United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 14-220**
	)	**Issued: May 2, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 12, 2013 appellant filed a timely appeal from a September 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and his request to subpoena witnesses. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on February 10, 2010; and (2) whether OWCP properly denied his request for subpoenas.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 9, 2011 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2010 his preexisting Type 1 diabetes was aggravated when he had to work a double capacity shift by himself, causing his blood sugar to drop. He stated that his supervisors forced him to seek emergency treatment at the hospital even though he would have recovered with a break.

By letter dated November 27, 2012, OWCP informed appellant that the evidence received was insufficient to establish his claim. It requested additional factual and medical evidence and asked that he respond to the provided questions within 30 days. OWCP also requested the employing establishment to provide additional factual information with respect to appellant's traumatic injury claim.

By letter dated December 8, 2012, appellant responded that, on February 10, 2010, he was working a double capacity job because his supervisor refused to replace his coworker. He was restricted from taking breaks without informing his supervisor. Appellant went to go find his supervisor to take his first break but his blood sugar had begun to fall due to his Type 1 diabetes. He began to sweat, experience cramped muscles and had difficulty walking. Appellant's coworkers helped him to the break room and his supervisors made him to go to the hospital by way of ambulance despite his protests. He noted that his supervisors overreacted and unnecessarily removed him from work. Appellant stated that, if he had been allowed to take his break, he would have been able to resume work as it would have given him a chance to raise his blood sugar. He argued that management failed to provide him with reasonable accommodations.

Appellant submitted narrative statements dated June 6, 2010 and July 1, 2011 recounting the February 10, 2010 employment incident. He stated that his medical treatment for emergency services should have been covered by the employing establishment or OWCP. Appellant further reiterated that he was forced to go to the hospital by his supervisors and no one ever told him he needed to file a Form CA-1 for immediate removal from work due to injury and payment of his medical bills.

Appellant also submitted a February 10, 2011 statement from Michelle Frankovich and a February 14, 2011 statement from Ashwin Patel, his coworkers. They supported his assertions regarding the February 10, 2010 employment incident.

In medical reports dated February 7, 2008 and June 29, 2009, Dr. Anne Missavage, a Board-certified surgeon, reported that appellant was a severe diabetic and was being treated for an infection in the third right toe. The toe required amputation on January 17 and February 11, 2008. Appellant stated that he constantly worked on his feet, was required to work overtime and had been doing more than one bid job. Dr. Missavage noted that he required work restrictions due to his diabetes so that he could appropriately adjust his insulin doses with breaks for foot elevation.

In medical reports dated February 6 and July 10, 2009 and September 21, 2010, Dr. David Wenkert, Board-certified in internal medicine, reported that appellant suffered from

Type 1 diabetes with highly variable blood sugar. Appellant required a consistent schedule every day during his work shift so that he could adequately plan his meals and insulin doses in order to control his blood sugar. He indicated that he was required, with no advanced notice, to change job positions frequently during his shift at work.

In a February 10, 2010 Ingham Regional Medical Center Emergency Room (ER) report, Dr. Shannon Wiggins, a doctor of osteopathic medicine, reported that appellant had a history of diabetes and was transported from work after his blood sugar dropped. She diagnosed low blood glucose and resolved hyperkalemia. Appellant was admitted overnight and released on February 11, 2010.

By decision dated May 21, 2013, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury. It found that the February 10, 2010 incident occurred as alleged; that he was working two positions by himself, and that he was unable to take regularly scheduled breaks. OWCP found that the evidence failed to provide a firm medical diagnosis which could be reasonably attributed to the accepted incident. It further noted that the evidence did not establish that a medical condition arose or was aggravated by the February 10, 2010 employment incident.

On January 14, 2013 appellant requested an oral hearing before the Branch of Hearings and Review.

On February 9, 2013 appellant requested that OWCP's hearing representative issue a subpoena for Ms. Frankovich and Mr. Patel, his coworkers, to establish his allegations on February 10, 2010 and to verify that he was unnecessarily sent to the hospital despite his protests.

On April 1, 2013 OWCP's hearing representative denied appellant's request for subpoenas stating that the facts surrounding his claim had been established and the case was denied due to a lack of medical evidence. The hearing representative noted that it was unclear how the subpoena request was relevant to the issue at hand which involved a medical issue and that appellant could submit written statements from the individuals. Appellant was also informed that he could bring witnesses to testify at the hearing.

At the May 8, 2013 hearing, appellant testified that he was required to do extra work because his workstation was understaffed which caused his blood sugar to drop. He further stated that his supervisors forced him to go to the hospital on February 10, 2010 despite his protests. Appellant requested that the employing establishment pay for his hospital bills. He was advised of the medical evidence needed to establish his claim. The record was held open for 30 days.

