United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 07-841**
	)	**Issued: July 16, 2007**
U.S. POSTAL SERVICE, GREENSBORO POSTAL & DISTRIBUTION CENTER, Greensboro, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2007 appellant filed a timely appeal from a January 17, 2007 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for a review of the written record and a July 5, 2006 merit decision that denied his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely filed.

FACTUAL HISTORY

On May 14, 2006 appellant, then a 41-year-old maintenance mechanic, filed a traumatic injury claim alleging that he injured his left knee on May 8, 2006 when a machine door hit him. He stopped work on May 8, 2006 and returned on May 14, 2006.

On May 11, 2006 the employing establishment issued appellant a Form CA-16 authorizing treatment by Dr. Michael E. King, an orthopedic surgeon, for the claimed May 8, 2006 injury for up to 60 days.

Appellant provided a May 11, 2006 report from Jill A. Payne, a physician's assistant, who noted the history of appellant's injury and complaints of left knee pain. Ms. Payne noted that x-rays taken on that day revealed evidence of "a questionable loose body along the inferior aspect of the patellar tendon" and also indicated that appellant had preexisting Osgood-Schlatter's disease, which his May 8, 2006 injury may have exacerbated.

On May 11, 2006 Dr. King diagnosed "pain in joint, lower leg/knee" and noted that appellant could return to work with limitations on bending, lifting and ladder climbing. In a May 22, 2006 disability statement, he recommended "computer work only; no walking, standing or squatting for one month." Dr. King did not provide a diagnosis. In a May 24, 2006 attending physician's report, he diagnosed "pain in joint/leg." Dr. King noted that he provided appellant with a knee immobilizer. In a May 24, 2006 duty status report, he again diagnosed "pain in joint" and recommended work restrictions of no bending, ladder climbing or lifting.

On May 30, 2006 appellant accepted a limited-duty job offer from the employing establishment.

On May 30, 2006 the Office requested additional information concerning appellant's claim. The letter was addressed to appellant's address of record.

In a May 16, 2006 report, Dr. Warren Stacks, a Board-certified family practitioner, stated: "At this time I am recommending that you be absent from work from May 16 to 30, 2006 due to illness."

In a June 12, 2006 disability form report, Dr. King reiterated his recommendations that appellant perform computer work only and refrain from walking, standing or squatting for another three weeks. In a narrative report of the same day, he stated: "The left knee is improving. [Appellant] has not been using it enough. The injury was reviewed today as a small steel door hitting the lateral side of the knee, just at Osgood-Schlatter's tubercle. [Appellant] is tender at that site, of course, and has a normal enlargement there."

By decision dated July 5, 2006, the Office denied appellant's traumatic injury claim on the grounds that the medical evidence of record did not establish a firm diagnosis that could be connected to the established employment incident. The Office advised that all prior medical authorization was terminated.

In a July 13, 2006 telephone memorandum, the Office advised that appellant telephoned to inquire about the denial of his claim and asserted that he did not receive the Office's May 30,

2006 letter requesting additional information. The Office noted that the type of evidence needed to establish the claim and the appeal process was explained to appellant. The Office also indicated that it would send appellant another copy of the May 30, 2006 development letter. Appellant subsequently provided medical evidence.

In an undated appeal request form received by the Office on September 11, 2006, appellant requested both reconsideration and a review of the written record. On October 4, 2006 the Office requested that appellant specify which appellate review he wished. On December 13, 2006 appellant requested a review of the written record.

By decision dated January 17, 2007, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. The Office also considered the request in view of the issue involved but found that appellant could have his claim equally well addressed by requesting reconsideration from the Office and submitting new evidence.

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 timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disabilities and/or specific conditions for which compensation is claimed are 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 upon a traumatic injury or an occupational disease.[3]

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 actually experienced the employment incident at the time, place and in the manner alleged.[4] 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.[5] As part of this burden, the claimant must present rationalized medical evidence based upon a complete factual and medical background showing causal relationship.[6]

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

[5] *Id.*

[6] *Joseph T. Gulla*, 36 ECAB 516 (1985).

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof in establishing that he sustained a traumatic injury in the performance of duty. The record reflects that the claimed employment incident occurred as alleged when appellant was struck on the left knee by the door of a machine on May 8, 2006. However, the medical evidence does not provide a clear diagnosis and does not provide a physician's opinion that the accepted incident caused or aggravated a diagnosed condition.

Appellant submitted several medical reports in support of his claim, including a May 11, 2006 treatment note from Ms. Payne, a physician's assistant. This report is not probative on the issue of causal relationship, as it was not authored by a physician.[7] Dr. Stacks May 16, 2006 report noted appellant's disability status but did not address whether the May 8, 2006 employment incident caused an injury. No firm diagnosis was provided by the physician.

