U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERTO A. SEALY and U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA

Docket No. 02-1169; Submitted on the Record; Issued June 18, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an occupational disease in the performance of his federal duties; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

On November 20, 2001 appellant, then a 44-year-old letter carrier, submitted a notice of occupational disease and claim for compensation (Form CA-2), alleging that his employment duties caused joint osteoarthritis and tendinitis in his left shoulder. In a January 7, 2002 letter, the Office informed appellant of the additional information he needed to submit, including rationalized medical evidence. Appellant wrote in response that he first noticed the pain on June 18, 2001 and that he has carried 35 to 45 pounds on his left shoulder 6 days a week for 13 years. In a November 9, 2001 report, Dr. John Petolillo, Jr., an orthopedic surgeon, wrote that appellant "has been a letter carrier for 15 years and has been experiencing increasing left shoulder pain since June. [Appellant] complains of night pain." Dr. Petolillo interpreted a magnetic resonance imaging (MRI) and diagnosed a rotator cuff tendinitis, subacromial bursitis, left shoulder and osteoarthritis acromioclavicular joint.

In a February 8, 2002 decision, the Office denied the claim finding that appellant had submitted insufficient evidence to establish a causal relationship between his medical condition and his employment factors. In March 30, 2002, appellant requested a hearing. In a May 23, 2002 decision, the Branch of Hearings and Review denied the request as untimely.

The Board finds that appellant has not met his burden of proof to establish that he sustained an occupational disease in the performance of his federal duties.

An employee seeking benefits under the Act[1] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United

[1] 5 U.S.C. §§ 8101-8193.

States" within the meaning of the Act, that the claim was timely filed 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.[2] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

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 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 the claimant. The medical evidence required to establish a causal relationship 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, must be one of reasonable medical certainty, 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]

In the present case, the medical evidence does not establish a causal relationship between appellant's medical condition and his employment factors. Dr. Petolillo's November 9, 2001 report is the only medical evidence appellant submitted and it does not discuss causal relationship. Dr. Petolillo reviewed an MRI scan and provided a diagnosis of appellant's shoulder condition, however, he did not provide any opinion relating his diagnosis to appellant's postal duties. Without such evidence appellant has not met his burden of proof.

The Board further finds that the Office did not abuse its discretion in denying appellant a hearing.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[5] As section 8124(b)(1) is unequivocal in setting

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

[3] *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

[4] *Victor J. Woodhams,* 41 ECAB 345, 351-52 (1989).

[5] 5 U.S.C. § 8124(b)(1).

forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[6]

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.[7] 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 Act which provided the right to a hearing,[8] when the request is made after the 30-day period for requesting a hearing,[9] and when the request is for a second hearing on the same issue.[10]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated February 8, 2002 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter postmarked March 30, 2002. Hence, the Office was correct in stating in its May 23, 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 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 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 issue in the case was medical and could be resolved by submitting additional medical evidence to establish that his injury was causally related to factors of 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.[11] In the present 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.

The decisions by the Office of Workers' Compensation Programs dated February 8 and May 23, 2002 are hereby affirmed.

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[6] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[7] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[8] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[9] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[10] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[11] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Dated, Washington, DC
June 18, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member