 1998 employment incident.

The Board has held that probative medical evidence must be in the form of a reasoned opinion by a qualified physician based on a complete and accurate factual and medical history.[6] In the absence of probative medical evidence on causal relationship between a left shoulder condition and the employment incident, the Board finds that appellant has not met his burden of proof in this case.

The Board further finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or

[3] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[4] 5 U.S.C. § 8101(2).

[5] *See Barbara J. Williams*, 40 ECAB 649 (1989).

[6] *Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

[7] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

(3) submitting relevant and pertinent evidence not previously considered by the Office.[8] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[9]

In his July 17, 2001 letter requesting reconsideration, appellant stated that the December 10, 1998 incident had aggravated a preexisting shoulder condition. There is no indication, however, that any medical evidence was submitted.[10] The underlying issue in the case is a medical issue and appellant did not submit any new or relevant medical evidence. Accordingly, the Board finds that the Office properly denied his request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 30, 2002 and June 12, 2001 are affirmed.

Dated, Washington, DC
October 4, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] 20 C.F.R. § 10.606(b)(2).

[9] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[10] Appellant submitted a medical report on appeal, but the Board cannot review evidence that was not before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).