United States Department of Labor
Employees' Compensation Appeals Board

FRANCIS N. McCOMAS, Appellant	)	
and	)	**Docket No. 04-1179**
	)	**Issued: August 12, 2004**
U.S. POSTAL SERVICE, WEST HAMLIN POST OFFICE, West Hamlin, WV, Employer	)	

Appearances:
Francis N. McComas, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 29, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 17, 2003 finding that he had not sustained an injury on August 26, 2003 and a December 30, 2003 nonmerit decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury while in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

FACTUAL HISTORY

On August 27, 2003 appellant, then a 36-year-old rural carrier, filed a traumatic injury claim alleging that on August 26, 2003 he pulled a muscle in his left hip and upper leg while "setting the parking brake to dismount to the office." In support of his claim, appellant

submitted a September 3, 2003 letter from the employing establishment to his treating Board-certified internist, Dr. George McKay, regarding his diagnosis, prognosis and ability to perform limited-duty work. He also submitted a request for leave and a disability certificate dated August 28, 2003 from Dr. McKay indicating that he was disabled during the period August 28 through September 10, 2003 and that he could return to work on September 11, 2003. Family and Medical Leave Act (FMLA) certification of medical provider forms signed by Dr. Jimmy W. Adams, a pain management specialist, and dated January 25, 2002 and February 19, 2003 addressed appellant's back condition.

The employing establishment controverted appellant's claim on the grounds that no objective medical evidence was provided, the evidence did not relate appellant's condition to factors of his employment and appellant had already filed a claim for a back injury under the FMLA.

By letter dated September 12, 2003, the Office advised appellant that the factual and medical evidence submitted was insufficient to establish his claim. The Office further advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

The Office received the employing establishment's July 10, 2003 offer of a limited-duty position to appellant, which he accepted on September 11, 2003. The Office also received a September 9, 2003 disability certificate from Dr. Shelley Bailey, a family practitioner, revealing that appellant was disabled during the period September 9 through 14, 2003. She indicated that appellant could return to work on September 15, 2003. Dr. Bailey's September 11, 2003 attending physician's report noted that appellant sustained an injury on August 26, 2003 while setting the emergency break and that he sustained a muscle strain of the left leg and acute exacerbation of lumbosacral pain. She indicated with an affirmative mark that appellant's condition was aggravated by an employment activity. Dr. Bailey's September 16, 2003 duty status report provided a diagnosis of left lower extremity muscle strain and appellant's physical limitations. The Office received a duplicate copy of the September 3, 2003 letter from the employing establishment to Dr. McKay.

In response to the Office's September 12, 2003 letter, appellant submitted an undated letter providing, among other things, a description of the August 26, 2003 injury and his symptoms.

By decision dated October 17, 2003, the Office found the evidence of record sufficient to establish that appellant actually experienced the incident at the time, place and in the manner alleged but, insufficient to establish that he sustained a medical condition causally related to the accepted employment incident. Accordingly, the Office denied appellant's claim. On November 20, 2003 appellant requested an oral hearing before an Office hearing representative.

By decision dated December 30, 2003, the Office's Branch of Hearings and Review denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124. The Office found that appellant's request was postmarked November 20, 2003 and it was received more than 30 days after the issuance of the October 17, 2003 decision denying his claim and, therefore, he was not entitled to a hearing as a matter of right. Additionally, the Office

considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue in the case could be equally addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

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 filed within applicable time limitation; that an injury was sustained while 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 and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

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 or exposure, which is alleged to have occurred.[4] 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 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.[5] 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.[6] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[7]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

[4] *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[5] *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).

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

[7] *Charles E. Evans*, 48 ECAB 692 (1997).

ANALYSIS -- ISSUE 1

In this case, there is no dispute that appellant was in the performance of duty while setting his parking brake on August 26, 2003. Thus, appellant has satisfied the first criteria. The Board, however, finds the medical evidence of record insufficient to establish that this incident caused an injury.

The disability certificates of Dr. McKay and Dr. Bailey indicated that appellant was disabled for work during the period August 28 through September 14, 2003. These disability certificates, however, are insufficient to establish appellant's claim because the physicians failed to provide a diagnosis or to discuss how appellant's condition was caused by the August 26, 2003 employment incident.[8]

The January 25, 2002 and February 19, 2003 FMLA certification forms of Dr. Adams are not relevant as they predate the August 26, 2003 employment incident and they do not address whether appellant sustained an injury causally related to this accepted incident.

Dr. Bailey's September 11, 2003 attending physician's report noted that appellant had a muscle strain of the left leg and acute exacerbation of lumbosacral pain and indicated with an affirmative mark that appellant's conditions were caused by the August 26, 2003 employment incident. Dr. Bailey did not provide any medical rationale explaining how or why appellant's leg and back conditions were caused by the August 26, 2003 employment incident and, therefore, her report is insufficient to establish appellant's claim. This type of report, without more by way of medical rationale explaining how the incident caused the injury is insufficient to establish causal relationship and is of diminished probative value.[9]

Dr. Bailey's September 16, 2003 duty status report, which found that appellant sustained a left lower extremity muscle strain and noted his physical limitations, failed to address whether appellant's leg condition was caused by the August 26, 2003 employment incident.

Based on the foregoing, appellant has failed to submit sufficient rationalized medical evidence to establish that he sustained an injury caused by the August 26, 2003 employment incident.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant ... 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."[10] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant can choose between an oral

[8] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

[9] *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

[10] 5 U.S.C. § 8124(b)(1).

hearing or a review of the written record.[11] The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.[12]

Section 10.616(a) of the Office's regulations[13] provides in pertinent part:

> "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date 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 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.[14] 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,[15] when the request is made after the 30-day period for requesting a hearing[16] and when the request is for a second hearing on the same issue.[17]

ANALYSIS -- ISSUE 2

In this case, the 30-day period for determining the timeliness of appellant's hearing request would commence on October 18, 2003, the date following the issuance of the Office's October 17, 2003 decision finding that he failed to establish that he sustained an injury while in the performance of duty. Thirty days from October 18, 2003 would be November 16, 2003. Appellant's hearing request would be timely if filed by November 16, 2003.

In this case, appellant requested an oral hearing on November 20, 2003. The envelope which contained appellant's request reveals a postmark date of November 20, 2003. As appellant's request for a hearing was dated more than 30 days after the Office issued the October 17, 2003 decision, the Board finds that it was not timely filed and he is not entitled to a hearing as a matter of right. Further, the Office considered appellant's request and correctly advised him that he could equally well address the issue in his case through the reconsideration

[11] 20 C.F.R. § 10.615.

[12] *Id.*

[13] 20 C.F.R. § 10.616(a).

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

[15] *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

[16] *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

[17] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

process. Under these circumstances, the Board finds that the Office properly denied a discretionary hearing on the matter.[18]

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury while in the performance of duty. The Board further finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the December 30 and October 17, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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