United States Department of Labor
Employees' Compensation Appeals Board

W.K., Appellant	)	
and	)	**Docket No. 20-0765**
	)	**Issued: February 26, 2021**
U.S. POSTAL SERVICE, PORT HADLOCK POST OFFICE, Port Hadlock, WA, Employer	)	

Appearances:
Colleen Rodrigues, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 25, 2020 appellant, through his representative, filed a timely appeal from an August 29, 2019 merit decision and a January 28, 2020 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.[3]

[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.*

[3] The Board notes that, following the January 28, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a diagnosed medical condition causally related to the accepted May 4, 2019 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record before a representative of OWCP's Branch of Hearings and Review as untimely filed under 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On July 12, 2019 appellant, then a 41-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on May 4, 2019 he tore his bicep and rotator cuff when lifting and unloading a sorting case while in the performance of duty. On the reverse side of the claim form the employing establishment acknowledged that appellant was injured in the performance of duty. Appellant stopped work on July 8, 2019 and returned on July 12, 2019.

In a development letter dated July 18, 2019, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received a work excuse note, dated July 9, 2019, from Dr. Helene Lhamon, a Board-certified specialist in emergency medicine, who noted that appellant could not work for 48 hours and/or use his left arm for lifting, pulling, or pushing until cleared by an orthopedic specialist.

In a July 11, 2019 report, Jordan Giesler, a physician assistant, noted that appellant experienced left shoulder pain after attempting to move a mail sorting shelf. He examined appellant and diagnosed left rotator cuff tendinitis and lateral epicondylitis of the left elbow. In an accompanying duty status report (Form CA-17), Mr. Giesler advised that appellant could return to modified-duty work on July 11, 2019.

In a July 17, 2019 report, Mr. Giesler noted that appellant experienced left elbow pain radiating into his left shoulder. He examined appellant and diagnosed left shoulder pain and cervical radiculopathy.

On July 20, 2019 appellant accepted an offer of modified assignment to work a limited-duty position as a laborer custodian.

By decision dated August 29, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted May 4, 2019 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On an appeal request form dated January 3, 2020 appellant, through his representative, requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. The request was received by OWCP's Branch of Hearings and Review on January 14, 2020.

OWCP subsequently received a January 4, 2020 letter from appellant's representative who noted that she attempted to submit medical evidence on September 16, 2019, but was unsuccessful. She submitted a July 17, 2019 x-ray of appellant's left shoulder and a September 11, 2019 report from a nurse practitioner.

By decision dated January 28, 2020, an OWCP hearing representative denied appellant's request for a review of the written record as untimely, finding that his request was not made within 30 days of the August 29, 2019 decision. The hearing representative determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] 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 timely filed within the applicable time limitation period of FECA,[5] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[6] 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.[7]

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[8] The second component is whether the employment incident caused a personal injury.[9]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[10] 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 incident identified by the claimant.[11]

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[4] *Supra* note 2.

[5] *M.O.*, Docket No. 19-1398 (issued August 13, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *D.M.*, Docket No. 20-0386 (issued August 10, 2020); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *A.R.*, Docket No. 19-0465 (issued August 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[11] *W.L.*, Docket No. 19-1581 (issued August 5, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a diagnosed medical condition causally related to the accepted May 4, 2019 employment incident.

In support of his claim, appellant submitted a work excuse note from Dr. Lhamon who indicated that appellant could not work for 48 hours and listed his work restrictions. However, Dr. Lhamon did not provide an opinion relative to causal relationship. The Board has held that medical evidence that does not offer an opinion regarding causal relationship is of no probative value.[12] Therefore, this evidence is insufficient to establish appellant's claim.

Appellant also submitted a July 11, 2019 Form CA-17 report and July 11 and 17, 2019 reports from Mr. Giesler and a September 11, 2019 report from a nurse practitioner. However, certain healthcare providers such as physician assistants and nurse practitioners are not considered physicians as defined under FECA.[13] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[14] As such, this evidence is of no probative value and is insufficient to establish appellant's claim.

The record also contains a July 17, 2019 x-ray of appellant's left shoulder. The Board has held that diagnostic studies are of limited probative value on the issue of causal relationship as they do not address whether the employment incident caused a diagnosed condition.[15]

As the medical evidence of record does not contain rationalized medical evidence establishing a medical diagnosis in connection with the accepted May 4, 2019 employment incident, the Board finds that appellant has not met his burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on

[12] *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[13] Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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). *R.R.*, Docket No. 20-0558 (issued August 31, 2020) (physician assistants are not considered physicians under FECA).

[14] *See N.D.*, Docket No. 20-0699 (issued November 16, 2020).

[15] *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

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."[16]

OWCP's regulations at 20 C.F.R. § 10.616(a) further provides in pertinent part: "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision."[17]

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[18] Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record,[19] the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.[20] Similarly, the Board has held that the Branch of Hearings and Review may exercise its discretion to conduct a hearing or review the written record where a claimant requests a second hearing or review of the written record on the same issue.[21]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record before a representative of OWCP's Branch of Hearings and Review as untimely filed under 5 U.S.C. § 8124(b).

As noted above, a request for a review of the written record must be made within 30 days after the date of the issuance of an OWCP final decision. Appellant submitted an appeal request form dated January 3, 2020 requesting a review of the written record. As the request was submitted more than 30 days following issuance of the August 29, 2019 merit decision, the Board finds that it was untimely filed and appellant was not entitled to a review of the written record as a matter of right.[22] Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.[23]

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its January 28, 2020 decision, properly exercised its discretion in denying appellant's request for a review of the written record by determining that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence. The Board has held that the only limitation on OWCP's authority is reasonableness, and an abuse of discretion is

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.616.

[18] *R.M.*, Docket No. 19-1088 (issued November 17, 2020); *D.M.*, Docket No. 19-0686 (issued November 13, 2019).

[19] 20 C.F.R. § 10.616(a).

[20] *L.S.*, Docket No. 18-0264 (issued January 28, 2020); *K.L.*, Docket No. 18-1018 (issued April 10, 2019).

[21] *Id.*

[22] *K.W.*, Docket No. 19-0529 (issued September 4, 2019).

[23] 5 U.S.C. § 8124(b)(1); *see L.S.*, *supra* note 20; *William F. Osborne*, 46 ECAB 198 (1994).

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.[24] In the present case, the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's January 3, 2020 request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a diagnosed medical condition causally related to the accepted May 4, 2019 employment incident. The Board further finds that OWCP properly denied appellant's request for a review of the written record before a representative of OWCP's Branch of Hearings and Review as untimely filed under 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2019 and January 28, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 26, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[24] *R.M., supra* note 18; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).