

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

J.R., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SUPPORT ACTIVITY, Annapolis, MD,
Employer**

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**Docket No. 13-313
Issued: August 15, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 26, 2012 appellant filed a timely appeal of a November 8, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for a hearing. He also filed a timely appeal of an August 6, 2012 merit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a traumatic injury while in the performance of duty on March 24, 2012; and (2) whether OWCP properly denied his request for a hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 19, 2012 appellant, then a 60-year-old supervisory police officer, filed a traumatic injury claim alleging that he was kneeling at a firing range on March 24, 2012 when he sustained a bilateral knee condition. OWCP informed him in a June 29, 2012 letter that medical evidence was needed to establish his claim. It provided appellant 30 days to submit a report from a qualified physician explaining how the accepted March 24, 2012 employment incident was causally related to a diagnosed injury. OWCP did not receive a response.

By decision dated August 6, 2012, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that the March 24, 2012 work event caused or contributed to a bilateral knee condition. A copy of the decision was mailed to his address of record.

Appellant filed a request for a telephonic hearing. The postmark of the envelope containing the request was dated October 1, 2012. Appellant provided a July 6, 2012 note from Dr. Gregg A. Ferrero, a Board-certified orthopedic surgeon, diagnosing bilateral knee pain, knee joint osteoarthritis and chondromalacia patellae.

By decision dated November 8, 2012, OWCP denied appellant's hearing request on the grounds that it was not made within 30 days after the issuance of the August 6, 2012 merit decision. After considering whether to grant a discretionary hearing, OWCP determined that the issue could be further addressed by requesting reconsideration and submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative and substantial evidence,² including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.³ The employee must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.⁴

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. There are two components involved in establishing 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. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁵

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *R.C.*, 59 ECAB 427 (2008).

⁴ *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *T.H.*, 59 ECAB 388 (2008).

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant did not establish that he sustained a traumatic injury while in the performance of duty. Although OWCP accepted that he was kneeling at a firing range on March 24, 2012, he did not provide a medical report from a qualified physician explaining how this employment incident was causally related to a diagnosed injury. Moreover, appellant did not respond to OWCP's June 29, 2012 letter asking for such evidence to be submitted within 30 days. Because he did not offer any medical evidence demonstrating that the accepted March 24, 2012 work event caused or contributed to a diagnosed condition, he failed to establish a *prima facie* claim for compensation.⁷

The Board notes that appellant submitted new evidence on appeal and after issuance of the August 6, 2012 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.⁸

Appellant may submit new evidence or argument as part of a formal 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 who is 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.⁹ He or she is afforded the choice of either an oral hearing or a review of the written record.¹⁰ While a claimant is no longer entitled to an oral hearing or a review of the written record as a matter of right if his or her request is filed past the 30-day period, OWCP may grant the request within its discretionary power and must exercise that discretion.¹¹

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *See Donald W. Wenzel*, 56 ECAB 390 (2005).

⁸ 20 C.F.R. § 501.2(c).

⁹ 5 U.S.C. § 8124(b)(1); *Joseph R. Giallanza*, 55 ECAB 186, 190-91 (2003).

¹⁰ 20 C.F.R. § 10.615.

¹¹ *See Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

ANALYSIS -- ISSUE 2

Appellant filed a request for a telephonic hearing on October 1, 2012,¹² more than 30 days after OWCP issued its August 6, 2012 decision. Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹³ Because the application was not timely filed, appellant was not entitled to a hearing.

OWCP has the discretionary power to grant a hearing when a claimant is not entitled to one as a matter of right. In this case, it exercised this discretion in its November 8, 2012 decision, finding that appellant's issue could be addressed by requesting reconsideration and submitting additional evidence. This basis for denying his request for a hearing is a proper exercise of OWCP's authority.¹⁴ Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

Appellant contends on appeal that he did not receive a copy of OWCP's August 6, 2012 decision until September 4, 2012. The case record shows that such a copy was mailed to his address of record. A notice properly addressed and duly mailed to an individual in the ordinary course of business is presumed to have been received by that individual.¹⁵ In addition, appellant did not present evidence of nondelivery to rebut this presumption.¹⁶

CONCLUSION

The Board finds that appellant did not establish that he sustained a traumatic injury while in the performance of duty on March 24, 2012. Furthermore, the Board finds that OWCP properly denied appellant's request for a hearing as untimely.

¹² Under OWCP's procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

¹³ *William F. Osborne*, 46 ECAB 198 (1994).

¹⁴ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

¹⁵ *Marilyn K. Webb*, Docket No. 00-747 (issued September 19, 2001); *Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

¹⁶ *See E.C.*, Docket No. 11-510 (issued September 8, 2011).

ORDER

IT IS HEREBY ORDERED THAT the November 8 and August 6, 2012 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 15, 2013
Washington, DC

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

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

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