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<b>R.W., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 13-44</b>
	)	<b>Issued: February 22, 2013</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Grand Rapids, MI, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

On September 28, 2012 appellant filed a timely appeal from a July 3, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her traumatic injury claim and an August 27, 2012 nonmerit decision which denied her request for review of the written record as untimely. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a diagnosed condition causally related to a May 18, 2012 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely.

<sup>2</sup> The Board notes that appellant submitted additional medical evidence following the July 3, 2012 merit 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.

### **FACTUAL HISTORY**

On May 23, 2012 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that on May 18, 2012 she sustained an insect bite in her upper chest in the performance of duty. She explained that she leaned on a cage and felt a stinging, burning sensation on her upper chest. Appellant noticed that it became black and swollen and experienced muscle problems with her left arm. She related that her doctor informed her that it was either a spider or ant bite. The employing establishment stated that it was unsure if the injury occurred while appellant was working because it was unable to investigate.

On May 29, 2012 OWCP advised appellant that the evidence submitted was insufficient to establish her claim and requested additional evidence to support her claim. It specifically requested a medical report from a physician which included a history of injury, description of examination findings, a firm medical diagnosis and a physician's opinion, based on medical rationale, explaining how appellant's condition was causally related to the alleged employment incident.

In a May 24, 2012 treatment note, a physician's assistant noted that appellant was examined on May 20, 2012 with a probable insect bite and excused her from work for one day.

In a June 11, 2012 treatment note, a physician's assistant stated that appellant was examined that day for worsening of infection on her left breast secondary to a bug bite she received at work in May. Appellant was authorized to return to work on June 12, 2012.

In a decision dated July 3, 2012, OWCP denied appellant's claim finding insufficient medical evidence to establish that she sustained any condition as a result of the May 18, 2012 employment incident. It accepted that the May 18, 2012 incident occurred as alleged but found that the medical evidence did not establish that she sustained any diagnosed condition causally related to the accepted incident.

In an undated appeal form received into the record on August 7, 2012 and date stamped as received by OWCP on August 6, 2012, appellant requested a review of the written record. Appellant submitted various treatment notes co-signed by a physician's assistant and Dr. Dan Wallace, a family practitioner, dated May 20 to July 9, 2012.

By decision dated August 27, 2012, OWCP denied appellant's request for a review of the written record as untimely. It found that her request was received August 6, 2012, more than 30 days after the last OWCP decision of July 3, 2012. OWCP exercised its discretion by considering appellant's request and further denied it as the issue involved could be addressed equally well pursuant to a valid request for reconsideration and submitting evidence not previously considered to support her claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence<sup>4</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>5</sup>

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.<sup>6</sup> There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>7</sup> 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.<sup>8</sup>

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.<sup>10</sup> The weight of the 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.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on May 18, 2012 appellant sustained an insect bite in her upper chest in the performance of duty but found that the medical evidence failed to establish that she sustained any medical condition as a result of the accepted incident. The Board finds that

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>5</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>7</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>8</sup> *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>9</sup> *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>10</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>11</sup> *James Mack*, 43 ECAB 321 (1991).

appellant failed to provide sufficient medical evidence demonstrating that she sustained any condition causally related to the May 18, 2012 employment incident.

The only medical evidence appellant submitted to support her claim were May 24 and June 11, 2012 treatment notes signed by a physician's assistant. Section 8102(2) of FECA, however, provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. Because physician's assistants are not "physicians" according to FECA, their medical opinions regarding diagnosis and causal relationship are of no probative medical value.<sup>12</sup> These reports, therefore, are insufficient to establish appellant's claim.

Because the record does not contain any medical evidence providing a firm medical diagnosis or rationalized medical opinion establishing that appellant sustained any medical condition as a result of the May 18, 2012 employment incident, the Board finds that appellant did not meet her burden of proof to establish her claim. Appellant may submit that evidence to OWCP along with a request for reconsideration.

Causal relationship is a medical issue that can only be shown by reasoned medical opinion evidence that is supported by medical rationale.<sup>13</sup> Appellant has not provided such evidence in this case. Thus, the Board finds that she did not meet her burden of proof to establish her claim.

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**

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 or her claim before a representative of the Secretary.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> Although there 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

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<sup>12</sup> 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>13</sup> *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

<sup>14</sup> 5 U.S.C. § 8124(b)(1).

<sup>15</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>16</sup> *Id.* at § 10.616(a).

powers grant or deny appellant's request and must exercise its discretion.<sup>17</sup> OWCP 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).<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

Appellant requested a review of the written record in an undated appeal form that was stamped as received by OWCP on August 6, 2012. OWCP determined that her request was made more than 30 days after the date of issuance of OWCP's July 3, 2012 decision. Accordingly, it found that appellant's request was untimely filed and she was not entitled to a review of the written record as a matter of right. The Board finds that OWCP properly found that appellant's request was not timely filed.

The Board notes that the appeal form was not dated and the envelope in which the appeal form was mailed was not included in the record. The Board has held that, if there is no postmark, then other evidence of timeliness must be considered.<sup>19</sup> In this case, the appeal form requesting a review of the written record was stamped as received by OWCP on August 6, 2012. Because appellant did not submit a timely request for review of the written record, her request was untimely. OWCP, therefore, properly found that appellant was not entitled to an oral hearing or examination of the written record as a matter of right.

On appeal, appellant alleges that she timely mailed her request for review of the written record. She did not, however, provide any evidence to establish a timely date of mailing. Although she contended that she mailed her request on August 3, 2012, appellant did not provide any documentation, such as a return receipt, to support her contention.

OWCP also has the discretionary authority to grant a request for hearing or review of the written record when a claimant is not entitled to such as a matter of right. In its August 27, 2012 decision, OWCP properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.<sup>20</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion in finding that appellant could further pursue the matter through the reconsideration process. Consequently, OWCP properly denied appellant's request for a review of the written record.

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<sup>17</sup> *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>18</sup> 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).

<sup>19</sup> *Tonja M. Polly*, Docket No. 04-1848 (issued December 2, 2004).

<sup>20</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

### **CONCLUSION**

The Board finds that appellant did not establish that she sustained any diagnosed condition in the performance of duty on May 18, 2012. The Board further finds that OWCP properly denied appellant's request for a review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 27 and July 3, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 22, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board