United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 13-2057**
	)	**Issued: February 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Burlington, VT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 9, 2013 appellant filed a timely appeal from the May 16, 2013 merit decision and the July 25, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues in this case are: (1) whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on August 20, 2012; and (2) whether OWCP properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On August 22, 2012 appellant, then a 58-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his left hand in the performance of

[1] 5 U.S.C. § 8101 *et seq.*

duty on August 20, 2012. He stated that his left hand was shut in a side lobby door by a customer running in the hallway. The employing establishment noted that appellant's injury had been caused by an unknown third party. Appellant did not stop work.

In a form report dated August 22, 2012, Andrew M. Ancel, a physician's assistant, noted that appellant had fractured the third metacarpal of his left hand. In a duty status report of the same date, he recommended a work restriction of light lifting. Mr. Ancel prescribed Vicodin for appellant's severe pain and recommended that he be seen by an orthopedic surgeon. In a report from the same date, he reviewed appellant's history of injury and described findings on physical examination.

In a duty status report dated August 29, 2012, George Connelly, a physician's assistant, recommended work restrictions of no lifting, pushing, pulling or repetitive use of the left hand until September 4, 2012. Appellant also submitted physical therapy notes dated August 29 through November 5, 2012.

In a diagnostic report dated August 29, 2012, Dr. Judy K. Tam, a Board-certified radiologist, examined the results of three x-rays of appellant's left wrist. She found no bony abnormalities and mild radiocarpal joint space narrowing.

In a report dated August 29, 2012, Mr. Connelly described appellant's history of injury and diagnosed a fracture of the left third metacarpal head. Appellant submitted progress notes from Mr. Connelly dated October 3, 2012 through January 15, 2013.

In a diagnostic report dated October 3, 2012, Dr. Janusz K. Kikut, a Board-certified radiologist, examined three x-rays of appellant's left hand. She noted near complete healing of a fracture at the head of the third metacarpal.

By letter dated April 9, 2013, OWCP advised appellant that his case had been reopened for consideration because medical bills had exceeded $1,500.00 and that the evidence of record was insufficient to support his claim. It noted that a physician's assistant, nurse or nurse practitioner did not qualify as a "physician" under FECA and that the evidence he had submitted was signed by physicians' assistants. In response, appellant resubmitted the August 22, 2012 report signed by Mr. Ancel.

By decision dated May 16, 2013, OWCP denied appellant's claim. It found that he had not submitted any medical evidence from a qualified physician. OWCP noted that the medical evidence in appellant's case was from physicians' assistants.

By letter postmarked June 25, 2013 and dated June 15, 2013, appellant requested an oral hearing.

By decision dated July 25, 2013, OWCP denied appellant's request for an oral hearing as untimely. It found that he had not made his request for an oral hearing within 30 days.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] 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 timely filed within the applicable time limitation period of FECA, that an injury[3] 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.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[6] 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.[7] 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.[8]

ANALYSIS -- ISSUE 1

Appellant alleged that on August 20, 2012, he sustained an injury to his left hand in the performance of duty. The Board finds that he did not submit sufficient medical evidence from a physician to establish a left third metacarpal fracture in connection with the accepted incident.

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[2] 5 U.S.C. §§ 8101-8193.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Id*. *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[6] *See J.Z.*, 58 ECAB 529, 531 (2007); *Paul E. Thams*, 56 ECAB 503, 511 (2005).

[7] *I.J.*, 59 ECAB 408, 415 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *James Mack*, 43 ECAB 321, 329 (1991).

Appellant submitted several reports from Mr. Connelly and Mr. Ancel, certified physicians' assistants, as well as physical therapy notes. A physician's assistant or physical therapists are not defined as a physician under FECA. Their reports do not qualify as probative medical evidence supportive of a claim for federal workers' compensation, unless such reports are countersigned by a physician.[9] No reports from Mr. Connelly or Mr. Ancel were countersigned by a physician. The physical therapy notes were also unsigned by a physician. Therefore, the reports do not constitute probative medical evidence on the issue of causal relationship.

Appellant submitted two reports from physicians. In a diagnostic report dated August 29, 2012, Dr. Tam observed no bony abnormalities and mild radiocarpal joint space narrowing. On October 3, 2012 Dr. Kikut noted near complete healing of a fracture at the head of the third metacarpal. However, neither Dr. Tam nor Dr. Kikut offered any opinion as to the cause of the diagnosed conditions. 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.[10] The reports of Drs. Tam and Kikut lack any opinions on the issue of causal relationship, and thus are of limited probative value on that issue. The evidence of record does not establish that appellant sustained an employment-related injury in the performance of duty on August 20, 2012.

OWCP procedures also provide that in clear-cut traumatic injury claims, where fact of injury has been established such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed.[11] In the present case, no physician has offered an affirmative statement regarding causal relationship.

OWCP advised appellant of the evidence required to establish his claim; however, he failed to submit probative medical opinion from a physician. Consequently, the Board finds that appellant has not met his burden of proof to establish that his claimed left hand injury was causally related to the August 20, 2012 employment incident.

Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.[12] 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

[9] *See* 5 U.S.C. § 8101(2); *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998) (regarding physicians' assistants); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000) (regarding physical therapists).

[10] *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Ellen L. Noble*, 55 ECAB 530, 534 (2004).

[11] *A.S.*, 59 ECAB 246 (2007); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[12] 20 C.F.R. § 501.2(c).

issuance of the decision, to a hearing on his claim before a representative of the Secretary.[13] 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.[14] 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.[15] 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 powers grant or deny appellant's request, and must exercise its discretion.[16] OWCP's 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).[17]

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing in an appeal form dated June 15, 2013, received on June 27, 2013, and postmarked June 25, 2013. OWCP denied the request as untimely by decision dated July 25, 2013. As appellant's request for an oral hearing was postmarked June 25, 2013, more than 30 days after OWCP issued its May 16, 2013 decision, he was not entitled to a hearing as a matter of right.

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.[18] It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the basis that the case could be pursued by submitting additional evidence to OWCP in support of his claim with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, or a clearly unreasonable exercise of judgment or actions taken, which is contrary to both logic and probable deductions from established facts.[19] The evidence of record does not establish that OWCP took any action in connection with its denial of appellant's request for an oral hearing that could be found to be an abuse of discretion. For these reasons, it properly denied his request for an oral hearing as untimely under section 8124 of FECA.

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. §§ 10.616-10.618.

[15] *Id.* at § 10.616(a).

[16] *Eddie Franklin*, 51 ECAB 223, 227 (1999); *Delmont L. Thompson*, 51 ECAB 155, 157 (1999).

[17] *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

[18] *Afegalai L. Boone*, 53 ECAB 533, 536 (2002).

[19] *Minnie B. Lewis*, 53 ECAB 606, 609 (2002).

CONCLUSION

The Board finds that appellant failed to establish that he sustained a left hand injury causally related to an August 20, 2012 employment incident. The Board further finds that OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

ORDER

IT IS HEREBY ORDERED THAT the July 25 and May 16, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 7, 2014
Washington, DC

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

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board