U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOEL L. McCULLA and U.S. POSTAL SERVICE,
SPRINGFIELD POST OFFICE, Springfield, OH

Docket No. 03-1937; Submitted on the Record;
Issued January 13, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury in the performance of duty on April 8, 2002; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record under section 8124 of the Federal Employees' Compensation Act as untimely filed.

On April 9, 2002 appellant, then a 42-year-old letter carrier, filed a notice of traumatic injury (Form CA-1) alleging that he injured his low back on April 8, 2002 when he "unload[ed] mailbags out of back of truck and loading onto a dock." The employing establishment stated that appellant lost no time from work.

Appellant submitted a February 6, 2003 invoice for services performed on April 9, April 16 and May 21, 2002 at the Community Hospital's Center for Occupational Health and Medicine.

By letter dated March 6, 2003, the Office requested that appellant provide additional information. Specifically, appellant was requested to have his treating physician submit a detailed narrative medical report which included a history of injury given by him to the physician, dates of examination and treatment, a detailed description of findings, results of x-rays and laboratory tests, a diagnosis and clinical course of treatment followed and a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury. Appellant was advised that the physician's explanation was crucial to his claim. The Office allotted appellant 30 days within which to submit the requested information. No response was received within the allotted time.

By decision dated April 11, 2003, the Office denied appellant's claim, finding that the April 8, 2003 incident occurred as alleged, but that the medical evidence of record did not establish that a condition was diagnosed as a result of the incident. Therefore, fact of injury was not established.

On April 11, 2003 the Office received an April 8, 2002 medical report from Community Hospital indicating that appellant was seen that day by Dr. James T. Goodrich. Appellant was diagnosed with lumbosacral strain/sprain, treated with medicine and returned to work with restrictions that were not specifically stated.[1]

Also received on May 29, 2003 were March 17 and April 18, 2003 copies of facsimile cover sheets from the employing establishment indicating that the information requested by the Office was previously sent. By letter dated May 8, 2003, received by the Office on May 19, 2003, appellant requested review with proof of mailing on May 16, 2003. He stated that he had faxed the foregoing to the Office on March 17, and April 18, 2003.

By decision dated July 2, 2003, the Office denied appellant's request for a review of the written record finding that the request was made more than 30 days from April 11, 2003 and that the issue in this case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which established that he sustained an injury as alleged.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an employment-related injury to his low back on April 8, 2002.

An employee seeking benefits under the Act 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 the applicable time limitations 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 and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or 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 which is alleged to have occurred.[4] In the instant case, there is no dispute that the claimed incident occurred at the time, place and in the manner alleged.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal

[1] On May 29, 2003 appellant submitted a copy of a job offer with restrictions, which he accepted.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[3] *David J. Overfield*, 42 ECAB 718, 721 (1991).

[4] *Elaine Pendleton*, *supra* note 2.

relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[5] The Office found that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

In support of his claim, appellant submitted a February 6, 2003 invoice from The Community Hospital's Center for Occupational Health and Medicine. The invoice revealed that appellant was rendered services on April 9, April 16 and May 21, 2002. The invoice is not medical evidence as it did not provide a history of injury as given by appellant, a diagnosis or address a causal relationship between the employment-related incident on April 8, 2002 and a diagnosed condition.[6] Therefore, the February 6, 2003 invoice is insufficient to establish appellant's claim. Appellant was advised, by letter dated March 6, 2003, of the medical evidence needed to establish his claim. As appellant failed to timely submit medical evidence to support his claim, the Board finds that he has failed to meet his burden of proof.

The Board further finds that the Office properly denied appellant's request for a review of the written record under section 8124 of the Act as untimely filed.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing or review of the written record before an Office hearing 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."[7] As section 8124(b)(1) is unequivocal in setting 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.[8]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings or review the written record in certain circumstances where no legal provision was made for such hearings or review and that the Office must exercise this discretionary authority in deciding whether to grant a hearing or review.[9] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request or review of the written record on a claim involving an injury sustained prior to the

[5] *Kathryn Haggerty*, 45 ECAB 383 (1994); *see* 20 C.F.R. § 10.115(e).

[6] With his request for a review of the written record appellant submitted an April 8, 2003 report by Dr. James T. Goodrich with the Community Hospital. The Office did not review this evidence when issuing its July 2, 2003 decision. The Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). Appellant may submit tis evidence together with a written request for reconsideration directly to the Office.

[7] 5 U.S.C. § 8124(b)(1).

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

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

enactment of the 1966 amendments to the Act which provided the right to a hearing or review,[10] when the request is made after the 30-day period for requesting a hearing or review.[11]

In the present case, appellant's request for a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision dated April 11, 2003 and, thus, appellant was not entitled to a review of the written record as a matter of right. He requested a review of the written record in a letter postmarked May 16, 2003. Therefore, the Office was correct, in finding in its July 2, 2003 decision, that appellant was not entitled to a review of the written record as a matter of right because his request was not made within 30 days of the Office's April 11, 2003 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review as a matter of right, the Office, in its July 2, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for review of the written record on the basis that the case could be resolved by submitting additional evidence to establish that he sustained an injury as a result of the April 8, 2002 employment-related incident. 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.[12] 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 request for a review of the written record which could be found to be an abuse of discretion. The Office advised appellant that he could submit the evidence with a request for reconsideration to the district Office. For these reasons, the Office properly denied appellant's request for a review of the written record under section 8124 of the Act.

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

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

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

The decisions dated July 2 and April 11, 2003 of the Office of Workers' Compensation Programs are affirmed.[13]

Dated, Washington, DC
January 13, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] The Board notes that, subsequent to the issuance of the Office's July 2, 2003 decision and on appeal, appellant submitted evidence which was not previously before the Office. As this evidence was not previously submitted to the Office for consideration prior to its decision of July 2, 2003, the evidence represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant should resubmit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).