United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 12-656**
	)	**Issued: August 10, 2012**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Charleston, SC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 25, 2012 appellant filed a timely appeal from an August 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his traumatic injury claim and a November 8, 2011 decision which denied his request for an oral hearing as untimely. 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.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the August 25, 2011 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on July 10, 2011, as alleged; and (2) whether OWCP properly denied his October 11, 2011 request for an oral hearing as untimely.

FACTUAL HISTORY

On July 16, 2011 appellant, then a 63-year-old transportation security officer, filed a traumatic injury claim alleging that on July 10, 2011 at 10:21 a.m. he suffered back pain and left buttock muscle spasms when his left foot got caught on the floor mat as he lifted a heavy bag. He stopped work and sought treatment from the hospital the next day.

In a July 11, 2011 hospital record, Dr. Gary Headden,[3] a Board-certified internist, noted appellant's complaints of left hip pain radiating down into his lower back that began two days ago. He related that appellant's work required heavy lifting and that appellant hurt his back while lifting. Dr. Headden reviewed appellant's history and conducted an examination. He observed tenderness over the sciatic notch and normal extremities. X-rays of the lumbar spine revealed osteopenic bones with spondylosis and mild wedging of the T12 vertebral body. X-rays of the hip revealed minimal degenerative findings and no other abnormality. Dr. Headden diagnosed left hip strain. He restricted appellant to light duty from July 14 to 21, 2011.

In a July 11, 2011 x-ray report, Dr. Gary Rike, a Board-certified radiologist, noted appellant's complaints of left hip pain. He noted minor spurring in each acetabulum with no fracture, lesion or acute abnormality. Dr. Rike diagnosed minimal degenerative findings in the hips.

In a July 11, 2011 x-ray report, Dr. John Daly Jr., a Board-certified diagnostic radiologist, noted appellant's complaints of back pain. He observed osteopenic bones, mild anterior wedging of the T12 vertebral body likely chronic and bilateral sacroiliac joint osteoarthritic changes. Sacroiliac joints were in normal alignment. Dr. Daly diagnosed osteopenic bones with spondylosis and mild wedging of the T12 vertebral body.

In a July 18, 2011 hospital record, Dr. Cameron J. Maile, Board-certified in emergency medicine, stated that appellant experienced back, left hip and left leg pain two weeks ago when he lifted heavy objects at work. He related that appellant aggravated his hip when he did house work yesterday. Dr. Maile further related that appellant injured his hip while lifting heavy objects at work about two weeks prior. Since that time appellant had been seen several times. Upon examination, Dr. Maile observed mild left paralumbar tenderness with extension of the left hip and decreased sensation to light touch to the lateral aspect of the left lower leg. No edema or cyanosis was observed and extremities were normal. Dr. Maile restricted appellant to light-duty work with no lifting greater than 10 pounds and limited bending and twisting until July 23, 2011.

[3] The report was signed by Dana Miller, a physician's assistant. Dr. Headden noted that he reviewed the chart, discussed it with her, and agreed with her findings and plan.

On July 28, 2011 OWCP advised appellant that the evidence submitted was insufficient to support his claim and requested additional evidence. It requested a more detailed description of the alleged July 10, 2011 incident and a medical report from his treating physician, which included a history of injury, firm diagnosis, findings and test results, treatment provided and a physician's opinion, based on medical rationale explaining how the diagnosed condition was caused or aggravated by the claimed injury.

In an undated statement, appellant stated that on July 10, 2011 he performed a bag search for a suspicious item. After the search he picked up the bag and started to turn to his left but his left foot got caught on floor mats and he was unable to turn or move. Appellant explained that the checkpoint was a narrow path covered with two long rubber floor mats that often slid and overlapped. He believed that this incident occurred at the time of his injury and prevented him from turning his left foot. As a result, appellant experienced sharp pain in his left buttocks, which caused immediate discomfort. He did not recall any other officers who were present. Appellant resubmitted the July 11 and 14, 2011 hospital reports and radiology reports.

In an undated statement, Ronie K. Norton, a coworker, recalled that on July 10, 2011 between the hours of 10:00 and 11:30 a.m. he saw appellant limping as he came up the exit lane. Appellant told him that he had hurt or pulled a muscle while doing a bag check.

