United States Department of Labor
Employees' Compensation Appeals Board

SANDRA J. DAVIS, Appellant	)	
and	)	**Docket No. 04-2244**
	)	**Issued: February 17, 2005**
FEDERAL EMERGENCY MANAGEMENT AGENCY, Prairie Village, KS, Employer	)	

Appearances:
Sandra J. Davis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 15, 2004 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated March 30, 2004, finding that she did not sustain an injury while in the performance of duty. She also appeals the Office's nonmerit decision dated June 9, 2004 denying her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the nonmerit denial of appellant's request for a review of the written record.

ISSUES

The issues are: (1) whether appellant has established that she sustained an injury while in the performance of duty; and (2) whether the Office properly denied appellant's request for a review of the written record on the grounds that it was not timely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On July 2, 2002 appellant, then a 48-year-old monitor, filed a traumatic injury claim alleging that on May 30, 2002 she sustained an insect bite on her left leg while working as a debris monitor in the field. On the reverse of the claim form, Ted McCollum, an employing establishment supervisor, indicated that notice of appellant's injury was received on June 20, 2002. He further indicated with an affirmative mark that she was in the performance of duty when she sustained a tick bite to the leg on May 30, 2002.

In support of her claim, appellant submitted a June 20, 2002 Form CA-16, authorization for examination and/or treatment, completed by a physician whose signature is illegible. The physician stated that appellant sustained a tick bite on her left lower leg three weeks ago on May 30, 2002. The physician indicated with an affirmative mark that appellant's condition was caused by the employment activity. She also submitted medical care instructions dated June 23, 2002 from B. McGeha, a nurse. A consent form for emergency medical treatment was signed by appellant and a nurse whose signature is illegible on June 20, 2002. A December 31, 2002 medical report from Dr. Curtis J. FitzSimmons, a Board-certified internist, revealed a history that appellant's symptoms began in late May 2002 when she noticed some sort of itchy lesion in the calf area of her left leg. He noted that she had been walking around in the woods the day before. Dr. FitzSimmons further noted that appellant did not see a tick in this area and thought she might have sustained some sort of chigger bite. He described her symptoms and stated that she eventually went to the emergency room where she was diagnosed as having Lyme disease and was given doxycycline. Dr. FitzSimmons also described her medical, family and social background. He reported his findings on physical examination and opined that appellant had a history of an insect bite noting that it was unclear from the history that she had a tick bite that caused her rash. Dr. FitzSimmons stated that it was doubtful that she had Lyme disease at that time as it did not appear that the tick was on her for 24 hours and it was unlikely that a tick could transmit the disease if it was attached less than 24 hours. He concluded by noting appellant's treatment plan. She submitted a medical claim that had been denied by the Office.

On January 5, 2004 appellant filed a claim alleging that she sustained a recurrence of disability on December 31, 2002 accompanied by a duplicate copy of her traumatic injury claim form. The Office received Dr. FitzSimmons' December 31, 2002 letter advising Dr. Kenneth R. Kopp, a Board-certified internist, that he evaluated appellant on that date and enclosed a copy of his findings. The Office also received laboratory reports dated July 9 and 16, 2003 regarding appellant's blood test results. In addition, the Office received a document from appellant's life and health insurance company explaining her benefits.

By decision dated March 30, 2004, the Office found the evidence of record insufficient to establish that appellant actually experienced the incident at the time, place and in the manner alleged and that she sustained a medical condition causally related to the alleged employment incident. Accordingly, the Office denied her claim. In a letter dated April 29, 2004 and postmarked April 30, 2004, appellant requested a review of the written record by an Office hearing representative.

The Office received a copy of its February 24, 2004 letter in which appellant was advised that the evidence she had submitted in support of her traumatic injury and recurrence of

disability claims was insufficient and about the type of factual and medical evidence she needed to submit to establish her claims. The Office also received duplicate copies of the March 30, 2004 decision, the June 20, 2002 Form CA-16, nurse McGeha's medical care instructions, the July 9 and 16, 2004 blood test results and Dr. FitzSimmons' December 31, 2002 letter and report. In addition, the Office received Dr. FitzSimmons' amendments to his December 31, 2002 report based on changes requested by appellant. These changes included, among other things, that she sustained a tick bite "on May 30, 2002" and "not in late May 2002" and that she was treated in the emergency room on the morning of June 20, 2002 where she was diagnosed as having a tick bite which was described as a "bull's eye rash" associated with Lyme disease. Dr. FitzSimmons noted that appellant stated that he had previously indicated that it was unclear as to whether she had a tick bite. He also reported that appellant complained of experiencing numbness and tingling in her feet.

In a June 9, 2004 decision, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124. The Office found that appellant's request was postmarked April 30, 2004 and it was not made within 30 days after the issuance of the March 30, 2004 decision denying her claim and, therefore, she was neither entitled to a hearing nor a review of the written record as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue in the case could be equally addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 the Act; that the claim was filed within applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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 or exposure, which is alleged to have occurred.[4] In order to meet her burden of proof to establish the fact that she sustained an injury in the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

[4] *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner alleged. In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.[5] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action.[6] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[7]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[10]

ANALYSIS -- ISSUE 1

The Office found that appellant did not sustain an insect bite as alleged. The June 20, 2002 Form CA-16 provided a history that she sustained a tick bite on her left lower leg on May 30, 2002. Dr. FitzSimmons' December 31, 2002 report provides a history that appellant experienced an itchy lesion in the calf area of her left leg in late May 2002, which she thought might have been a chigger bite. He later amended this history at appellant's request to clarify that she sustained a tick bite on May 30, 2002.