Appellant also provided two May 24, 2006 form reports from Dr. King who diagnosed "pain in joint," and noted that appellant's joint pain was specific to the leg. However, the Board notes that "pain" is not a compensable diagnosis under the Act.[8] Neither form report addressed or established a causal relationship between the employment incident and a diagnosed condition. The Board has held that a physician's report that provides no opinion on the cause of a condition is not probative on the issue of causal relationship.[9] As noted, part of appellant's burden of proof includes the submission of rationalized medical evidence showing a causal relationship between a diagnosed condition and his employment activity on the date in question. Dr. King's May 11 and 22, 2006 disability statements similarly diagnosed pain and did not address causal relationship. On May 22, 2006 he diagnosed "contusion left knee, Osgood-Schlatter's tubercle, and bursitis in the pretibial area." However, Dr. King did not provide sufficient explanation or rationale to connect this diagnosis to the accepted employment incident.[10] His June 12, 2006 disability statement neither provided a diagnosis nor addressed causal relationship. A June 12, 2006 narrative report, noted only that a small steel door hit the left lateral side of appellant's knee at the site of the Osgood-Schlatter's tubercle and indicated that appellant experienced tenderness and "normal enlargement" at that site. However, Dr. King did not provide a firm diagnosis or give any explanation or rationale linking the employment incident to the diagnosed condition. The Board finds that appellant did not meet his burden of proof in establishing that he

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[7] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[8] *Robert Broome*, 55 ECAB 493 (2004), *citing John L. Clark*, 32 ECAB 1618 (1981).

[9] *See, e.g., Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (medical evidence which 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] In order to be considered rationalized medical evidence, a physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the claimant's specific employment factors. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989); *Steven S. Saleh*, 55 ECAB 169, 172 (2003). The Board has held that a medical opinion not fortified by medical rationale is of limited probative value. *Caroline Thomas*, 51 ECAB 451, 456 n.10 (2000); *Brenda L. Dubuque*, 55 ECAB 212, 217 (2004).

sustained a traumatic injury in the performance of duty because the medical evidence of record does not establish a causal relationship between the employment incident and a diagnosed condition.

On appeal, appellant contends that the Office did not send its May 30, 2006 claim development letter until July 14, 2006 and that he did not receive it until July 16, 2006. While the Office's July 13, 2006 telephone memorandum supports that the Office sent appellant another copy of the letter on July 14, 2006, there is no evidence that the original letter was not sent to appellant's address of record in the ordinary course of business on May 30, 2006. The record contains a properly addressed May 30, 2006 letter from the Office to appellant requesting additional evidence in support of his claim. The Board has held that, under the mailbox rule, in the absence of evidence to the contrary, it is presumed that a notice properly addressed and mailed to an individual in the ordinary course of business was received by that individual.[11] There is no evidence to rebut that the Office sent appellant the May 30, 2006 letter in the ordinary course of business on that date and that the letter was received.[12]

Notwithstanding the Board's affirmance of the Office's July 5, 2006 decision denying appellant's claim, the Board finds that appellant is still entitled to reimbursement for payment of expenses incurred for medical treatment for the period May 11, 2006, the date the employing establishment official signed the Form CA-16, to July 5, 2006, the date the Office denied the claim and terminated authorization of medical treatment at its expense. By Form CA-16, signed by an employing establishment official on May 11, 2006, treatment was authorized for Dr. King's office to provide medical care for a period of up to 60 days from that date. The employing establishment's authorization for appellant to obtain medical examination and/or treatment created a contractual obligation to pay for the cost of necessary medical treatment regardless of the action taken on the claim.[13]

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 his claim before a representative of the Secretary.[14] 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.[15] 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

[11] *See Larry L. Hill*, 42 EAB 598 (1991); *George F. Gidicsin*, 36 ECAB 175 (1984).

[12] Following the Office's July 5, 2006 decision, appellant submitted additional evidence. However, as this evidence was not considered by the Office in reaching a decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). This decision of the Board does not preclude appellant from submitting such evidence to the Office as part of a reconsideration request before the Office.

[13] *See Robert F. Hamilton*, 41 ECAB 431 (1990); 20 C.F.R. § 10.300.

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 10.615.

the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[16]

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,[17] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[19]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for a review of the written record as untimely filed. Appellant requested a review of the written record in response to the Office's decision issued on July 5, 2006. Initially, in an undated letter received by the Office on September 11, 2006, appellant requested both a review of the written record and reconsideration. After the Office asked that appellant clarify his request, he submitted a December 13, 2006 request for a review of the written record. Both requests were made more than 30 days after the July 5, 2006 decision was issued.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by examining appellant's request for an appeal. The Office determined that appellant's case would be best served by his submission of a request for reconsideration along with new supporting evidence. Accordingly, the Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because he failed to file the request within the statutory time requirements.

CONCLUSION

The Board concludes that appellant did not meet his burden of proof in establishing that he sustained a traumatic injury in the performance of duty and that the Office properly denied his request for a review of the written record as untimely filed.

[16] 20 C.F.R. § 10.616(a).

[17] 5 U.S.C. §§ 8101-8193.

[18] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[19] *Teresa M. Valle*, 57 ECAB __ (Docket No. 06-438, issued April 19, 2006). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2007 and July 5, 2006 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: July 16, 2007
Washington, DC

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

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

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