

**United States Department of Labor
Employees' Compensation Appeals Board**

)	
G.H., Appellant)	
)	
and)	Docket No. 12-1477
)	Issued: December 17, 2012
DEPARTMENT OF THE ARMY, ARMY)	
NATIONAL GUARD, Wilmington, NC,)	
Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of the Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Judge
 PATRICIA HOWARD FITZGERALD, Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2012 appellant filed a timely appeal from an April 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and a June 14, 2012 nonmerit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the claim and the nonmerit decision.

ISSUES

The issues are: (1) whether appellant established that he sustained a right knee injury on February 17, 2012 in the performance of duty; and (2) whether OWCP properly denied a request for a review of the written record.

On appeal, appellant asserts that factual statements from his supervisor establish that he was injured in the performance of duty as alleged. He also contends that imaging studies demonstrate the presence of the claimed knee injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 21, 2012 appellant, then a 47-year-old surface maintenance mechanic, filed a traumatic injury claim (Form CA-1) claiming that on February 17, 2012 at 10:15 a.m., his knee “popped” while he climbed up on a large vehicle. Appellant’s supervisor checked a box “yes” indicating that he agreed with appellant’s account of events.²

In a March 2, 2012 letter, OWCP advised appellant of the type of evidence needed to establish his claim, including a factual statement describing the February 17, 2012 incident and a statement from his attending physician explaining how and why that incident would cause the claimed knee injury. It afforded him 30 days in which to submit such evidence.

In response, appellant submitted a February 20, 2012 report from Dr. Eric J. Lescault, an attending osteopathic physician Board-certified in orthopedic surgery, who related appellant’s account of getting into a lightweight transport vehicle at work “when he felt a pop in his right knee,” with subsequent swelling and buckling. On examination of the right knee, Dr. Lescault found a positive Lachman’s sign and a positive pivot shift sign with guarding. He diagnosed a possible anterior cruciate ligament rupture of the right knee. In a March 7, 2012 report, Dr. Lescault stated that appellant sustained a possible right anterior cruciate ligament rupture while “getting on a vehicle.”

By decision dated April 4, 2012, OWCP denied appellant’s claim on the grounds that fact of injury was not established. It found that he submitted insufficient factual evidence to establish that the February 17, 2012 incident occurred at the time, place and in the manner alleged. OWCP further found that the medical evidence was insufficient to establish an injury related to any factor of appellant’s federal employment.

In a May 15, 2012 letter postmarked on May 16, 2012, appellant requested a review of the written record. He submitted additional evidence.

Dr. Lescault obtained right knee x-rays on February 20, 2012 demonstrating patellofemoral osteoarthritis with a possible loose body. On March 21, 2012 he stated that a magnetic resonance imaging (MRI) scan of the right knee showed a large posterior Baker’s cyst causing dysfunction of the anterior cruciate ligament. Dr. Lescault recommended surgical reconstruction. In a May 9, 2012 report, he opined that appellant’s right anterior cruciate ligament dysfunction and underlying osteoarthritis were exacerbated by “the incident on the truck where he felt a pop in his knee.”

In an April 17, 2012 statement, appellant’s supervisor asserted that, at the time of the claimed injury, appellant was climbing into the engine compartment of a light medium tactical vehicle as part of his assigned duties as a mechanic. He provided three photographs of the vehicle.

² Appellant also submitted his supervisor’s March 8, 2012 authorization for examination or treatment (Form CA-16).

By decision dated June 14, 2012, OWCP denied appellant's request for a hearing on the grounds that it was not timely filed within 30 days of the April 4, 2012 decision. It exercised its discretion by performing a limited review of the evidence and further denied his request as the issue in the case could be addressed equally well pursuant to a valid request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

In order to determine whether an employee sustained a traumatic 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 that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.⁸

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a right knee injury while climbing up a large vehicle in the performance of duty on February 17, 2012. Appellant's supervisor indicated that his knowledge of the incident agreed with appellant's assertion. OWCP denied the claim on the

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

grounds that there was insufficient evidence to establish the claimed incident as factual. It also noted that the medical evidence was insufficient to establish causal relationship.

