U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. COUNTS and DEPARTMENT OF THE NAVY, MARINE CORPS DEVELOPMENT & EDUCATION COMMAND, Quantico, VA

Docket No. 03-554; Submitted on the Record;
Issued May 23, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an injury on May 13, 2002; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record.

On May 13, 2002 appellant, then a 51-year-old boiler plant mechanic, filed a claim for traumatic injury alleging that on that day he fractured his left ankle while in the performance of duty.

By letter dated June 26, 2002, the Office advised appellant regarding the kind of evidence he needed to support his claim.

In a report dated May 21, 2002, Dr. John Lucey, appellant's attending Board-certified orthopedic surgeon, noted that appellant "may return to work on July 1, 2002."

Appellant returned to light duty on July 15, 2002.

By decision dated July 25, 2002, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury as a result of the May 13, 2002 incident. The Office found that appellant "actually experienced the claimed incident," but that the evidence failed to support that a condition was diagnosed in connection with the May 13, 2002 incident.

By letter dated September 11, 2002, appellant requested a review of the written record.

By decision dated October 28, 2002, the Branch of Hearings and Review denied appellant's request for review of the written record on the grounds that his request was more than 30 days from the date of the Office's decision and thus was untimely filed. The Office noted that the Office's decision was dated July 25, 2002 and that appellant's request was dated

September 11, 2002. The Office further noted that the issue in this case "can equally well be addressed by requesting reconsideration."

The Board finds that appellant failed to establish that he sustained a work-related left ankle fracture on May 13, 2002.

An employee seeking benefits under the Federal Employees' Compensation 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 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. These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[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 which is alleged to have occurred.[3] In this case, the Office, in its initial July 25, 2002 decision, found that appellant "actually experienced the claimed [May 13, 2002] accident."

The second component of fact of jury is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[4] Appellant presented a May 21, 2002 report from Dr. Lucey, who stated that appellant could return to work on July 1, 2002. This report, however, is of limited probative value on the relevant issue in it does not contain an opinion on causal relationship.[5] Dr. Lucey did not provide any opinion that appellant was disabled due to an employment-related condition. He did not address how appellant's left ankle condition was caused or aggravated by factors of his federal employment. The Office requested that appellant submit a rationalized medical report relating his claimed injury to employment factors, but he did not do so within the time allotted.

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

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Trina Bornejko*, 53 ECAB ___ (Docket No. 01-1118, issued February 27, 2002).

[3] *Gary J. Watling*, 52 ECAB ___ (Docket No. 00-634, issued March 1, 2001).

[4] *Id.*

[5] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

Section 8124(b)(1) of the Act provides that "a claimant is entitled, on request made within 30 days after the date of the issue of the decision, to a hearing on his claim before a representative of the Secretary."[6] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[7] Thus, a claimant has a choice of requesting an oral argument or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulations.

Section 10.616(a) of the Office's regulations[8] provides in pertinent part that "the hearing request must be sent within 30 days as determined by postmark or other carrier's date of marking of the date of the decision for which a hearing is sought."

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 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.[9] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[10]

In this case, appellant's October 1, 2001 request for a review of the written record was made more than 30 days after the date of issuance of the Office's August 31, 2001 decision. Therefore, the Office was correct in stating in its October 24, 2001 decision that appellant was not entitled to a review of the written record.

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 October 24, 2001 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 could be resolved by the submission of additional evidence.

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 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.

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[6] 20 C.F.R. § 8124(b)(1).

[7] 20 C.F.R. § 10.615 (1999).

[8] 20 C.F.R. § 10.616 (a) (1999).

[9] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[10] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

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

The decisions of the Office of Workers' Compensation Programs dated October 28 and July 25, 2002 are hereby affirmed.[12]

Dated, Washington, DC
May 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[12] Appellant submitted evidence to the Board that was not before the Office at the time of its July 25, 2002 decision. However, the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c). Appellant may wish to resubmit such evidence to the Office through the reconsideration process; *see* 5 U.S.C. § 8128.