

**United States Department of Labor
Employees' Compensation Appeals Board**

N.T., Appellant)

and)

DEPARTMENT OF THE NAVY, MARINE)
CORPS LOGISTICS BASE, Barstow, CA,)
Employer)

**Docket No. 11-407
Issued: September 14, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 17, 2010 appellant filed a timely appeal from a November 17, 2010 Office of Workers' Compensation Programs' (OWCP) decision. The Board also has jurisdiction over a June 23, 2010 decision that denied his claim. 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 the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on September 25, 2009; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 4, 2009 appellant, then a 56-year-old electronic integrated systems mechanic, filed a traumatic injury claim alleging that he slipped and twisted his left knee while removing air conditioning units from a vehicle on September 25, 2009. He did not incur any time loss from work. In a statement dated October 1, 2009, a witness stated that appellant fell off a shelter carrier and twisted his left knee upon hitting the ground. The employing establishment did not controvert the claim.

In a November 12, 2009 report, Dr. Samuel H. Rice, a Board-certified orthopedic surgeon, related that appellant was stepping out of a vehicle at work on October 4, 2009 when he fell approximately four feet and twisted his left knee. He examined appellant and observed bilateral medial joint line tenderness and positive meniscal grind and valgus stress test results for the right knee. X-rays of both knees revealed medial, posterior and anterior osteophytes and medial compartment arthritis with bone-on-bone contact. Dr. Rice noted that appellant underwent right knee arthroscopy in 2001. He diagnosed bilateral knee arthritis and advised knee replacements.

In a March 29, 2010 progress report from Dr. Rice, appellant complained of left knee symptoms. On examination, he exhibited medial joint line tenderness and slightly positive patellar grind test results. Dr. Rice diagnosed localized osteoarthritis and released appellant to full-time duty. He duplicated his findings in a May 12, 2010 progress report.

OWCP informed appellant in a May 19, 2010 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a physician's report offering a reasoned opinion explaining how the September 25, 2009 work incident caused or aggravated an osteoarthritic condition. Appellant responded with copies of Dr. Rice's reports from November 12, 2009 to May 12, 2010 and an incomplete May 12, 2010 work status note.

By decision dated June 23, 2010, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that the accepted September 25, 2009 incident caused or aggravated a left knee condition.²

Appellant filed an oral hearing request on August 4, 2010. He submitted an August 2, 2010 report by Dr. Rice opining that the September 25, 2009 fall at work aggravated his left knee arthritis.

On November 17, 2010 OWCP denied his hearing request on the grounds that he failed to make the request within 30 days after the issuance of the June 23, 2010 merit decision. After considering whether to grant a discretionary hearing, it determined that the issue could be further addressed by requesting reconsideration and submitting additional evidence.

² OWCP pointed out that appellant's claim was originally received as a simple, uncontroverted case resulting in minimal or no time loss from work and payment was approved for limited medical expenses without formal adjudication.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim by the weight of reliable, probative and substantial evidence,³ including that he is an “employee” within the meaning of FECA and that he filed his claim within the applicable time limitation.⁴ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. 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. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician’s opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, 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.⁷

ANALYSIS -- ISSUE 1

The evidence supports that appellant slipped off a vehicle at work and twisted his left knee on September 25, 2009. Nevertheless, the medical evidence remains insufficient to establish that this accepted incident caused or aggravated his left knee condition.

Dr. Rice noted in a November 12, 2009 report that appellant was exiting a vehicle when he fell approximately four feet and twisted his left knee on October 4, 2009. His opinion did not sufficiently establish causal relationship because he failed to explain how the fall pathophysiologically caused or aggravated appellant’s arthritic left knee.⁸ Moreover, Dr. Rice identified October 4, 2009 instead of September 25, 2009 as the date of the incident at work.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁴ *R.C.*, 59 ECAB 427 (2008).

⁵ *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *T.H.*, 59 ECAB 388 (2008).

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁸ *Joan R. Donovan*, 54 ECAB 615, 621 (2003); *Ern Reynolds*, 45 ECAB 690, 696 (1994).

Opinions based on an incomplete or inaccurate history are of diminished probative value.⁹ Other medical evidence composed of Dr. Rice's records for the period March 29 to May 12, 2010 did not address whether appellant's federal employment caused or aggravated his knee injury.¹⁰

Appellant argues on appeal that his knee worsened since the September 25, 2009 incident. As noted, the medical evidence of record did not sufficiently explain how the accepted employment incident caused or aggravated his injury. In the absence of necessary factual evidence, the Board finds that appellant has failed to establish a *prima facie* claim.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation who is 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.¹² A claimant is afforded the choice of either an oral hearing or a review of the written record.¹³ While a claimant is no longer entitled to an oral hearing or a review of the written record as a matter of right if his request is filed past the 30-day period, OWCP may grant the request within its discretionary power and must exercise that discretion.¹⁴

ANALYSIS -- ISSUE 2

Appellant filed his request for an oral hearing on August 4, 2010, more than 30 days after OWCP issued its June 23, 2010 decision. Because it was not timely filed, OWCP properly denied the request.

OWCP has the discretionary power to grant an oral hearing when a claimant is not entitled to one as a matter of right. In its November 17, 2010 decision, OWCP exercised this discretion and found that appellant's issue could be addressed by requesting reconsideration and submitting additional evidence. This basis for denying appellant's request is a proper exercise of OWCP's authority.¹⁵ Moreover, no evidence is offered that OWCP abused its discretion. Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

The Board notes that appellant submitted new evidence after issuance of the June 23, 2010 merit decision. The Board lacks jurisdiction to review evidence for the first time on

⁹ *M.W.*, 57 ECAB 710 (2006); *James A. Wyrick*, 31 ECAB 1805 (1980).

¹⁰ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (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).

¹¹ See *O.W.*, Docket No. 09-2110 (issued April 22, 2010).

¹² 5 U.S.C. § 8124(b)(1); *Joseph R. Giallanza*, 55 ECAB 186, 190-91 (2003).

¹³ 20 C.F.R. § 10.615.

¹⁴ See *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁵ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

appeal.¹⁶ However, appellant may submit new evidence or argument as part of a formal 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.

CONCLUSION

The Board finds that appellant did not establish that he sustained a traumatic injury in the performance of duty on September 25, 2009 and OWCP properly denied appellant's request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the November 17 and June 23, 2010 decisions of Office of Workers' Compensation Programs are affirmed.

Issued: September 14, 2011
Washington, DC

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

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

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

¹⁶ 20 C.F.R. § 501.2(c).