The employing establishment did not dispute appellant's account of her injury. Mr. McCollum, an employing establishment supervisor, indicated with an affirmative mark on appellant's traumatic injury claim form that her tick bite to the leg occurred while she was in the performance of duty on May 30, 2002. The Board finds that, although appellant filed her traumatic injury claim more than a month from the alleged incident and did not submit medical evidence contemporaneous to the alleged May 30, 2002 incident, the June 20, 2002 Form CA-16, Dr. FitzSimmons' December 31, 2002 report and amendments and Mr. McCollum's statement, provide a consistent history of the alleged incident. Moreover, as there is no evidence disputing

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

[6] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[7] *Id.* at 255, 256.

[8] *John J. Carlone, supra* note 5; *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) ("traumatic injury" and "occupational disease" defined, respectively).

[9] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[10] *Charles E. Evans*, 48 ECAB 692 (1997).

that appellant sustained an insect bite on her left leg on May 30, 2002, the Board finds that she has established an insect bite in the performance of duty.

The Board, however, finds the medical evidence of record insufficient to establish that appellant sustained an injury as a result of the accepted employment incident. The June 20, 2002 Form CA-16 indicated with an affirmative mark that her condition was caused by the May 30, 2002 employment incident. This report does not provide any medical rationale explaining how or why appellant's condition was caused by the accepted employment incident and, therefore, the report is insufficient to establish her claim. This type of report, without more by way of medical rationale explaining how the incident caused the injury is insufficient to establish causal relationship and is of diminished probative value.[11]

Nurse McGeha's medical care instructions and the consent form for emergency medical treatment signed by a nurse whose signature is illegible do not constitute competent medical evidence since a nurse is not considered a "physician" under the Act.[12]

In his December 31, 2002 report, Dr. FitzSimmons diagnosed a history of an insect bite but stated that it was not clear from this history that she had a tick bite that caused her rash. He also stated that it was doubtful appellant had Lyme disease and provided rationale in support of his opinion, stating that it did not appear that the tick had attached itself to her for at least 24 hours, which was needed to support a transmission of Lyme Disease. Dr. FitzSimmons' report is deficient because he did not provide a specific diagnosis related to appellant's insect bite. Further, he did not address a causal relationship between the diagnosed condition and the May 30, 2002 employment incident.[13] Although Dr. FitzSimmons later clarified that appellant sustained a tick bite on May 30, 2002 and that she was diagnosed as having Lyme disease after being treated in an emergency room on June 20, 2002, he did not specifically address whether and how appellant's condition was caused by the May 30, 2002 employment incident which was essential to support the change in his earlier conclusion.

Further, Dr. FitzSimmons' December 31, 2002 letter to Dr. Kopp and the July 9 and 16, 2003 laboratory reports are insufficient to establish appellant's burden because they do not provide a diagnosis and they fail to address whether or how the diagnosed condition was caused by the accepted employment incident.[14]

[11] *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

[12] 5 U.S.C. § 8101(2); *see Sheila A. Johnson*, 46 ECAB 323 (1994)

[13] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[14] *Id.*

Based on the foregoing, the Board finds that appellant has failed to submit sufficient rationalized medical evidence to establish that she sustained an injury caused by the May 30, 2002 employment incident.[15]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant ... 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."[16] Section 10.615 of the Office's federal regulation implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.[17] The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.[18]

Section 10.616(a) of the federal regulation provides that a request for a review of the written record or an oral hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[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, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[19]

ANALYSIS -- ISSUE 2

In this case, the 30-day period for determining the timeliness of appellant's request for a review of the written record would commence on March 31, 2004 the date following the issuance of the Office's March 30, 2004 decision finding that she failed to establish that she sustained an injury while in the performance of duty. Thirty days from March 31, 2004 would be April 29, 2004. Appellant's request for a review of the written record would be timely if filed by April 29, 2004.

In this case, appellant requested a review of the written record in a letter dated April 29, 2004. The envelope which contained her request reveals a postmark date of April 30, 2004. As appellant's request for a review of the written record is postmarked more than 30 days after the Office issued the March 30, 2004 decision, the Board finds that it was not

[15] *See Laura Swilley*, Docket No. 93-1769 (issued November 16, 1994) (appellant alleged that she sustained a tick bite in the performance of duty resulting in Lyme Disease). In affirming the Office's denial of the claim for failure to establish fact of injury, the Board found that assuming appellant had established a tick bit, this did not obviate the necessity of appellant submitting rationalized medical evidence, based on a complete and proper background establishing causal relationship between appellant's condition and the employment incident.

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.615.

[18] *Id.*

[19] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

timely filed and she is not entitled to a review of the written record as a matter of right. Further, the Office considered appellant's request and correctly advised her that she could equally well address the issue in her case through the reconsideration process. As the only limitation on the Office's 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 known facts.[20] Under these circumstances, the Board finds that the Office properly denied a discretionary review of the written record on the matter.

CONCLUSION

The Board finds that, although appellant has established incident, she has failed to establish that she sustained an injury while in the performance of duty. The Board further finds that the Office properly denied appellant's request for a review of the written record on the grounds that it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the June 9 and March 30, 2004 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Issued: February 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] *Daniel J. Perea*, 42 ECAB 214 (1990).