United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 11-95**
	)	**Issued: September 7, 2011**
DEPARTMENT OF THE ARMY, U.S. ARMY INSTALLATION MGMT AGENCY, APO, AE, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 14, 2010 appellant filed a timely appeal from a May 27, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and an August 26, 2010 nonmerit decision denying his request for a hearing by the Branch of Hearings and Review. 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on December 24, 2007; and (2) whether OWCP properly denied his request for a hearing under 5 U.S.C. § 8124.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 9, 2010 appellant, then a 51-year-old motor vehicle operator supervisor, filed a traumatic injury claim (Form CA-1) alleging that on December 24, 2007 he strained his back and felt shooting pain in his legs when he was unloading containers of mail. Appellant stopped work on December 26, 2007 and returned to work on January 7, 2008.

By letter dated April 20, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was directed to submit additional evidence within 30 days.

In a December 25, 2007 emergency room report, Dr. Patrizio Cervellini, a treating physician, reported that appellant had an accident the previous day when moving boxes. Upon physical examination and x-rays of the spine, he diagnosed severe lumbosciatalgia in the L5 radicular area.[2]

In a December 26, 2007 x-ray report, Dr. Aldo Paolucci, a treating physician, diagnosed spondylolisthesis at the level of the opposing body surfaces of L5-S1 and noted intervertebral space markedly reduced at L5-S1.

In an October 28, 2008 note, Brian O'Connor, an orthopedic physician's assistant (PA-C), reported that appellant should not lift greater than five pounds for two months.

In a January 28, 2009 medical report, Dr. Ssa Mansour, a treating physician, reported that appellant's magnetic resonance imaging (MRI) scan remained mostly unchanged from a prior MRI scan, showing bilateral posteriomedian and paramedian L4-L5 disc herniation and wide-angle L4-L5 and L5-S1 disc protrusion with anterolisthesis of L5 over S1.

In a January 30, 2009 discharge letter, Dr. Giampaolo De Luca, a treating physician, reported that appellant had been admitted to the hospital on January 28, 2009 for L4-L5 herniated disc. Dr. De Luca noted that appellant was scheduled for surgery on February 10, 2009. In a February 12, 2009 discharge letter, Dr. De Luca reported that on February 10, 2009, appellant had undergone removal of a bulging L4-L5 disc herniation with emptying of the disc space.

In a February 11, 2009 medical note, Dr. Steven Slack, Board-certified in anesthesiology, reported that appellant was admitted to St. Bortolo Hospital in Italy on January 28, 2009, sent home the following day, was committed to bed rest, and readmitted on February 9, 2009 for surgery. Dr. Slack noted that appellant would not be able to return to his employment for another two to three weeks.

By decision May 27, 2010, OWCP denied appellant's claim on the grounds that there was insufficient medical evidence to establish his back condition was related to the December 24, 2007 employment incident.

[2] Appellant submitted numerous medical reports in Italian because he received treatment in Vicenza, Italy. Appellant also submitted an English translation of these reports.

On July 1, 2010 appellant appealed from the May 27, 2010 OWCP decision and noted that he was attaching supporting documentation. On the appeal request form, appellant checked both reconsideration and review of the written record.

Appellant submitted a January 28, 2008 report from Mr. O'Connor, who reported that appellant had experienced low back pain with radiation into the buttocks and posterior thighs. An MRI scan of the lumbar spine showed multilevel degenerative disc disease with large right paracentral herniation of nucleus pulsposus (HNP) at the L4-L5 level causing severe spinal canal stenosis. He also noted bilateral L5 spondylolysis with Grade I spondylolisthesis.

By letter dated July 6, 2010, Mr. O'Connor reported that appellant's medical record supported a low back injury sustained on December 24, 2007 from lifting heavy mail containers during his regular duty hours. After reporting appellant's history, he opined that appellant's diagnosis of a large lumbar L4-L5 HNP was causally related to his work injury in December 2007 when lifting heavy mail containers at work.

By letter dated August 12, 2010, OWCP informed appellant that he could request only one appeal at a time and inquired whether he sought reconsideration or a review of the written record. Appellant did not respond to OWCP's request.

By letter dated August 23, 2010, OWCP informed appellant that the Branch of Hearings and Review received request for review of the written record.

By decision dated August 26, 2010, the Branch of Hearings and Review denied appellant's request for a review of the written record finding, that it was not made within 30 days of the May 27, 2009 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.[3]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 filed within the 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 are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[5]

[3] The Board notes that appellant submitted additional evidence after OWCP rendered its May 27, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

[4] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[5] *Michael E. Smith*, 50 ECAB 313 (1999).

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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 which is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[7] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

The term physician is defined under section 8101(2), as follows: "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."[9] Registered nurses, licensed practical nurses and physicians assistants, they are not physicians as defined under FECA, their opinions are of no probative value.[10]

ANALYSIS -- ISSUE 1

OWCP accepted that the December 24, 2007 incident occurred as alleged. It denied appellant's claim finding that the medical evidence of record was insufficient to establish causal relation. The Board finds that appellant did not submit sufficient medical evidence to support that he sustained a back injury causally related to the December 24, 2007 employment incident.[11]

In a December 25, 2007 emergency room report, Dr. Cervellini reported that appellant had an accident the previous day when moving boxes. He diagnosed severe lumbosciataglia in the L5 radicular area. In a December 26, 2007 x-ray report, Dr. Paolucci diagnosed L5-S1 spondylolisthesis. In a January 28, 2009 medical report, some 15 months after the incident,

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

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *James Mack*, 43 ECAB 321 (1991).

