

FACTUAL HISTORY

On October 25, 2011 appellant, a 51-year-old pharmacy technician, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2011 she sustained neck strain and spasms in her lower back while pushing an intravenous (IV) cart on an uneven space at work. She did not stop work on the date of the alleged injury.

The record contains reports from Dr. Michael Miller, an employing establishment physician, dated September 28, 2011 through January 10, 2012. He stated that appellant experienced pain at work after pushing a heavy IV cart on September 12, 16 and 19, 2011. Dr. Miller diagnosed probable muscle strain to the cervical and lumbar spine. On October 4, 2011 Dr. Miller related appellant's history that she had sustained an injury at work on September 12, 2011 when she tried to stop an IV cart from falling over. On the date of his examination, appellant reported recurrent lumbar pain and spasms running up into her neck and down into her left leg. In follow-up reports through January 10, 2012, Dr. Miller monitored appellant's neck and back pain and recommended light duty. The record contains a report of a January 18, 2012 magnetic resonance imaging (MRI) scan of the lumbar spine.

On February 16, 2012 OWCP notified appellant that the evidence submitted was insufficient to establish that she experienced the traumatic incident alleged to have caused injury. It advised her to provide, within 30 days, additional information and documentation, including a firm diagnosis and a physician's opinion as to how her injury resulted in the diagnosed condition. OWCP specifically asked appellant to provide a detailed description as to how the injury occurred.

In a February 16, 2012 report, Dr. Randy S. Katz, a treating physician, noted appellant's report that she sustained an injury in mid-September 2011 while pushing a 200- to 300-pound IV cart into an elevator. Appellant did not know the exact date, but that the incident occurred between September 12 and 16, 2011. Dr. Katz provided examination findings and diagnosed "left shoulder impingement; cervical facet/disc disease; likely cause of neck pain, no injury; and L5-S1 disc herniation."

On March 13, 2012 Dr. Katz stated that sometime between September 12 and 16, 2011, appellant was pushing a 200- to 300-pound IV cart onto an elevator. When appellant pushed the cart over the uneven flooring, it began to tilt. She caught the cart before it fell over. Appellant did not fall during the alleged incident and believed she was okay at the time. The next day, however, she woke up in pain. Dr. Katz reiterated his previous diagnoses and provided work restrictions.

In a merit decision dated March 19, 2012, OWCP denied appellant's claim. It found that the evidence was insufficient to establish that the claimed incident occurred as alleged. The medical evidence did not establish that appellant had a diagnosed condition causally related to the claimed event.

In a letter to the Branch of Hearings and Review dated April 18, 2012, appellant, through her representative, requested an oral hearing.² The record contains a copy of the envelope that contained appellant's request reflecting a postmark of April 30, 2012. Appellant asked that her claim be accepted for an aggravation of preexisting anxiety and depression. She also submitted additional medical evidence relating to her claimed emotional condition.

In a statement dated April 17, 2012, appellant provided another account of the claimed injury. She alleged:

“On September 12, 2011 she was pushing the extremely heavy IV cart (weighing anywhere from 200-350 lbs) onto the elevator. The floor and the elevator were not leveled even; therefore, in order for me to get the cart across the uneven surface, I had to shove/push the cart with force onto the elevator. At that time the cart fell over and I grabbed it. At that time I felt a strain in my back but I continued to make my 11:30 round onto the floor and in the different units.”

In a decision dated May 25, 2012, OWCP found that appellant's request was untimely and that she was not entitled to a hearing as a matter of right. It considered her request and denied a discretionary hearing on the grounds that she could equally well address any issues in her case by requesting reconsideration before OWCP and submitting evidence not previously considered which established that she sustained an injury in the performance of duty, as alleged.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ The phrase “sustained while in the performance of duty” is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, “arising out of and in the course of employment.”⁴

An employee seeking benefits under FECA has the burden of proof to establish 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, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ When an employee claims that he or she sustained a traumatic injury in the performance of duty, he or she must establish the “fact of injury,” namely, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure

² The representative asked the Branch of Hearings and Review to reconsider the denial of appellant's claim.

³ 5 U.S.C. § 8102 (a).

⁴ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

⁵ *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.⁶

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on a claimant's statements. The employee has not met his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁷

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.⁸ An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.⁹

In order to establish a causal relationship between the diagnosed condition and the established incident or factor of employment, a claimant must provide rationalized medical opinion evidence. The physician's opinion 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 established incident or factor of employment.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a traumatic injury to her neck or back on September 16, 2011. Appellant's presentation of the factual history is not supported by the evidence of record and does not establish her allegation that a specific incident occurred which caused an injury on the date in question.¹¹ Moreover, there are inconsistencies in the evidence which cast doubt on the validity of her claim.

