U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALEEM H. FATANI and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Loma Linda, CA

Docket No. 03-657; Submitted on the Record;
Issued April 25, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he sustained a stroke on April 5, 2002 in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

On May 28, 2002 appellant, then a 59-year-old supervisory general engineer, filed a traumatic injury claim alleging that on April 5, 2002 he sustained a "loss of motor functions of the body including speech" as a result of an "[a]rgument with Dr. Darryl G. Heustis and then [an] argument between me and the grounds staff."

By decision dated August 2, 2002, the Office found that appellant had not met his burden of proof to establish fact of injury.

In a letter dated November 11, 2002 and postmarked November 12, 2002, appellant requested a review of the written record. In a decision dated December 31, 2002, the Office denied appellant's request for a hearing as untimely.

The Board finds that appellant has not established that he sustained a stroke in the performance of duty.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for

which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.[1]

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,[2] must be one of reasonable medical certainty[3] 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.[4] The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused by or aggravated by employment conditions is sufficient to establish causal relation.[5]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[6] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[7]

In this case, appellant primarily attributed the stress, resulting in his stroke or transient ischemic attack, to an argument between himself and Dr. Heustis. Appellant related that Dr. Heustis "scolded" and "blamed" him in a loud voice about the roach infestation problem. He related that he then shouted "at the two workers … who were challenging my orders. I took them to my office and kept discussing the pest problem and telling them to take care of this without any overtime as Dr. Heustis would not approve the overtime[.]" Appellant submitted electronic mail transmissions between himself and Dr. Heustis regarding overtime to correct the pest problem.

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[1] *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[2] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[3] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[4] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[5] *Manuel Garcia*, 37 ECAB 767, 773 (1986); *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

Verbal altercations, when sufficiently detailed by the claimant and supported by the evidence of record, may constitute factors of employment.[8] This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[9] In this case, appellant has not established that Dr. Heustis verbally abused him in discussing the pest control problem with him on April 5, 2002. In a statement received by the Office on August 2, 2002, Dr. Heustis related that he requested that appellant work with a head nurse to find a solution to the roach problem. He related: "I did not raise my voice at any time, but was firm in conveying my concerns. In addition, at no time was [appellant] treated disrespectfully and/or unprofessionally by me during our hallway conversation." Dr. Heustis further indicated that he had requested that appellant "prepare a justification" for overtime and that it was later approved. Appellant, therefore, has not established any compensable factor of employment with respect to the claimed verbal abuse by Dr. Heustis on April 5, 2002.[10]

Further, the Board notes that Dr. Heustis' decision regarding appellant's request for approved overtime constitutes an administrative matter unrelated to his assigned duties and, therefore, does not constitute a compensable factor of employment absent a disclosure of error or abuse by the employing establishment.[11] In this case, appellant has submitted no evidence showing error or abuse by the employing establishment in matters related to his request for approved overtime and, consequently, has not established a compensable factor of employment under the Act.[12]

Appellant, therefore, has not met his burden of proof in establishing a compensable factor of employment.[13]

The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... 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."[14] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a

[8] *Garry M. Carlo*, 47 ECAB 299 (1996).

[9] *Compare Abe E. Scott*, 164 (1993); *Sandra F. Powell*, 45 ECAB 877 (1994).

[10] Additionally, appellant has not submitted any evidence supporting his contention that he engaged in a verbal altercation with coworkers "challenging [his] orders" on April 5, 2002.

[11] *Anne L. Livermore*, 46 ECAB 425 (1995).

[12] Appellant submitted new evidence subsequent to the Office's last merit decision on August 2, 2002; however, the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[13] Only when appellant establishes a compensable factor of employment is the Office required to base its decision to accept or reject the claim on an analysis of the medical evidence. *See Norma L. Blank*, 43 ECAB 384 (1992).

[14] 5 U.S.C. § 8124(b)(1).

claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[15]

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Federal Employees' Compensation Act, which provided the right to a hearing,[16] when the request is made after the 30-day period established for requesting a hearing[17] or when the request is for a second hearing on the same issue.[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[19]

In this case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated August 2, 2002 and, thus, appellant was not entitled to a hearing as a matter of right. He requested a hearing in a letter postmarked November 12, 2002. Hence, the Office was correct in stating in its December 31, 2002 decision that appellant was not entitled to a hearing as a matter of right, because his hearing request was not made within 30 days of the Office's August 2, 2002 decision.

While the Office also 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 December 31, 2002 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by appellant requesting reconsideration and submitting additional evidence to establish that his condition was due to his employment. The Board has held that 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.[20] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[15] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[16] *Rudolph Bermann*, 26 ECAB 354 (1975).

[17] *Herbert C. Holley*, 33 ECAB 140 (1981).

[18] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[19] *Sandra F. Powell*, 45 ECAB 877 (1994).

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

The decisions of the Office of Workers' Compensation Programs dated December 31 and August 2, 2002 are affirmed.

Dated, Washington, DC
April 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member