United States Department of Labor
Employees' Compensation Appeals Board

W.E., Appellant	)	
and	)	**Docket No. 11-724**
	)	**Issued: October 4, 2011**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Tucson, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 28, 2011 appellant filed a timely appeal of an August 3, 2010 merit decision of the Office of Workers' Compensation Programs' (OWCP) denying his traumatic injury claim and a January 6, 2011 nonmerit decision finding that he abandoned his oral hearing. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider both the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a traumatic injury on September 21, 2009 as alleged; and (2) whether the Branch of Hearings and Review properly determined that he had abandoned his oral hearing.

Appellant alleged on appeal that he did not receive notification of his oral hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 25, 2009 appellant, then a 71-year-old building equipment mechanic, filed a traumatic injury claim alleging that on September 21, 2009 he felt a pain in his right knee while walking to a work truck on a flat parking lot blacktop. He submitted form reports from a physician's assistant dated September 22, 2009. On September 22, 2009 a diagnostic test revealed an effusion and no fracture. In a letter dated June 28, 2010, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It allowed 30 days for a response.

Appellant stated that he was walking across the employing establishment parking lot to pick up a vehicle when he felt a sharp pain in his right knee. He noted that he was carrying his 15-pound tool belt. Appellant stated that he did not have any disability or symptoms before the injury.

Dr. John A Meany, a Board-certified orthopedic surgeon, completed a form report on October 16, 2009 and diagnosed a torn meniscus. He indicated that appellant's condition commenced on September 18, 2009. The employing establishment controverted appellant's claim on July 23, 2010 noting that he informed his physician that his injury occurred on September 18, 2009 rather than September 21, 2009.

By decision dated August 3, 2010, OWCP denied appellant's claim finding that the factual evidence did not establish that the claimed event occurred as described noting that the medical evidence supported a preexisting condition dating from September 18, 2009 rather than a traumatic injury occurring on September 21, 2009.

Appellant requested an oral hearing on August 20, 2010. In a letter dated November 10, 2010, the Branch of Hearings and Review informed him that his oral hearing would take place on December 13, 2010 at 12:40 p.m. eastern time and provided him with the number and pass code. The Branch of Hearings and Review addressed this letter to appellant at his address of record.

By decision dated January 6, 2011, the Branch of Hearings and Review noted that appellant had received written notification of the hearing 30 days in advance and that he failed to appear. The Branch of Hearings and Review noted that there was no indication in the file that he contacted OWCP prior or subsequent to the scheduled hearing to explain his failure to appeal. The Branch of Hearings and Review determined that appellant had abandoned his request for an oral hearing.

LEGAL PRECEDENT -- ISSUE 1

OWCP defines a traumatic injury as, "[A] condition of the body caused by a specific event or incident, or series of events or 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."[2] In order to

[2] 20 C.F.R. § 10.5(ee).

determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[3] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. 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 unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established. 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.[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. 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.[5] Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.[6] A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[7] Medical rationale 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 activity. The opinion of the physician must be based on a complete factual and medical background of the claim, 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 specific employment activity or factors identified by the claimant.[8]

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

[4] *D.B.*, 58 ECAB 464, 466-67 (2007).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *J.Z.*, 58 ECAB 529 (2007).

[7] *T.F.*, 58 ECAB 128 (2006).

[8] *A.D.*, 58 ECAB 149 (2006).

ANALYSIS -- ISSUE 1

Appellant filed a claim alleging that he sustained a right knee injury on September 21, 2010 in the performance of duty. He sought medical treatment on September 22, 2010 from a physician's assistant. While a physician's assistant's reports are not medical evidence as a physician's assistant is not a physician under the FECA,[9] these notes do contain appellant's factual statement regarding the date of his employment injury. Appellant completed the form indicating that his injury occurred on September 21, 2010. Dr. Meany completed a report on October 16, 2009 listing appellant's date-of-injury as September 18, 2009. The employing establishment controverted appellant's claim based on Dr. Meany's report. OWCP denied his claim for a traumatic injury on the basis that he had provided an inconsistent history of injury.

The Board finds that appellant has submitted sufficient evidence to establish the September 21, 2010 employment incident. Appellant provided a consistent history of injury on his claim form and to his initial medical provider. He also sought medical treatment on the date after his alleged employment incident. The Board finds that the record does not contain strong or persuasive evidence that the employment incident did not occur on September 21, 2010 as alleged by appellant.

The Board finds, however, that the medical evidence in the record is not sufficient to establish that the diagnosed condition resulted from the September 21, 2010 employment incident. The only medical evidence in the record in accordance with FECA is Dr. Meany's October 16, 2009 form report. This report provides a diagnosis of "right knee injury torn meniscus." Dr. Meany did not describe the employment incident and did not opine that the employment incident was sufficient to cause or contribute to the diagnosed condition. The Board is unable to determine from this report whether he believed that appellant's diagnosed condition was in anyway causally related to his accepted employment incident. Due to the absence of medical opinion evidence, appellant has failed to meet his burden of proof in establishing his traumatic injury 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:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[10]

[9] *J.M.*, 58 ECAB 303 (2007).

[10] 5 U.S.C. § 8124(b)(1).

Unless otherwise directed in writing by the claims examiner, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[11] OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.[12]

OWCP's procedures state:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
>
> "Under these circumstances, [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return to case to the [district office]."[13]

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing and on November 10, 2010, the Branch of Hearings and Review informed him that his oral hearing would take place on December 13, 2010 at 12:40 a.m. eastern time and provided him with the telephone number and the pass code. As noted, OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant. The Board has held that, in the absence of evidence to the contrary, a notice mailed to an individual in the ordinary course of business is presumed to have been received by that individual. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.[14] Here, the record shows that OWCP scheduled a December 13, 2010 hearing and mailed proper written notice with the designated time, date and location of the hearing to appellant's address of record on November 10, 2010. Appellant is presumed to have received the notice and did not submit any rebutting evidence. The record also shows that he did not request postponement or explain his failure to appear at the hearing within 10 days of the scheduled hearing date. Thus, under these circumstances, OWCP properly found that appellant abandoned his hearing request. Appellant's failure to provide any notification, together with his failure to appear at the scheduled hearing, constituted abandonment of his request for a hearing and the Board finds that OWCP properly so determined.

[11] 20 C.F.R. § 10.617(b).

[12] *See Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 1.1601.6(e) (January 1999).

[14] *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, *supra* note 12.

CONCLUSION

The Board finds that appellant has established that the employment incident occurred at the time, place and in the manner alleged, contrary to OWCP's August 3, 2010 decision. The Board further finds that he failed to submit the necessary medical opinion evidence to establish that a medical condition resulted from this employment incident and therefore failed to meet his burden of proof in establishing a traumatic injury. The Board also finds that appellant abandoned his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed and the August 3, 2010 decision is affirmed, as modified.

Issued: October 4, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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