⁶ See *Paul Foster*, 56 ECAB 208 (2004). *Betty J. Smith*, 54 ECAB 174 (2002); see also *Tracey P. Spillane*, 54 ECAB 608 (2003). The term "injury" as defined by FECA, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101 (5). See 20 C.F.R. § 10.5(q), (ee).

⁷ See *Betty J. Smith*, *supra* note 6.

⁸ *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

⁹ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹⁰ *John W. Montoya*, 54 ECAB 306 (2003).

¹¹ See *Dennis M. Mascarenas*, *supra* note 9.

Appellant initially reported on her October 25, 2011 CA-1 form that she sustained neck strain and spasms in her lower back while pushing an IV cart on an uneven space at work on September 16, 2011. She provided no detailed account of the incident, as required in a traumatic injury claim. Appellant's allegations were vague and did not relate with specificity the circumstances, or the exact and immediate consequences, of the injury. Although OWCP specifically asked her to provide a detailed description as to how the alleged injury occurred, she provided no additional information prior to the March 19, 2012 merit decision. Although appellant alleged that the incident was witnessed by a coworker, she provided no statement to corroborate her claim from any witness, or to whom she immediately reported, the incident.

Appellant's claim is further undermined by inconsistencies in the evidence. In her Form CA-1, she alleged that she injured her neck and back on September 16, 2011. On September 28, 2011, however, appellant informed Dr. Miller that she experienced pain at work after pushing a heavy IV cart on three separate dates, namely September 12, 16 and 19, 2011. On October 4, 2011 Dr. Miller related appellant's report that she had sustained an injury at work on September 12, 2011 when she tried to stop an IV cart from falling over. On February 16, 2012 appellant told Dr. Katz that she sustained an injury mid-September 2011 while pushing a 200- to 300-pound IV cart into an elevator, and that, although she did not know the exact date, the incident occurred between September 12 and 16, 2011. On March 13, 2012 she reported to Dr. Katz that sometime between September 12 and 16, 2011, a heavy IV cart began to tilt when she shoved it over uneven flooring onto an elevator. Appellant allegedly caught the cart before it fell over, did not fall, and she believed she was okay at the time. The next day, however, she woke up in pain.

Appellant failed to provide a consistent history as to how or when the alleged incident occurred. Thus, she has failed to establish the fact of injury: she did not submit sufficient evidence to establish that she actually experienced an employment incident at the time, place and in the manner alleged or that the alleged incident caused her condition. Therefore, the Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on September 16, 2011.¹²

On appeal, appellant's representative contends that appellant reported the September 12, 2011 injury to her employer on September 13 and 16, 2011 and that her filing was delayed because she was given incorrect filing information. For the reasons stated, the Board finds that appellant failed to meet her burden of proof.¹³

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.

¹² As appellant failed to establish that the claimed event occurred as alleged, it is not necessary to discuss the probative value of medical evidence. *Id.*

¹³ Appellant's representative also requests that the claim be expanded to include an aggravation of appellant's emotional condition. As this issue was not addressed by OWCP in its March 19, 2012 decision, the Board does not have jurisdiction over this matter.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation 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.¹⁴ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁵

A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days.¹⁶ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁷ Its procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁸

ANALYSIS -- ISSUE 2

In its March 19, 2012 merit decision, OWCP denied appellant's traumatic injury claim. Appellant's request for an oral hearing was dated April 18, 2012. The record, however, contains the envelope in which the request was made reflecting a postmark of April 30, 2012. A hearing request is considered timely if it was mailed (as determined by the postmark or other carrier's date marking) within 30 days of the date of the district OWCP's decision.¹⁹ As appellant's request was postmarked more than 30 days after the date of issuance of OWCP's March 19, 2012 decision, it was untimely filed and he was not entitled to an oral hearing as a matter of right.

OWCP also has the discretionary authority to grant a request for hearing or review of the written record when a claimant is not entitled to such as a matter of right. 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, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.²⁰ In its May 25, 2012 decision, OWCP properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. Consequently, it properly denied her request for an oral hearing.

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ 20 C.F.R. §§ 10.616, 10.617.

¹⁷ *Id.* at § 10.616(a).

¹⁸ See *R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

¹⁹ 20 C.F.R. § 10.616; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011)

²⁰ *Samuel R. Johnson*, 51 ECAB 612 (2000).

CONCLUSION

Appellant has not met her burden of proof to establish that she sustained a traumatic injury to her back or neck in the performance of duty on September 16, 2011.

ORDER

IT IS HEREBY ORDERED THAT the May 25 and March 19, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 21, 2012
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