United States Department of Labor
Employees' Compensation Appeals Board

K.L., Appellant	)	
and	)	**Docket No. 09-1631**
	)	**Issued: February 22, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Colorado Springs, CO, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 10, 2009 appellant filed a timely appeal from a March 17, 2009 nonmerit decision of the Office of Workers' Compensation Programs, denying his hearing request as untimely. The Board also has jurisdiction over a September 29, 2008 merit decision that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on July 7, 2008; and (2) whether the Office properly denied his request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On August 18, 2008 appellant, a 48-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) for a sprained left foot and ankle that he attributed to a July 7, 2008 incident when he stepped on a rock.

Appellant submitted notes excusing him from work July 8 through 14, 2008. These notes were signed by a physician's assistant, Katrina Grabling, and Jude L. Fleming, a nurse practitioner.

By decision dated September 29, 2008, the Office denied the claim. Although it accepted that the identified employment incident occurred as alleged, it denied the claim because appellant had not established that the accepted employment incident caused a medically diagnosed condition.

Appellant disagreed and on December 24, 2008 requested an oral hearing.

By decision dated March 17, 2009, the Office denied appellant's hearing request because it was untimely.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[2] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[3] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[4] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[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]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

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

[4] *G.T.*, *supra* note 3; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[5] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[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).

ANALYSIS -- ISSUE 1

The Office accepted that appellant stepped on a rock on July 7, 2008. Appellant's burden of proof is to establish that the identified employment incident caused a diagnosed condition. As noted above, causal relationship is a medical issue that can only be proven by probative rationalized medical opinion evidence. Appellant has not submitted such evidence and therefore has not established his claim.

The medical evidence of record at the time of the Office's September 29, 2008 merit decision consisted of notes excusing appellant from work from a physician's assistant and a nurse practitioner. 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.[8]

Appellant failed to meet his burden of proof to establish a *prima facie* claim for compensation. Although he submitted a statement which identified the factors of employment that he believed caused his condition, at the time of the Office's merit decision he had failed to submit any medical evidence in support of his claim. The Office informed appellant of the need to submit a physician's opinion which explained how the claimed condition was related to the implicated employment factors. Appellant failed to submit any medical evidence in support of his claim.[9]

The Board finds that appellant has not established that he sustained a injury in the performance of duty on July 7, 2008.

LEGAL PRCEDENT -- ISSUE 2

Section 8124(b)(1) of the Act,[10] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: 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.

Section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[11] The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in

[8] 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

[9] *Donald W. Wenzel*, 56 ECAB 390 (2005); *Richard H. Weiss*, 47 ECAB 182 (1995).

[10] 5 U.S.C. § 8124(b)(1).

[11] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

deciding whether to grant a hearing.[12] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[13]

ANALYSIS -- ISSUE 2

On September 29, 2008 the Office denied appellant's claim. Appellant's hearing request was postmarked December 24, 2008, more than 30 days after the Office issued its initial decision and therefore the Office correctly found that he was not entitled to a hearing as a matter of right.

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and probable deduction from established facts.[14] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of his request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on July 7, 2008. The Board also finds that the Office properly denied his request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

[12] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[13] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[14] *See André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2009 and September 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 22, 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