United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 17-0612**
	)	**Issued: July 10, 2017**
DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, Alexandria, VA, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 18, 2017 appellant, through counsel, filed a timely appeal from a September 6, 2016 merit decision and a December 7, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that his neck and shoulder injuries are causally related to the September 22, 2015 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 23, 2015 appellant, then a 49-year-old inspector, filed a traumatic injury claim (Form CA-1), alleging that on September 22, 2015, while a passenger in an unmarked police car sitting surveillance, the vehicle was struck by another vehicle and he experienced stiffness in his neck, shoulder blades, lower back and extremities. He did not stop work.

Appellant submitted a statement dated September 25, 2015 and reiterated that on September 22, 2015, while he was a passenger in a vehicle conducting surveillance, the vehicle was struck by another vehicle and he sustained injuries to his neck, lower back, left arm and left elbow.

By letter dated October 1, 2015, OWCP advised appellant of the type of evidence needed to establish his claim, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors. It noted that medical evidence must be submitted by a qualified physician under FECA.

Appellant submitted a September 29, 2015 report from Dr. Charles F. Leinberry, a Board-certified orthopedist, who treated him for an injury to his left elbow. He reported pain and discomfort in the left elbow after a work injury which occurred on September 22, 2015. Dr. Leinberry noted findings on examination of a normal gait, tenderness over the lateral epicondylar region of the elbow, full finger and wrist range of motion, and pain with resisted wrist extension. He diagnosed left lateral epicondylitis. Dr. Leinberry advised that this was a self-limiting condition that would improve over time and may take up to 12 months. He recommended physical therapy and a cortisone injection.

In a November 4, 2015 decision, OWCP denied appellant's claim for compensation because the evidence of record was insufficient to establish that the medical condition was causally related to the accepted work incident.

Following OWCP's decision, appellant submitted an October 13, 2015 physical therapy order from Dr. Paul W. Codjoe, a Board-certified orthopedist, for treatment two to three times a week for four to six weeks. Dr. Codjoe diagnosed left lateral epicondylitis, nonoperable and recommended treatment exercises for strengthening, joint mobilization, stretching, and range of motion. Appellant also submitted physical therapy reports dated October 19 to December 1, 2015.

On November 24, 2015 appellant, through counsel, requested an oral hearing which was held before an OWCP hearing representative on July 8, 2016. Counsel indicated that he

experienced difficulty obtaining medical records and the hearing representative agreed to keep the record open for 30 days for submission of additional evidence.

In a September 6, 2016 decision, an OWCP hearing representative affirmed the decision dated November 4, 2015. She indicated that the record was held open for 30 days after the telephone hearing, but no additional evidence was received.

Appellant, through counsel, requested reconsideration by letter dated September 9, 2016. Counsel indicated that the hearing representative's decision noted that no additional records or reports had been received following the telephonic hearing of July 8, 2016 but, he contended that he had faxed 31 pages, including multiple records which explained that appellant had injured his left elbow at work on September 22, 2015. He provided a copy of the letter he had sent to the hearing representative dated July 11, 2016 which indicated that the reports which had been obtained from Dr. Codjoe's office were attached. Counsel submitted a fax cover sheet and fax receipt indicating that 31 pages of records had been received at the fax number of (202) 693-1386 on July 11, 2016. No medical evidence accompanied the reconsideration request.

In an December 7, 2016 decision, OWCP denied appellant's September 9, 2016 request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish 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 of FECA, 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[4]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical

[3] *Gary J. Watling*, 52 ECAB 357 (2001).

[4] *T.H.*, 59 ECAB 388 (2008).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5]

ANALYSIS -- ISSUE 1

It is undisputed that on September 22, 2015 appellant was a passenger in an unmarked police car conducting surveillance in the performance of duty when the vehicle was struck by another vehicle. The evidence supports that he was diagnosed with left lateral epicondylitis. However, the Board finds that appellant has failed to submit sufficient medical evidence to establish that his diagnosed medical condition is causally related to the September 22, 2015 employment incident.

Appellant submitted a September 29, 2015 report from Dr. Leinberry who treated him for pain and discomfort in the left elbow after a work injury. Dr. Leinberry noted findings on examination of tenderness over the lateral epicondylar region of the elbow and pain with resisted wrist extension. He diagnosed left lateral epicondylitis. Dr. Leinberry advised that this was a self-limiting condition and would improve over time. He recommended physical therapy and a cortisone injection. However, Dr. Leinberry merely repeated the history of injury as reported by appellant without providing his own opinion regarding whether his condition was work related. To the extent that he is providing his own opinion, he failed to provide a rationalized opinion regarding the causal relationship between appellant's left elbow condition and the accepted work incident.[6] Therefore, this report is insufficient to meet appellant's burden of proof.

Appellant submitted a physical therapy order from Dr. Codjoe who diagnosed left lateral epicondylitis, nonoperable and recommended treatment exercises for strengthening, joint mobilization, stretching, and range of motion. Dr. Codjoe's order is insufficient to establish the claim as he did not provide a history of injury[7] or specifically address whether appellant's employment activities had caused or aggravated a diagnosed medical condition.[8]

Appellant submitted physical therapy reports dated October 19 to December 1, 2015. The Board has held that notes signed by a physical therapist are not considered medical evidence

[5] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *R.M.*, Docket No. 16-1845 (issued March 6, 2017); *see also 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).

[7] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[8] *A.D.*, 58 ECAB 149 (2006); Docket No. 06-1183 (issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

as they are not physicians under FECA.[9] Thus, these treatment records are of no probative medical value in establishing appellant's claim.

Consequently, the Board finds that appellant has failed to submit sufficient medical evidence to establish that his accepted work incident on September 22, 2015 caused or aggravated a diagnosed medical condition.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,[10] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[11]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[12]

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim as he failed to provide sufficient medical evidence to establish that the accepted work incident on September 22, 2015 caused or aggravated a diagnosed medical condition. Appellant requested reconsideration.

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[9] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law). *See also E.W.*, Docket No. 16-1729 (issued May 12, 2017) (where the Board found that a physical therapist was not considered a physician under FECA).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(3).

[12] *Id*. at § 10.608(b).

The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant, through counsel, disputed that no additional records or reports had been received following the telephonic hearing of July 8, 2016. He claimed that he had faxed 31 pages which included multiple records which explain that appellant injured his left elbow at work on September 22, 2015. Counsel indicated that a facsimile receipt verified that 31 pages of documents had been submitted to OWCP. These assertions do not show a legal error by OWCP or a new and relevant legal argument not previously considered by OWCP. The underlying issue in this case is whether appellant submitted sufficient evidence to establish the accepted work incident on September 22, 2015 caused or aggravated a diagnosed medical condition. That is a medical issue which must be addressed by relevant new medical evidence.[13]

With respect to relevant and pertinent new evidence not previously considered by OWCP, appellant submitted a July 11, 2016 letter to the hearing representative, a fax cover sheet and fax receipt indicating that 31 pages of records went through to the fax number of (202) 693-1386 on July 11, 2016. However, no new medical evidence was received into the record. Therefore, OWCP properly found no basis upon which to reopen the case for a merit review.

On appeal counsel reiterates that he sent 31 pages of records to the hearing representative and a fax receipt. He indicated that he then filed an appeal with the Board citing that he sent records in and OWCP's decision did not note these facts in their decision. The record before the Board, however, does not contain any such evidence.

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or provide relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish injuries causally related to the accepted September 22, 2015 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[13] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 7 and September 6, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 10, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board