

FACTUAL HISTORY

On December 25, 2008 appellant, then a 50-year-old dock clerk, filed a traumatic injury claim alleging that, on December 24, 2008, she was hit by an all-purpose container that hit her on the right side. She indicated that she fell between the first and second containers, and that the second container rolled over her. Appellant alleged that she sustained injuries to her arm, neck, hip, back and shoulder. She also noted muscle spasms, swelling and aches and pains. The accident report by the employing establishment was submitted in support of appellant's claim. This report indicates that the first container hit appellant, that she fell to the floor and that the second container rolled over her. The report notes that the incident occurred on December 24, 2008 at 23:30.

In support of her claim, appellant submitted a nursing assessment indicating that she was treated at the hospital on December 24 through 25, 2008. The comments indicate that appellant was brought in by emergency services. The nurse's notes indicate that appellant had pain in her right shoulder, right ribs and back. The nurse indicated that appellant informed her that a cart ran over her torso. Imagings taken on December 25, 2008, were interpreted as normal chest, normal cervical spine and normal right shoulder. A computerized tomography of the same date was interpreted as "no acute process."

Appellant also submitted notes from her physical therapist indicating that she received treatment from January 28 through March 13, 2009 for right "cervical and shoulder."

By letter dated May 7, 2009, the Office informed appellant that the evidence of record was insufficient to establish that she sustained an injury as alleged and informed her that she must submit medical information in support of her claim.

By decision dated June 8, 2009, the Office denied appellant's claim. It found that, although the evidence supports that the claimed event occurred, there was no medical evidence that provides a diagnosis which could be connected to the accepted events.

In a request dated July 31, 2009, received by the Board on August 3, 2009, appellant requested a review of the written record and an oral hearing before an Office hearing representative. She alleged on the form that the paperwork was sent to the wrong address.

By decision dated August 20, 2009, the Office denied appellant's request as it was not filed within 30 days. It further denied her request as it determined that the evidence could be equally well addressed by requesting reconsideration from the district Office and submitting new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable,

¹ 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,² including that she is an “employee” within the meaning of the Act³ and that she filed her claim within the applicable time limitation.⁴ The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. 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.⁶ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

In order to satisfy the burden of proof, an employee must submit a physician’s rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.⁸ Neither the fact that, the condition became apparent during a period of employment, nor appellant’s belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.⁹

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained multiple injuries when she was hit by one container cart and run over by another on December 24, 2008. The Board initially notes that there is no dispute that this incident occurred on December 24, 2008, as alleged. The Board finds, however, that appellant submitted no medical evidence to establish that she sustained an injury causally related to this incident. As noted, part of appellant’s burden of proof includes the submission of rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship between the employment incident and the diagnosed condition. The record contains no such medical evidence. The reports do not contain any opinion on causal relationship. Furthermore, these reports evince normal findings and are

² *J.P.*, 59 ECAB ____ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *See M.H.*, 59 ECAB ____ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁴ *R.C.*, 59 ECAB ____ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O’Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁵ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁷ *T.H.*, 59 ECAB ____ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁸ *Gary L. Fowler*, 45 ECAB 365 (1994).

⁹ *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

accordingly not evidence that appellant sustained an injury. The remaining documents consist of nurse's assessments and physical therapist's notes. However, because healthcare providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence.¹⁰

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹¹ Rationalized medical 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.

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.¹² There is insufficient medical evidence to establish that appellant sustained a work-related injury on December 24, 2008. Accordingly, the Board finds that appellant failed to meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that, before review under section 8128(a) of this title, 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 her claim before a representative of the Secretary.¹³ Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹⁴ The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹⁵ It has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁶ In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹⁷

¹⁰ 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

¹¹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 57 (1979).

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ 20 C.F.R. § 10.615.

¹⁵ *Id.* at 10.616(a).

¹⁶ *Id.* at § 10.616(b).

¹⁷ *James Smith*, 53 ECAB 188 (2001).

ANALYSIS -- ISSUE 2

The Office issued its decision denying appellant's claim on June 8, 2009. Appellant requested review of the written record on August 3, 2009, which was more than 30 days after the issuance of the final decision. Accordingly, the Office properly found that her request for review of the written record was not timely filed under section 8123(b)(1) of the Act and that she was not entitled to such review as a matter of right.

The Office then properly exercised its discretion and determined that the issue in the case could equally well be addressed in a request for reconsideration. As the only limitation on its authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from the known facts.¹⁸ The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Although appellant alleges that the decision was sent to her at the wrong address, the record indicates that the decision was properly addressed to her at her last address of record. The Board notes it was her responsibility to inform the Office of any change of address.¹⁹ The Board notes that appellant's request can be addressed by requesting reconsideration from the Office and submitting further evidence which establishes that she sustained an injury as alleged. Thus, the Board finds that the Office's denial of her request for review of the written record or an oral hearing was proper under the law and facts of this case.

CONCLUSION

The Board finds that appellant did not establish that she sustained an injury in the performance of duty on December 24, 2008, as alleged. The Board further finds that the Office did not abuse its discretion in denying her request for a review of the written record or an oral hearing as untimely filed.

¹⁸ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁹ *Jack Sucic*, 39 ECAB 1338 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 20 and June 8, 2009 are affirmed.

Issued: June 4, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board