[9] 5 U.S.C. § 8101(2).

[10] *Id.*

[11] *See Robert Broome*, 55 ECAB 339 (2004).

Dr. Marcucci reported that appellant's MRI scan showed bilateral posteriomedian and paramedian L4-L5 disc herniation and wide-angle L4-L5 and L5-S1 disc protrusion with anterolisthesis of L5 over S1.

These records, however, did not provide any explanation by the examining physicians as to how appellant's diagnosed back condition was caused or contributed to by the accepted incident at work.

In an October 28, 2008 note, Mr. O'Connor, a physician's assistant, reported that appellant should not lift greater than five pounds for two months. This medical evidence is insufficient to establish the causal relationship between appellant's back condition and the December 24, 2007 employment incident. Registered nurses, licensed practical nurses and physicians assistants are not physicians as defined under FECA. Their opinions are of no probative medical value.[12]

The remaining medical evidence of record is also insufficient to establish causal relationship. In January 30 and February 10, 2009 discharge letters, Dr. De Luca reported that appellant was admitted on January 28, 2009 for an L4-L5 herniated disc and was discharged after removal of the disc herniation with emptying of the disc space. In a February 11, 2009 medical note, Dr. Slack noted that appellant would not be able to return to his employment for another two to three weeks. While the above medical records addressed appellant's treatment, the physicians failed to address the issue of causal relationship between appellant's back condition and the December 24, 2007 employment incident. 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.[13] Without medical reasoning explaining how appellant's employment caused his back condition, the reports are not sufficient to meet appellant's burden of proof.[14]

In the instant case, the record is without rationalized medical evidence establishing a causal relationship between December 24, 2007 employment incident and appellant's right shoulder injury. Appellant has failed to establish his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

A claimant for compensation not satisfied with a decision by OWCP 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.[15] According to 20 C.F.R. § 10.615, a claimant

[12] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

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

[14] *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

[15] 5 U.S.C. § 8124(b)(1).

shall be afforded a choice of an oral hearing or a review of the written record.[16] The regulations provide that a request for a hearing or review of the written record must be made within 30 days as determined by the postmark or other carrier's date marking, of the date of the decision.[17] A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of the OWCP decision.[18] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[19] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[20]

ANALYSIS -- ISSUE 2

In the present case, appellant requested a review of the written record on July 1, 2010 and OWCP found that the reconsideration request was postmarked on July 21, 2010. Appellant's request was made more than 30 days after the date of issuance of OWCP's prior decision dated May 27, 2010. Therefore, OWCP properly found in its August 26, 2010 decision that appellant was not entitled to an examination of the written record as a matter of right because his request for an examination of the written record was not made within 30 days of its May 27, 2010 decision.[21]

The Board has held that OWCP has the discretion to hold hearings where no specific legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[22] OWCP's authority to grant or deny a written review of the record is analogous to its authority to grant or deny a hearing. Its procedures require that it exercise its discretion and explain, as appropriate, its decision to grant or deny an examination of the written record when a claimant's request is not granted as a matter of right. Those procedures are a proper interpretation of FECA and Board precedent.[23]

In its August 26, 2010 decision, OWCP properly exercised its discretion by stating that it had considered the matter and had denied appellant's request for an examination of the written record because the issue of fact of injury could be addressed through a reconsideration application. The Board has held that the only limitation on OWCP's authority is reasonableness and an 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

[16] 20 C.F.R. § 10.615.

[17] *Id.* at § 10.616(a).

[18] *See James Smith*, 53 ECAB 188 (2001).

[19] *Herbert C. Holley*, 33 ECAB 140 (1981).

[20] *Id.*

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

[22] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[23] *Michael J. Welsh*, 40 ECAB 994 (1989).

probable deduction from established facts.[24] In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for an examination of the written record.

The Board notes that appellant's July 1, 2010 request was not solely one for an examination of the written record. He requested reconsideration and a review of the written record, accompanied by a July 6, 2010 letter from Mr. O'Connor.

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.[25] OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.606(b)(2) of the federal regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by OWCP; or (3) submitting relevant and pertinent evidence not previously considered by OWCP.[26] Appellant's July 1, 2010 request for reconsideration and a review of the written record was accompanied by relevant evidence not previously considered by OWCP. This submission of new evidence is consistent with the requirements under section 8128 of FECA for granting reconsideration of the case on its merits.

The Board has held that when simultaneous requests for an examination of the written record under section 8124(b)(1) and for reconsideration under section 8128(a) are made, OWCP must properly consider the request for an examination of the written record first to avoid a conflict with the requirement of section 8124(b)(1) that an examination of the written record be granted only before review under section 8128(a).[27] OWCP's denial of appellant's request for an examination of the written record under section 8124(b)(1) does not address appellant's request for review under section 8128(a). Appellant's request for an examination of the written record was denied by OWCP on the basis that it was untimely.

The Board notes that appellant's request for merit reconsideration of OWCP's May 27, 2010 decision is still pending before OWCP. Accordingly, on return of the record the Office should adjudicate appellant's request for reconsideration under section 8128(a).[28]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on December 24, 2007 in the performance of duty. The Board also

[24] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[25] 5 U.S.C. § 8128(a).

[26] 20 C.F.R. § 10.606(b)(2).

[27] *See generally, Luis E. Colon*, 43 ECAB 1143 (1992); *see generally, Mary G. Allen*, 40 ECAB 190 (1988).

[28] *See also Mary G. Allen, id.*

finds that OWCP did not abuse its discretion by denying appellant's request for an examination of the written record.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 26 and May 27, 2010 are affirmed.

Issued: September 7, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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