In a July 23, 2011 hospital record, Dr. Kevin Price, Board-certified in emergency medicine, stated that appellant complained of left hip and leg pain and noted that he was seen three previous times at the hospital for the same symptoms. He reviewed appellant's history and conducted an examination. Dr. Price observed mild left paralumbar tenderness with extension of the left hip and decreased sensation to light touch to the lateral aspect of the left lower leg.

In an August 11, 2011 consultation report, Dr. Stephen E. Rawe, a Board-certified neurological surgeon, stated that on July 10, 2011 appellant suffered a work-related injury when he picked up a bag and turned to the left but his left foot did not move. Appellant complained of left buttocks and thigh pain that intensified over the next three days. Dr. Rawe reviewed appellant's history and conducted an examination. Neuromuscular examination revealed painful range of motion of the lumbar spine on forward bending and weakness of the anterior tibialis of the left and extensor hallucis longus muscle. Dr. Rawe observed that appellant walked with a limp on the left lower extremity. Straight leg raise testing was negative bilaterally and range of motion of the hips was unremarkable. Dr. Rawe opined that appellant's problems were consistent with a left L5 radiculopathy weakness of the extensor hallucis longus muscle and anterior tibialis muscle. He recommended appellant remain on light duty.

In a decision dated August 25, 2011, OWCP denied appellant's claim finding insufficient factual evidence to establish fact of injury in the performance of duty. It noted that the medical evidence did not correspond with the alleged incident as he described. OWCP also noted that appellant had submitted insufficient medical evidence demonstrating that he sustained a diagnosed condition causally related to the alleged incident.

In a letter addressed to the claims examiner dated September 14, 2011, appellant requested an appeal of the August 25, 2011 decision based on Dr. Rawe's report. He stated that the decision contained several discrepancies and requested that OWCP take time to review all the

transcripts, notes and statements provided. Appellant resubmitted the hospital records and diagnostic reports.

On September 23, 2011 OWCP informed appellant that it received his September 14, 2011 letter requesting an appeal but it was unclear what type of appeal he requested. It advised him to read through the attached appeal rights, make a selection by checking his choice and return it to the appropriate address.

In an appeal request form dated October 8, 2011 and postmarked October 11, 2011, appellant submitted a request for an oral hearing. He resubmitted the July 18, 2011 hospital records and Dr. Rawe's August 11, 2011 report.

By decision dated November 8, 2011, OWCP denied appellant's request for an oral hearing as untimely. It found that the hearing request was postmarked October 11, 2011, more than 30 days after the last OWCP decision was issued on August 25, 2011. OWCP exercised its discretion by considering appellant's hearing request and further denied it as the issues involved could be addressed equally well pursuant to a valid request for reconsideration and submitting evidence not previously considered to support his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence[5] 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 injury.[6]

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.[7] There are two components involved in establishing the 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.[8] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[9]

[4] 5 U.S.C. §§ 8101-8193.

[5] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[6] *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

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

[9] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[10] An employee has not met his burden of proof in establishing the occurrence of an injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty,[11] nor can it find fact of injury if the evidence fails to establish that the employee sustained an injury within the meaning of FECA. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise explained, cast sufficient doubt on an employee's statements as to whether a *prima facie* case has been established.[12] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[13]

ANALYSIS -- ISSUE 1

Appellant alleged that on July 10, 2011 at 10:21 a.m. he experienced back pain muscle spasms when he lifted heavy luggage at work and turned but his left foot got caught on a floor mat. He stopped work that day and sought medical treatment at the hospital on July 11, 2011. OWCP denied appellant's claim finding insufficient factual evidence to establish that the July 10, 2011 employment incident occurred as alleged. The Board finds, however, that the evidence is sufficient to establish that appellant experienced the July 10, 2011 work incident at the time, place and in the manner alleged.

In his Form CA-1 and subsequent statement, appellant experienced sharp back and leg pain when he completed a bag search and started to turn but his left foot did not turn. He explained that the rubber floor mats at the checkpoint often slid and overlapped and he believed that his foot got caught on one of the mats. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[14] In this case, the record does not contain any factual evidence to dispute that the claimed incident occurred as alleged. The employing establishment did not controvert the claim and a witness indicated that he observed appellant limping on July 10, 2011. Appellant sought treatment from the hospital on the next day after the incident and was examined by Dr. Headden, who related that appellant's left hip pain began about two days ago and that he believed he hurt his back while lifting heavy objects at work. He sought medical treatment from the hospital two more times for back, left hip and left foot pain.