In support of his claim, appellant submitted February 20 and March 7, 2012 reports from Dr. Lescault, an attending osteopathic physician Board-certified in orthopedic surgery, who related appellant's account of his right knee popping as he climbed a vehicle at work. Dr. Lescault diagnosed a possible right anterior cruciate ligament rupture sustained while "getting on a vehicle." The Board finds that, in conjunction with appellant's statement on his claim and his supervisor's concurrence that the climbing incident occurred as alleged, Dr. Lescault's reports are sufficient to establish the February 17, 2012 event as factual. There are no inconsistencies so as to cast serious doubt on the occurrence of the claimed employment incident.⁹ However, Dr. Lescault's opinion does not contain an explanation of how the February 17, 2012 incident would cause right knee instability or an anterior cruciate ligament injury. Therefore, his opinion is insufficient to meet appellant's burden of proof.¹⁰

The Board notes that OWCP advised appellant in a March 2, 2012 letter of the necessity of submitting medical evidence from a qualified physician explaining how and why that event would cause the claimed right knee injury. However, appellant did not submit such evidence before issuance of the April 4, 2012 decision. Therefore, OWCP properly denied his claim on the grounds that the medical evidence was insufficient to establish causal relationship.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA states that a claimant not satisfied with a decision of OWCP has a right, upon timely request, to a hearing before an OWCP representative.¹¹ Section 10.615 of Title 20 of the Code of Federal Regulations provides that a hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.¹²

A claimant is entitled to a hearing or review of the written record if the request is made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier's date marking of the request.¹³ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁴ In such a case, it will determine whether to grant a discretionary review of the written record and, if not, will so advise the claimant with reasons.¹⁵

⁹ *T.N.*, Docket No. 12-214 (issued May 25, 2012).

¹⁰ *Deborah L. Beatty*, *supra* note 7.

¹¹ 5 U.S.C. § 8124 (b)(1). *See A.B.*, 58 ECAB 546 (2007); *Joe Brewer*, 48 ECAB 411 (1997).

¹² 20 C.F.R. § 10.615.

¹³ *Id.* at § 10.616(a).

¹⁴ *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁵ *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

ANALYSIS -- ISSUE 2

OWCP denied appellant's traumatic injury claim by decision issued April 4, 2012. Appellant had 30 days from the date of that decision to make a timely request for a hearing. His letter requesting a review of the written record was postmarked May 16, 2012 and received by OWCP on May 21, 2012, after the 30-day time period had elapsed. Thus, OWCP properly found that appellant's request for a review of the written record was not timely filed under section 8124(b)(1) of FECA and that he was not entitled to a review of the written record as a matter of right.

OWCP then exercised its discretion and denied appellant's request for a hearing on the additional grounds that he could address the fact of injury issue in his case equally well by submitting relevant evidence accompanying a valid request for reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's April 4, 2012 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for a review of the written record.¹⁶

On appeal, appellant asserts that factual statements from his supervisor establish that he was injured in the performance of duty as alleged. He also contends that imaging studies demonstrate the presence of the claimed knee injury. The Board notes that the February 17, 2012 incident is accepted as factual. The Board also notes that OWCP has not performed a merit review of the evidence that appellant submitted pursuant to his request for a review of the written record. Appellant may submit new evidence or argument, such as the documents submitted in support of his request for a review of the written record, 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 OWCP properly denied appellant's claim on the grounds that the medical evidence was insufficient to establish causal relationship. The Board further finds that OWCP properly denied his request for a review of the written record as untimely.

¹⁶ See *Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 14, 2012 is affirmed. The April 4, 2012 decision is affirmed as modified, to find that the February 17, 2012 traumatic incident is established as factual.

Issued: December 17, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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