United States Department of Labor
Employees' Compensation Appeals Board

W.C., Appellant	)	
and	)	**Docket No. 11-215**
	)	**Issued: August 11, 2011**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 1, 2010 appellant filed a timely appeal from an August 2, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) and a September 30, 2010 nonmerit decision denying his request for a review of the written record as untimely. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on June 10, 2010, as alleged; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the September 30, 2010 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant requests that OWCP pay for four hours of continuation of pay (COP) and outstanding medical bills for physician's visits.

FACTUAL HISTORY

On June 17, 2010 appellant, then a 58-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that on June 10, 2010 he was exposed to legionella bacteria. He indicated that it was found in a blood test of a coworker sharing the same office and his coworker's physician advised him to seek medical attention. Appellant did not stop work.

By letter dated June 30, 2010, OWCP requested that appellant submit additional factual and medical evidence regarding his claim. It allotted 30 days for him to respond to its inquiries. Appellant did not respond.

By decision dated August 2, 2010, OWCP denied appellant's claim on the basis that the medical evidence submitted was insufficient to establish fact of injury. It found that although the described employment activities occurred as alleged, the medical evidence provided no firm diagnosis and did not establish causal relationship.

In an undated narrative statement, appellant indicated that there was possible exposure to legionella from a portable air conditioning unit with a water tank.

In a June 17, 2010 medical report, Dr. Carol Currier, a Board-certified occupational medicine physician, diagnosed legionnaires' disease and bronchitis.

In another June 17, 2010 medical report, Dr. Currier reiterated her diagnoses and released appellant to regular work from June 17 to 24, 2010.

In a June 24, 2010 progress report, Dr. Currier indicated that appellant still had a little bit of a sore throat and was still coughing. She reiterated her diagnoses, discharged him and released him to regular work on June 25, 2010.

By request form postmarked September 14, 2010 and received by OWCP on September 16, 2010, appellant requested a review of the written record by OWCP's hearing representative, in connection with his claim. He resubmitted his claim form and submitted a June 24, 2010 medical report by Dr. Currier, who reiterated her diagnoses and released him to regular work on June 25, 2010.

By decision dated September 30, 2010, OWCP denied appellant's request for a review of the written record. It found that his request was untimely because it was not made within 30 days of its August 2, 2010 decision. OWCP further indicated that it had exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[4] was sustained in the performance of duty, as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5]

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. A fact of injury determination is based on two elements. 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 sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[6]

ANALYSIS -- ISSUE 1

OWCP has accepted that the employment incident of June 10, 2010 occurred at the time, place and in the manner alleged. The issue is whether appellant sustained an injury which resulted from the June 10, 2010 employment incident. The Board finds that he did not meet his burden of proof to establish that he sustained an injury in the performance of duty on June 10, 2010.[7]

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[3] 5 U.S.C. §§ 8101-8193.

[4] OWCP's regulations define 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. 20 C.F.R. § 10.5(ee).

[5] *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Id. See also Gary J. Watling*, 52 ECAB 278 (2001).

[7] *See T.S.*, Docket No. 09-2184 (issued June 9, 2010).

In a June 17, 2010 medical report, Dr. Currier diagnosed legionnaires' disease and bronchitis. In another June 17, 2010 medical report, she reiterated her diagnoses and released appellant to regular work from June 17 to 24, 2010. In a June 24, 2010 progress report, Dr. Currier indicated that he still had a little bit of a sore throat and was still coughing. In another June 24, 2010 medical report, she reiterated her diagnoses and released appellant to regular work on June 25, 2010. Although the Board finds that Dr. Currier failed to directly address the issue of causal relationship as she did not explain how the mechanism of the June 10, 2010 employment incident caused or aggravated appellant's condition. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[8] The medical reports of Dr. Currier do not provide medical rationale explaining how appellant's legionnaires' disease and bronchitis were caused or aggravated by the June 10, 2010 employment incident. Lacking thorough medical rationale on the issue of causal relationship, the reports are of limited probative value and not sufficient to establish that appellant sustained an employment-related injury in the performance of duty on June 10, 2010.

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.

On appeal, appellant requests that OWCP pay for four hours of COP and outstanding medical bills for physician's visits. OWCP did not adjudicate the issue of his incurred medical expenses. Ordinarily, the employing establishment will authorize treatment of a job-related injury by providing the employee a properly executed Form CA-16 within four hours.[9] Under section 8103 of FECA, OWCP has broad discretionary authority to approve unauthorized medical care which it finds necessary and reasonable in cases of emergency or other unusual circumstances, to be determined on a case-by-case basis.[10] The Board finds that the circumstances of the case warrant additional development of this issue. The case will be remanded to OWCP for further development, to be followed by the issuance of a *de novo* decision on this issue.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], 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 [her] claim before a representative of the Secretary."[11]

[8] *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[9] *See Val D. Wynn*, 40 ECAB 666 (1989); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (March 2010).

[10] 5 U.S.C. § 8103; 20 C.F.R. § 10.304. *See L.B.*, Docket No. 10-469 (issued June 2, 2010); *see also* Federal (FECA) Procedure Manual, *id*.

[11] *Id*. at § 8124(b)(1).

Section 10.615 of Title 20 of the Code of Federal Regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[12] The hearing request 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.[13] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[14] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[15]

ANALYSIS -- ISSUE 2

Appellant had 30-calendar days from OWCP's August 2, 2010 decision or until September 1, 2010, to request a review of the written record. Because his request was postmarked September 14, 2010, his request was untimely. Appellant was not entitled to a review of the written record as a matter of right under 5 U.S.C. § 8124(b)(1). Exercising its discretion to grant a review of the written record, OWCP further denied his request on the grounds that he could equally well address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's August 2, 2010 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for a review of the written record.[16]

CONCLUSION

The Board finds that while appellant established that, the incident occurred as alleged, he did not establish an injury in the performance of duty on June 10, 2010. The Board further finds that OWCP properly denied his request for a review of the written record. The case is returned to OWCP for adjudication of the issue concerning appellant's reimbursement of medical expenses related to his treatment.

[12] 20 C.F.R. § 10.615.

[13] *Id*. at § 10.616(a).

[14] *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

[15] *Id. See also Rudolph Bermann*, 26 ECAB 354 (1975).

[16] *See Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 30 and August 2, 2010 are affirmed and the case is remanded for further development regarding the reimbursement of medical expenses.

Issued: August 11, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board