[10] *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[11] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[12] *M.H.*, 59 ECAB 461 (2008); *Constance G. Patterson*, 41 ECAB 206 (1989).

[13] *S.P.*, 59 ECAB 184 (2007).

[14] *Id.*; *see also Caroline Thomas*, 51 ECAB 451 (2000).

Appellant was also examined by Dr. Rawe who stated that on July 10, 2011 appellant suffered a work-related injury when he picked up a heavy bag at work. The record contains no strong or persuasive evidence to refute appellant's allegations nor are there any inconsistencies to cast serious doubt on his description of the July 10, 2011 employment incident. Accordingly, the Board finds that appellant has established the occurrence of the July 10, 2011 work incident.

Nevertheless, the Board further finds that appellant did not provide sufficient medical evidence to establish that he sustained a left hip strain, back, left hip and left leg condition as a result of the July 10, 2011 employment incident. Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[15] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.[16] Appellant submitted emergency room records from Drs. Headden, Maile and Price who noted his complaints of back, left hip and leg pain while lifting a heavy object at work.[17] They observed tenderness over his sciatic notch and mild left paralumbar tenderness with extension of the left hip. Appellant was also examined by Dr. Rawe, who provided an accurate history of injury and conducted an examination. Dr. Rawe opined that appellant's problems were consistent with a left L5 radiculopathy weakness of the extensor hallucis longus muscle and anterior tibialis muscle. None of the physicians, however, contained any opinion or explanation as to the cause of appellant's condition. The Board has held that 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.[18] Similarly, the diagnostic reports of Drs. Rike and Daly contain no opinion as to the cause of appellant's condition. Thus, the Board finds that appellant failed to provide sufficient medical evidence to establish his traumatic injury claim.

On appeal, appellant related the July 10, 2011 employment incident and stated that numerous doctors have told him that this injury was work related. As previously noted, however, causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. While appellant alleges that his doctors informed him that his injury was work related, the record does not contain any rationalized medical opinion from a physician sufficient to establish causal relationship. Thus, the Board finds that he did not meet his burden of proof to establish his claim.

[15] *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009); *D.I.*, 59 ECAB 158 (2007).

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

[17] Although Dr. Maile indicated that appellant may have aggravated his hip doing house work the prior day the report consistently refers to the original injury as occurring two weeks prior while lifting baggage at work.

[18] *Supra* note 15.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary 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.[19] Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[20] A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[21] Although that is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[22] Its procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[23]

OWCP procedures also provide that where the instructions on the appeal rights that accompanied the decision were not followed and the hearing request was received by OWCP and then forwarded to the Branch of Hearings and Review, it will review the available evidence and determine the timeliness of the request.[24]

ANALYSIS -- ISSUE 2

The Board finds that appellant's request for an oral hearing before the Branch of Hearings and Review was untimely.

Following OWCP's August 25, 2011 decision, appellant requested an appeal in a letter dated September 14, 2011, addressed to the claims examiner. He did not request an oral hearing until he completed the appeal request form on October 8, 2011, which was received by OWCP on October 14, 2011. Appellant had 30 calendar days from OWCP's August 25, 2011 decision or until September 24, 2011 to request an oral hearing. He sought an "appeal" by a claims examiner in a letter received on September 20, 2011, not an oral hearing.

OWCP properly exercised its discretion in denying appellant's request for hearing by determining that the issue in the case could be equally well addressed by requesting

[19] 5 U.S.C. § 8124(b)(1).

[20] 20 C.F.R. §§ 10.616, 10.617.

[21] *Id.* at § 10.616(a).

[22] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[23] *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Review Process*, Chapter 2.1601.4(a) (October 2011).

reconsideration and submitting new evidence. In the present case, there is no evidence that OWCP abused its discretion in denying his request for hearing under these circumstances.

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.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a traumatic injury in the performance of duty on July 10, 2011. The Board further finds that OWCP properly determined that his request for an oral hearing was untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the November 8 and August 25, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 10, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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