By decision dated September 5, 2013, OWCP's hearing representative affirmed the January 4, 2013 decision finding that the evidence of record failed to establish a diagnosed condition which could be reasonably attributed to the accepted employment incidents. The hearing representative also noted that appellant had established that he was forced to go to the hospital, against his wishes, on February 10, 2010 by employing establishment management.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability 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 occupational disease.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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] 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.[5] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. 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.[6]

ANALYSIS -- ISSUE 1

OWCP accepted that the February 10, 2010 incidents occurred as alleged. Appellant was working two positions on that day and was not allowed to take regularly scheduled breaks. He was also required by management to seek medical treatment at a hospital. OWCP denied appellant's claim on the grounds that it lacked sufficient medical evidence to support an injury related to the February 10, 2010 incident. The Board finds that he did not submit sufficient

[2] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[3] *Michael E. Smith*, 50 ECAB 313 (1999).

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

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

[6] *James Mack*, 43 ECAB 321 (1991).

medical evidence to support that he sustained an injury causally related to the February 10, 2010 employment incident.[7]

In a February 10, 2010 emergency room report, Dr. Wiggins advised that appellant had a history of diabetes and was transported from work after his blood sugar dropped. She diagnosed low blood glucose and hyperkalemia, resolved. Appellant was admitted overnight and released on February 11, 2010.

Dr. Wiggins' failed to provide any explanation regarding the cause of appellant's condition on February 10, 2010. She did not address his medical history other than noting his preexisting diabetes condition. Dr. Wiggins did not state that appellant's condition was work related or offer a rationalized opinion on the issue of causal relationship.[8] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[9] The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.[10] Dr. Wiggins' report is insufficient to meet appellant's burden of proof.[11]

The remaining medical evidence of record is also insufficient to establish appellant's traumatic injury claim. The reports of Dr. Missavage reference appellant's diabetes and right toe amputation, recommending a stable work schedule with breaks. The reports predating the February 10, 2010 employment incident are therefore irrelevant to establish an injury that day. Dr. Wenkert provided a diagnosis of Type 1 diabetes and recommended a consistent work schedule so that appellant could adequately plan his meals and insulin doses in order to control his blood sugar. This evidence is not sufficient to establish appellant's case.

OWCP accepted that the employing establishment required appellant to seek medical treatment at a hospital on February 10, 2010. It regulations provide that in unusual or emergency circumstances it may approve payment for medical expenses incurred.[12] OWCP may approve payment for medical expenses incurred even if a Form CA-16 authorizing medical treatment and expenses has not been issued and the claim is subsequently denied; payment in such situations must be determined on a case-by-case basis.[13] It did not consider whether emergency

[7] *See Robert Broome*, 55 ECAB 339 (2004).

[8] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[9] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[10] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[11] *Supra* note 9.

[12] 20 C.F.R. § 10.304.

[13] *G.S.*, Docket No. 13-1731 (issued December 3, 3013).

circumstances or unusual circumstances were present or whether this was a situation in which reimbursement of medical expenses was appropriate. OWCP is required to exercise its discretion to determine whether medical care has been authorized or whether unauthorized medical care involved emergency or unusual circumstances and is therefore reimbursable regardless of whether the underlying claim for benefits has been accepted or denied. The circumstances of the case warrant additional development of this issue. On return of the record, OWCP should issue a *de novo* decision on the issue of reimbursement of medical expenses.[14]

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[15] The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[16] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[17] Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[18] OWCP's hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[19] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of

[14] *Id*.

[15] 5 U.S.C. § 8126(1).

[16] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[17] *Id.*

[18] 20 C.F.R. § 10.619(a)(1).

[19] *See Gregorio E. Conde, supra* note 16.

judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[20]

ANALYSIS -- ISSUE 2

On January 14, 2013 appellant requested a hearing. By letter dated February 9, 2013, he requested subpoenas to compel the attendance of Ms. Frankovich and Mr. Patel, his coworkers, who were present during the February 10, 2010 employment incident. By letter dated April 1, 2013, finalized in the September 5, 2013 decision, OWCP's hearing representative denied appellant's request for subpoenas stating that he had established the factual portion of his claim. The witnesses had submitted to the record and their attendance was not relevant to the issue on appeal, which required the submission of medical evidence.

The Board finds that OWCP's hearing representative properly denied appellant's subpoena request. Appellant did not establish why a subpoena was the best method to obtain the evidence in question or why there was no other means by which the testimony could be obtained. As noted, the individuals for whom the subpoenas were requested had provided written statements to the record. An 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.[21] The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion. The Board finds that the hearing representative did not abuse his discretion in denying appellant's request for subpoenas.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that his low blood glucose and hyperkalemia is causally related to the accepted February 10, 2010 employment incident. In addition, the Board further finds that OWCP properly denied appellant's request for a subpoena.

[20] *Claudio Vazquez*, 52 ECAB 496 (2001).

[21] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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