U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD A. DAVIS, III and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Boston, MA

Docket No. 03-744; Submitted on the Record;
Issued April 4, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that his neck condition is causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On December 13, 2001 appellant, then a 45-year-old immigration inspector, filed a claim asserting that he developed neck problems while performing a free fall exercise on December 11, 2001 in the course of his federal duties. Appellant did not stop work.

In a letter dated June 18, 2002, the Office advised appellant of the requisite factual and medical evidence needed in order to make a determination on the claim and appellant submitted medical records documenting his complaints and his doctor's findings.

In a decision dated July 26, 2002, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury due to the claimed employment factor. The Office accepted that appellant actually experienced the claimed employment factor, but the evidence failed to establish a medical diagnosis due to this factor.

In a letter received on September 9, 2002, appellant requested a review of the written record before an Office hearing representative. In a decision dated October 22, 2002, an Office hearing representative denied appellant's request as untimely. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issues could equally well be addressed through the reconsideration process.

The Board finds that the evidence of record is insufficient to establish that appellant's neck condition is causally related to his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[2]

The Office accepts that on December 11, 2001 appellant fell backward onto his back during a physical training exercise at work. The question, therefore, is whether this employment factor caused an injury.

Causal relationship is a medical issue[3] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[4] must be one of reasonable medical certainty[5] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.

Appellant submitted a December 17, 2001 report from Dr. Phillip McAllister, a Board-certified neurologist, in which the physician stated: "[d]uring physical exercise training, practicing backward falls from a standing position, he wrenched his neck." Dr. McAllister also diagnosed right cervicobrachial syndrome. The Board notes that this physician offered no opinion as to how appellant's accepted employment injury caused or contributed to his neck condition, or specifically addressed the etiology of appellant's diagnosed cervicobrachial syndrome.[6]

Appellant further submitted documentation which consisted of either physician's reports that merely noted the history of injury and complaints of neck pain without addressing causal relationship or progress reports which discussed appellant's neck pain associated with the accepted injury; however, they did not bear a physician's signature. Thus, such documentation lacks probative value.[7]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See generally John J. Carlone*, 41 ECAB 354 (1989); *Abe E. Scott*, 45 ECAB 164 (1993); *see also* 5 U.S.C. § 8101(5) ("injury" defined).

[3] *Mary J. Briggs*, 37 ECAB 578 (1986).

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

[5] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[6] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954) (medical conclusions unsupported by rationale are of little probative value).

[7] *See* 20 C.F.R. § 10.331(a) (1999).

Appellant submitted medical opinions from Dr. Jorge Marquez, a Board-certified internist, but these are also insufficient to establish the element of causal relationship. On January 16, 2002 Dr. Marquez explained that appellant had been seen for neck pain, which "seems to be most likely whiplash kind of injury by history." This opinion is of little probative value because it is speculative.[8] On March 20, 2002 Dr. Marquez reported that in December 2001 appellant fell back onto a hard mat landing on his back while doing a routine exercise at work and complained of severe neck pain with radiation to the right shoulder. He opined that appellant's neck pain was "secondary to fall." As with Dr. McAllister's report noted above, Dr. Marquez does not discuss how the accepted factors caused or contributed to appellant's neck condition.[9]

Without a well-reasoned medical opinion explaining how, medically speaking, the accepted factors of appellant's federal employment caused or contributed to a firmly diagnosed medical condition, appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty.

The Board further finds that the Office properly denied appellant's request for a review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.[10] However, the Office has the discretion to grant or deny a request that was made after this 30-day period.[11] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[12]

Appellant's request for a review of the written record was date stamped as received on September 9, 2002, which is more than 30 days after the Office's July 26, 2002 decision. As such, he is not entitled to a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he sustained an injury causally related to employment factors could equally

[8] *Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

[9] *Supra* note 6.

[10] 20 C.F.R. § 10.616(a) (1999).

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

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

well be addressed by requesting reconsideration.[13] Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a review of the written record.

The October 22 and July 26, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
April 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[13] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).