U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD J. BAREND and SMALL BUSINESS ADMINISTRATION, DISASTER ASSISTANCE AREA TWO, Melvindale, MI

Docket No. 03-15; Submitted on the Record;
Issued October 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained a bacterial, viral or fungal infection in the performance of duty on January 7, 2001, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's April 12, 2002 request for reconsideration.

On January 11, 2001 appellant, then a 62-year-old construction analyst, filed a claim alleging that he sustained headaches, nausea, vomiting and frequent nosebleeds due to a January 7, 2001 exposure to a residential basement filled with feces and sewage after a September or October 2000 sewer backup. Appellant stated that as he descended the steps to the basement to continue his inspection, a "stench filled [his] nose and [he] threw up," remaining "very sick" for several days. Appellant's supervisor, Robert Badosky, confirmed that appellant was "constantly entering residential basements which have had sewer backup." Mr. Badosky checked a box "yes" noting that he witnessed appellant having a nosebleed.

Appellant submitted medical evidence in support of his claim from a January 11, 2001 emergency room visit. He was noted to be asymptomatic on presentation, alert and oriented and described as "very healthy." Dr. Daniel P. Sheesley, an osteopathic physician, provided a history of "nosebleed, head pressure yesterday, prior exposure to [increased] bacteria level," with nausea, vomiting, dizziness, headaches, nosebleeds and night sweats. Dr. Sheesley noted that appellant had taken an unspecified dose of erythromycin during the three days since January 7, 2001. Appellant's vital signs were unremarkable. Dr. Sheesley diagnosed a "viral syndrome with history [of] toxic exposure." Chart notes indicate that appellant informed a medical technician that he could not stay and left against medical advice.

Appellant's blood chemistry including a liver panel, differentiated cell counts including white cell counts, coagulation time, hematocrit and urinalysis results were all within normal limits. A blood culture for unspecified organisms taken on January 11, 2001 showed "no growth after five days." A chest x-ray and "chest pain profile" serology were normal. A computerized tomography scan of appellant's head showed brain atrophy, but no evidence of an intracranial

bleed, midline shift or mass effect. Electrocardiography was abnormal, demonstrating sinus bradycardia with frequent premature ventricular complexes (PVCs) in a pattern of bigeminy, left atrial enlargement, an intraventricular conduction delay, ST and T wave abnormalities and a prolonged Q-T interval.[1]

By decision dated April 1, 2002, the Office denied appellant's claim on the grounds that casual relationship was not established due to insufficient medical evidence. Appellant disagreed with this decision and in an April 12, 2002 letter, requested reconsideration. He reiterated his account of the January 7, 2001 incident, noting that he took two capsules of erythromycin after vomiting that day and described his January 11, 2001 emergency room visit, noting that no one would accept his compensation forms. Appellant alleged that corrections inmates cleaning up sewage in the same area died from toxic exposure soon afterward.[2] Appellant did not submit any evidence accompanying his April 12, 2002 letter.

By decision dated July 15, 2002, the Office denied appellant's request for reconsideration on the grounds that the April 12, 2002 letter did not establish that the Office committed an error of fact or law, or present new and relevant evidence or legal argument. Appellant filed his appeal with the Board on September 30, 2002.[3]

The Board finds that appellant has not established that he sustained a bacterial, viral or fungal infection in the performance of duty on January 7, 2001.

A person who claims benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his claim, including that he sustained an injury while in the performance of duty and that he had disability as a result.[5] To determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components, which must be considered one in conjunction with the other. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred. In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure

[1] In a January 25, 2002 letter, the Office advised appellant that the medical record was insufficient to establish that he sustained an injury in the performance of duty. The Office stated that the reports of record diagnosed a "viral syndrome." The Office advised appellant to submit a complete history of injury, objective findings, a definite diagnosis and a physician's rationalized statement explaining how and why the January 7, 2001 exposure would cause an illness.

[2] Appellant did not submit any evidence to corroborate the deaths of the corrections inmates from toxic exposure.

[3] The Board notes that, following the issuance of the Office's July 15, 2002 decision and accompanying his request for appeal, appellant submitted additional evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. Appellant may submit this evidence to the Office accompanying a valid request for reconsideration. 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Gary J. Watling*, 52 ECAB 278 (2001); *Daniel R. Hickman*, 34 ECAB 1220 (1983); *see* 20 C.F.R. § 10.110(a).

at the time, place and in the manner alleged. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[6] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[7] The belief of claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.[8]

Appellant has established that on January 7, 2001 he was exposed to a residential basement contaminated with human feces from a sewer backup.

Appellant submitted a January 11, 2001 report from Dr. Sheesley, an attending osteopathic physician, who provided a history of bacterial exposure, treatment with erythromycin and diagnosed a "viral syndrome." However, Dr. Sheesley did not identify the virus, or attribute any objective findings, including the abnormal electrocardiogram, to appellant's exposure to a contaminated basement on January 7, 2001. Thus, Dr. Sheesley's opinion is of diminished probative value in establishing causal relationship in this case.[9]

The Board notes that appellant was advised by a January 25, 2002 letter of the type of additional evidence needed to establish his claim, including a physician's rationalized statement explaining how and why the diagnosed condition was related to the January 7, 2001 incident. However, appellant did not submit such evidence. Consequently, appellant has failed to establish that he sustained a bacterial, viral or fungal infection on January 7, 2001 as he submitted insufficient evidence to establish that he sustained an injury resulting from entering the residential basement, or any other factor of his federal employment.

The Board also finds that the Office properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a).

Under section 8128(a) of the Act,[10] the Office has the discretion to reopen a case for review on the merits. Section 10.606(b)(2) of the implementing federal regulations[11] provides

[6] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and " occupational disease" defined).

[7] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[8] *Ricky S. Storms*, 52 ECAB 349 (2001); *Manuel Garcia*, 37 ECAB 767 (1986).

[9] *Lucrecia M. Nielsen,* 42 ECAB 583 (1991).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b).

that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[12]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[13]

The only evidence appellant submitted in support of his request for reconsideration was the April 12, 2002 letter, which reiterated appellant's account of exposure to a flooded basement on January 7, 2001 and his treatment at an emergency room on January 8, 2001. The issue at the time of the April 1, 2002 decision was whether appellant established that he sustained any injury or condition causally related to the January 7, 2001 exposure. Causal relationship is a medical issue and can be established only through the submission of medical evidence containing sufficient rationale explaining how and why work factors would cause or contribute to a claimed condition.[14] The Board notes that, as appellant is a lay person, his opinion on causal relationship is of no probative medical value.[15] As appellant's April 12, 2002 letter does not constitute new, relevant evidence, advance a new, relevant legal argument, or establish legal error by the Office, the Office properly denied appellant's request for a merit review.

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[12] *Id*.

[13] 20 C.F.R. § 10.608(b).

[14] *Claudio Vasquez*, 52 ECAB 496 (2001).

[15] *See James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is of not competent evidence on the issue of causal relationship).

The decisions of the Office of Workers' Compensation Programs dated July 15 and April 1, 2002 are hereby affirmed.

Dated, Washington, DC
October 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member