United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 09-1733**
	)	**Issued: March 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 17, 2009 appellant filed a timely appeal from a May 22, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his hearing request. The Board also has jurisdiction over the April 9, 2009 merit decision that denied appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.[1]

ISSUES

The issues are: (1) whether appellant satisfied his burden of proof to establish he sustained an injury in the performance of duty on December 30, 2008 causally related to his employment; and (2) whether the Office properly denied his request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

[1] By decision dated June 25, 2009, the Office denied reconsideration of the April 9, 2009 decision. An Office decision, issued while the Board has jurisdiction over the matter in dispute, is null and void. *Lawrence Sherman*, 55 ECAB 359 (2004).

FACTUAL HISTORY

On February 26, 2009 appellant, a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for a hernia, alleging that on December 30, 2008 while lifting a tub of mail he experienced a sharp pain in his stomach and groin area.

Appellant submitted a January 21, 2009 report in which Dr. Annie Kou, a family physician, presented findings on examination and diagnosed right inguinal pain with increased intra-abdominal pressure, sneezing, coughing and straining. Dr. Kou noted that, while appellant had groin discomfort, no mass or hernia was palpated. She opined that appellant's diagnosis "could be" strain or small hernia.

In a January 29, 2009 report, Dr. David S. Udis, a Board-certified diagnostic radiologist, reported that an ultrasound scan of appellant's abdomen revealed no abnormalities.

In a February 5, 2009 report, Dr. Kent Fung, a family physician, presented findings on examination and diagnosed right inguinal pain with increased intra-abdominal pressure, sneezing, coughing and straining.

In a February 9, 2009 note, Dr. Daniel D. Eun, a urologist, diagnosed bilateral inguinal groin hernias and opined that this condition was "likely related to his work." In a March 10, 2009 note, he reviewed appellant's history of injury. Dr. Eun opined that inguinal hernias are "predisposed to forming in patients who lift heavy weights on a regular basis." While noting that a congenital component may also influence development, he opined that appellant's inguinal hernia developed while he was in his late 30's, working as a mail carrier because his abdominal pain presented "only recently." In a subsequent report (CA-17) dated March 16, 2009, Dr. Eun diagnosed inguinal hernia and provided work restrictions.

By decision dated April 9, 2009, the Office denied the claim. While it accepted that appellant lifted a tub of mail on December 30, 2008, it denied the claim because the evidence of record did not establish that appellant's medical condition was caused by the accepted employment incident.

On May 16, 2009 appellant requested a hearing. By decision dated May 22, 2009, the Office denied appellant's hearing request because it was untimely.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

injury.[4] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant lifted a tub of mail on December 30, 2008. Appellant's burden is to demonstrate that the accepted employment incident caused a medically-diagnosed condition. Causal relationship is a medical issue that can only be proven by substantial, probative rationalized medical opinion evidence.[9] Appellant has not submitted sufficient medical opinion evidence and therefore has not satisfied his burden of proof.

Both Dr. Kou and Dr. Kent diagnosed right inguinal pain, but pain is a symptom, not a compensable diagnosis.[10] Dr. Udis' reported an ultrasound scan of appellant's abdomen revealed no abnormalities. The Board further notes that none of these physicians offered any opinion regarding the cause of appellant's current condition. As such their reports are of little probative value in establishing that appellant sustained a hernia while lifting a tub of mail on December 30, 2008.

While Dr. Eun, in his March 10, 2009 note, opined that appellant did have bilateral inguinal hernias and that appellant's condition occurred while working as a mail carrier, he did not present findings on examination, a review of appellant's medical history or describe, with sufficient medical rationale, the mechanism of injury or explain how the accepted employment

[4] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *G.T., id.*; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[6] *Jennifer Atkerson,* 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[7] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[8] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[9] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[10] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

incident of lifting a tub of mail on December 30, 2008 caused appellant's hernia. He merely offered a speculative opinion that appellant's work caused or contributed to his condition because his pain only presented recently. These deficiencies reduce the probative value of Drs. Kou, Fung, Eun and Udis' opinions such that their reports and notes are insufficient to satisfy appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation.[11] Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.

The Board finds that appellant has not satisfied his burden of proof to establish he sustained an injury in the performance of duty on December 30, 2008 causally related to his employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act,[12] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection(a) of this section 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.

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] When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was a review of an adverse decision by a hearing representative and that a claimant could choose between two formats: an oral hearing or a review of the written record.[14] These regulations also provide that the request for either type of hearing 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.[15]

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, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in

[11] *See also Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

[12] 5 U.S.C. § 8124(b)(1).

[13] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[14] 20 C.F.R. § 10.615.

[15] *Id.* at § 10.616. *See Leona B. Jacobs*, 55 ECAB 753 (2004).

deciding whether to grant a hearing.[16] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[17]

ANALYSIS -- ISSUE 2

On April 9, 2009 the Office denied appellant's claim. Appellant's hearing request was postmarked May 16, 2009 more than 30 days after the Office issued its initial decision and, therefore, the Office properly found that appellant was not entitled to a hearing as a matter of right.

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and probable deduction from established facts.[18] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of his request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant has not satisfied his burden of proof to establish he sustained an injury in the performance of duty on December 30, 2008 causally related to his employment. The Board finds the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

[16] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[17] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[18] *See André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the May 22 and April 9, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 18, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board