



## **FACTUAL HISTORY**

On April 21, 2011 appellant, then a 58-year-old high voltage electrician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right back injury on April 14, 2011 when he was climbing out of a bucket truck, slipped and fell. Chares Legasp, a witness to the incident, stated that he saw appellant's feet falling to the belly of the bucket truck.

By letter dated April 26, 2011, OWCP informed appellant that no evidence had been received in support his claim. Appellant was advised of the medical evidence needed and asked that his physician submit a narrative medical report within 30 days. OWCP did not receive any further evidence.

By decision dated May 26, 2011, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury because he did not submit any medical evidence containing a medical diagnosis in connection with the accepted April 14, 2011 employment incident.

On June 29, 2011 appellant requested an oral hearing before the Branch of Hearings and Review. This request was postmarked on June 30, 2011.<sup>3</sup>

In support of his request, appellant submitted a narrative statement detailing his injury and medical treatment, as well as medical reports dated April 14 to June 13, 2011.

By decision dated August 8, 2011, the Branch of Hearings and Review denied appellant's request for an oral hearing finding that his request was not made within 30 days of the May 26, 2011 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which establishes that he sustained an injury.

## **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> 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 period of FECA<sup>5</sup> and that an injury was sustained in the performance of duty.<sup>6</sup> These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

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<sup>3</sup> The Board notes that appellant also submitted a request for reconsideration to OWCP dated June 29, 2011.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *James E. Chadden Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *Delores C. Ellyet*, 41 ECAB 992 (1990).

When an employee claims that he or she sustained an injury in the performance of duty there must be sufficient evidence to establish that the employee experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.<sup>8</sup> Once an employee establishes an injury in the performance of duty, the employee has the burden of proof to establish that any subsequent medical condition or claim of disability is causally related to the accepted injury.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on April 14, 2011.

Appellant must establish all of the elements of his claim for his injury to be compensable. He must prove his employment, the time, place and manner of injury, a resulting personal injury and that his injury arose in the performance of duty. By letter dated April 26, 2011, OWCP informed appellant of detailed medical evidence needed to support his claim and provided him with a series of questions to provide to his physician; however, the record before the Board contains no additional evidence prior to the May 26, 2011 OWCP decision.

Appellant alleged that the April 14, 2011 employment incident caused a back injury. An award of compensation may not be based on surmise, conjecture or speculation.<sup>10</sup> Appellant must submit a report in which a physician reviews those factors of employment alleged to have caused his condition and, taking these factors into consideration, as well as findings upon examination and the medical history, explain how the employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.<sup>11</sup> His recitation of the facts is not sufficient to support his allegation that the April 14, 2011 employment incident caused any injury.<sup>12</sup> Where an appellant fails to submit any medical evidence, he or she has not established that the injury occurred as alleged.<sup>13</sup>

### **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.<sup>14</sup> According to 20 C.F.R. § 10.615, a claimant

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<sup>8</sup> See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

<sup>9</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>10</sup> *D.D.*, 57 ECAB 734 (2006).

<sup>11</sup> See *Robert Broome*, 55 ECAB 339 (2004).

<sup>12</sup> *Paul Foster*, 56 ECAB 1943 (2004); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

<sup>13</sup> *Tracey P. Spillane*, 54 ECAB 608 (2003); 5 U.S.C. § 8101(5).

<sup>14</sup> 5 U.S.C. § 8124(b)(1).

shall be afforded a choice of an oral hearing or a review of the written record.<sup>15</sup> 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.<sup>16</sup> 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 OWCP's decision.<sup>17</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>18</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>19</sup>

### ANALYSIS -- ISSUE 2

In the present case, appellant requested an oral hearing by letter postmarked on June 30, 2011. The Board finds that his request was therefore made more than 30 days after the date of issuance of OWCP's prior decision dated May 26, 2011. The Branch of Hearings and Review properly found in its August 8, 2011 decision that appellant was not entitled to an oral hearing as a matter of right because his request for an oral hearing was not made within 30 days of its May 26, 2011 decision.<sup>20</sup>

OWCP, however, has the discretionary authority to grant a hearing if the request was not timely filed. In its August 8, 2011 decision, it considered the issue involved and properly exercised its discretion when it denied appellant's hearing request and determined that he could equally well address the issue of fact of injury by requesting reconsideration and submitting new evidence. The Board has held that the only limitation on OWCP's authority is reasonableness. 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 probable deduction from established facts.<sup>21</sup> In the present case, OWCP did not abuse its discretion in denying a discretionary hearing and properly denied appellant's request for an oral hearing under section 8124 of FECA.<sup>22</sup>

On appeal, appellant argues that his request was untimely filed because his mail was going to his permanent home address instead of his temporary address. However, the record before the Board contains no evidence that he submitted a change of address to OWCP. Under the mailbox rule, it is presumed in the absence of evidence to the contrary, that a notice mailed to

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<sup>15</sup> 20 C.F.R. § 10.615.

<sup>16</sup> *Id.* at § 10.616(a).

<sup>17</sup> See *James Smith*, 53 ECAB 188 (2001).

<sup>18</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>19</sup> *Id.*

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

<sup>21</sup> *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>22</sup> See *D.F.*, Docket No. 11-42 (issued August 1, 2011); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>23</sup> Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

**CONCLUSION**

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a back injury in the performance of duty on April 14, 2011. The Board also finds that OWCP properly denied his request for an oral hearing as untimely.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 8 and May 26, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>23</sup> See *Michelle Lagana*, 52 ECAB 187 (2000).