United States Department of Labor
Employees' Compensation Appeals Board

VINCENT DIMARCO, Appellant	)	
and	)	**Docket No. 06-257**
	)	**Issued: March 16, 2006**
DEPARTMENT OF HEALTH & HUMAN SERVICES FEDERAL EMERGENCY MANAGEMENT AGENCY, Albuquerque, NM, Employer	)	

Appearances:
Vincent DiMarco, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 14, 2005 appellant filed a timely appeal of an October 5, 2005 decision of the Office of Workers' Compensation Programs which denied his request for an oral hearing and a June 2, 2005 decision which found that he did not sustain an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on September 4, 2004; and (2) whether the Office properly denied his request for an oral hearing.

FACTUAL HISTORY

On September 17, 2004 appellant, then a 58-year-old physician's assistant, filed a traumatic injury claim alleging that on September 4, 2004 he tripped and fell and struck his teeth

on the edge of a cot while in the performance of duty. He did not stop work. The employing establishment controverted the claim.

Appellant submitted a December 14, 2004 treatment estimate for dental work comprised of a crown, a bridge and an extraction in the amount of $4,823.00 dollars and his demobilization orders activating him to assist with hurricane Frances.

In a January 30, 2005 attending physician's report, Dr. Jaime Gonzalez, Board-certified in family medicine, indicated that appellant fell and hit his teeth on the floor. He noted a preexisting history of periodontal disease, including bone loss and recommended extraction of tooth number eight. Dr. Gonzalez checked the box "yes" that the condition was caused or aggravated by an employment activity and explained that the blow to the tooth resulted in the tooth moving.[1]

By letter dated March 23, 2005, the Office advised appellant that additional factual and medical evidence was needed. The Office allotted him 30 days to submit the requested information.

In a letter dated March 25, 2005, appellant explained that, while he was deployed to Florida during a hurricane, he fell and sustained an injury to his front incisor. He indicated that no dentists were available to examine him at that time as the hurricane had "put down almost all local medical and dental offices." He subsequently notified his superiors upon his return and submitted his documentation.

By decision dated June 2, 2005, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. The Office found that the evidence was sufficient to show that the claimed event occurred as alleged. However, the Office found that there was insufficient medical evidence supporting that the accepted employment incident caused a diagnosed condition.

Appellant requested a hearing on September 6, 2005.

By decision dated October 5, 2005, the Office denied appellant's request for an oral hearing on the grounds that the request was untimely. Additionally, the Office considered the matter in relation to the issue involved and denied his request on the basis that the issue could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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

[1] A treatment estimate for this procedure was also included.

[2] 5 U.S.C. §§ 8101-8193.

was timely filed within the applicable time limitation period of the Act[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

> 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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[6]

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7] The medical evidence required to establish causal relationship is usually rationalized medical evidence. 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.[8]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an injury to his front teeth on September 4, 2004. The Office accepted that he tripped, fell and struck his teeth on the edge of a cot while in the performance of duty at work. The Board finds that the first component of fact of injury, the claimed incident -- that appellant tripped and fell and struck his teeth, occurred as alleged.

However, the medical evidence is insufficient to establish that the employment incident caused an injury. The medical reports of record do not establish that the fall at work caused a

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyet*, 41 ECAB 992 (1990).

[6] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[7] *Id.* For a definition of the term "traumatic injury," *see* 20 C.F.R. § 10.5(ee).

[8] *Id.*

personal injury on September 4, 2004. The medical evidence contains no reasoned explanation of how the specific employment incident on September 4, 2004 caused or aggravated an injury.[9]

The only relevant report provided by appellant was the January 30, 2005 report of Dr. Gonzalez, who indicated that he fell and hit his teeth on the floor. He noted a preexisting history of periodontal disease, including bone loss and recommended extraction of tooth number eight. Dr. Gonzalez checked the box "yes" that the condition was caused or aggravated by an employment activity and explained that the blow to the tooth resulted in the tooth moving. However, he indicated that the incident occurred on September 6, 2004 as opposed to September 4, 2004 and did not appear to be aware of the circumstances regarding the fall. It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.[10] Furthermore, Dr. Gonzalez did not provide any medical reasoning to explain how the incident caused or aggravated appellant's preexisting history of periodontal disease and bone loss. Therefore, this report is insufficient to meet his burden of proof. Appellant did not submit any other medical evidence that specifically addressed how the September 4, 2004 incident caused or aggravated a diagnosed medical condition.

Consequently, appellant has submitted insufficient medical evidence to establish that the September 4, 2004 incident caused an injury.

LEGAL PRECEDENT -- ISSUE 2

A claimant for compensation not satisfied with a decision by the Office is entitled, on request made within 30 days after the date of the issuance of the decision,[11] to a hearing on his claim before a representative of the Secretary.[12] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing on his claim as a matter of right unless the request is made within the requisite 30 days.[13]

A request received after those dates will be subject to the Office's discretion.[14] 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

[9] *See George Randolph Taylor,* 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[10] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[11] Appellant must send a request in writing to the Branch of Hearings and Review, with which he specifically disagreed, within 30 days as determined by the postmark or other carrier's date marking of the date of the issuance of the decision for which a hearing is sought. *See* 5 U.S.C. § 8124(b)(1). The claimant must not have previously submitted a reconsideration request on the same decision. *See* 20 C.F.R. § 10.616(a) and (b).

[12] 5 U.S.C. § 8124(b)(1).

[13] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Charles J. Prudencio*, 41 ECAB 499 (1990).

[14] 20 C.F.R. §§ 10.615 and 10.616(a) and (b).

of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[15] The Board has held that the Office has the discretion to grant or deny a hearing request on a claim[16] when the request is made after the 30-day period for requesting a hearing[17] and when the request is for a second hearing on the same issue.[18] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[19]

ANALYSIS -- ISSUE 2

The Office issued a decision denying appellant's claim on June 2, 2005. He requested a hearing on a form postmarked September 9, 2005. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[20] Since appellant did not request a hearing within 30 days of the Office's June 2, 2005 decision, he was not entitled to a hearing under section 8124 as a matter of right.

The Branch of Hearings and Review further exercised its discretion and considered appellant's hearing request in its October 5, 2005 decision and denied it on the basis that he could pursue his claim by requesting reconsideration and submitting additional relevant and probative evidence. An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken prejudice, partiality, intentional wrong or action against logic.[21] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty. The Board also finds that the Office properly denied his request for an oral hearing under section 8124(b)(1).

[15] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

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

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

[18] *Johnny S. Henderson*, *supra* note 15.

[19] *Id.; Rudolph Bermann*, *supra* note 16.

[20] 20 C.F.R. § 10.616(a).

[21] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Daniel J. Perea*, 42 ECAB 214 (1990); *Charles J. Prudencio*, 41 ECAB 499 (1990).

ORDER

IT IS HEREBY ORDERED THAT the October 5 and June 2, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 14, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board