

FACTUAL HISTORY

On August 6, 2002 appellant, then a 56-year-old instrument worker, filed a notice of traumatic injury alleging on July 30, 2002 he sustained an aggravation of cervical disc disease and intermittent left eyelid ptosis due to lifting in the performance of duty.

The Office requested additional factual and medical information by letter dated October 10, 2002. Appellant responded and by decision dated November 25, 2002, the Office denied appellant's claim finding that he failed to establish that an injury resulted from the July 30, 2002 lifting incident.¹

Appellant requested an oral hearing by letter dated May 10, 2003.² By decision dated July 7, 2003, the Branch of Hearings and Review denied appellant's request for a hearing as untimely.

LEGAL PRECEDENT -- ISSUE 1

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 The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal 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.⁴ 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. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁵

¹ The Office noted that if appellant believed that his current conditions were due to his August 10, 2000 employment injury he could file a notice of recurrence of disability under that claim number.

² After the Office's November 25, 2002 merit decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁵ *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 1

In this case, the Office accepted that the lifting incident on July 30, 2002 occurred as alleged. However, the Office found that appellant had not submitted sufficient medical evidence to establish an injury as a result of this incident. Appellant submitted an emergency room note dated July 31, 2002, which listed appellant's complaints as choking sensation, difficulty swallowing and numbness on the left side of his face since July 30, 2002, as well as difficulty closing his left eye. The physician, whose signature is illegible, diagnosed acute bell's palsy and sinusitis. The physician did not mention an employment incident on July 30, 2002 and did not attribute any of appellant's diagnosed condition to such an incident. Therefore, this report is not sufficient to meet appellant's burden of proof.

In a form report dated August 6, 2002, the employing establishment medical officer noted appellant's description of the July 30, 2002 employment incident and diagnosed aggravation of cervical disc disease and intermittent left eyelid ptosis. However, this report was not signed and lacks proper identification as it is not clear that the medical officer is a physician. Therefore, this report cannot be considered as probative evidence.⁶

In support of his claim, appellant submitted a series of medical records from the Department of the Veterans Affairs, Veterans Administration Medical Center. On August 12, 2002 appellant stated that he had been unable to open his eyes, more on the left than the right for the past two weeks. Dr. Anurupa Damineni, a Board-certified internist, did not provide a history of employment injury. In a report dated August 19, 2002, Dr. Damineni stated that appellant had been unable to work since a head injury on August 8, 2000⁷ that appellant had a history of venous stasis disease, osteoarthritis, cellulitis and sleep apnea, as well as psoriasis. He further noted that appellant was hospitalized from August 12 though 14, 2002, due to left sided weakness and was diagnosed with transient ischemic attacks. Dr. Damineni stated that appellant was considered unemployable due to head injury and brain stem injury. This report also lacks a history of an employment injury on July 30, 2002 and is, therefore, insufficient to meet appellant's burden of proof.

Appellant also submitted a report from a physician's assistant on August 31, 2001. A physician's assistant is not a physician for the purposes of the Federal Employees' Compensation Act⁸ and his report does not constitute medical evidence.⁹ Therefore, this report cannot be sufficient to meet appellant's burden of proof.

Appellant submitted medical records from a hospital admission on September 18, 2002. Dr. William J. Briggs, a general practitioner, noted appellant's August 2000 employment injury, but did not mention the employment incident of July 30, 2002. As this report does not include an

⁶ *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁷ The Office accepted that appellant sustained a cervical strain as a result of his August 10, 2000 employment injury.

⁸ 5 U.S.C. §§ 8101-8193, 8101(2).

⁹ *Ricky S. Storms*, 52 ECAB 349, 353 (2001); *John A. Williams*, 37 ECAB 238 (1985).

accurate history of injury and does not include an opinion that appellant's various diagnosed conditions are due to the July 30, 2002 employment incident, this report is not sufficient to establish an injury as a result of the July 30, 2002 employment incident.

Appellant also submitted information from the internet regarding brain stem tumors. The Board has held that excerpts of medical publications are of no evidentiary value in establishing a claim as they are of general application and are not determinative as to whether specific conditions or disability were the result of the employment. This material has probative value only to the extent that it is interpreted and cited by a physician rendering an opinion on the causal relationship between a condition and specified employment injury.¹⁰ Appellant has not submitted medical evidence from a physician regarding the diagnosis of brain stem tumors and has not submitted any evidence supporting that this condition is related to his July 30, 2002 employment incident.

Appellant has submitted no medical evidence in support of his claim that he sustained an employment injury on July 30, 2002 as alleged, therefore, the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act,¹¹ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹²

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.¹³ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.¹⁴

ANALYSIS -- ISSUE 2

In the instant case, the Office properly determined appellant's May 10, 2003 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's November 25, 2002 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

¹⁰ *Harlan L. Soeten*, 38 ECAB 566, 567 (1987).

¹¹ 5 U.S.C. §§ 8101-8193, 8124(b); 20 C.F.R. § 10.616.

¹² 5 U.S.C. § 8124(b)(1).

¹³ *Tammy J. Kenow*, 44 ECAB 619 (1993).

¹⁴ *Id.*

The Office then proceeded to exercise its discretion, in accordance with the Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

CONCLUSION

The Board finds that appellant has not submitted any medical evidence noting his history of an employment incident on July 30, 2002 and opining that one or more of his diagnosed conditions are due to this incident. Therefore, appellant has failed to establish that he sustained an injury in the performance of duty on July 30, 2002. The Board further finds that the Branch of Hearings and Review properly determined that appellant's request for an oral hearing was not timely filed and properly denied this request.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2003 and November 25, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 26, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member