United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 11-1879**
	)	**Issued: June 1, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Baton Rouge, LA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 15, 2011 appellant filed a timely appeal from an April 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 a traumatic injury in the performance of duty on November 20, 2010; and (2) whether OWCP properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On November 23, 2010 appellant, then a 56-year-old custodian, filed a traumatic injury claim alleging that on November 20, 2010 he felt a burning pain in his groin when he lifted a

[1] 5 U.S.C. § 8101 *et seq.*

wooden pallet out of a wire pen at work.[2] OWCP initially treated the claim as a minor injury with little lost time from work.

Appellant submitted medical reports from Dr. Graham Tujaque, a treating physician. In a November 23, 2010 attending physician's report, Dr. Tujaque diagnosed inguinal pain and indicated by placing a checkmark in the "yes" box his belief that the condition was caused or aggravated by appellant's employment activities, as described. In notes dated November 23, 2010, he related appellant's report that he had developed abdominal pain while picking up a pallet from a bin on November 20, 2010. In a November 23, 2010 disability slip, Dr. Tujaque indicated that appellant had been off work for two days after an acute injury and suspected that he had a hernia because he had lower abdominal pain and was "pouching out."

In a November 24, 2010 referral form, Dr. Munir Khalad-Abasi, an osteopathic physician, diagnosed inguinal hernia and recommended a surgical evaluation.

The record contains November 23 and 24, 2010 triage notes from Ken Neale, a physician's assistant, reflecting a diagnosis of right inguinal pain and hernia. In a November 24, 2010 duty status report, Mr. Neale diagnosed inguinal hernia and recommended work restrictions. He identified the date of injury as November 20, 2010, noting appellant's report that he had felt a spasm in his abdomen when he lifted a pallet from a wire pen at work. Mr. Neale indicated by placing a checkmark in the "yes" box that the diagnosis was due to claimed injury.

In a November 23, 2010 authorization for examination and treatment, Supervisor Larry Green of the employing establishment indicated that there was doubt as to whether appellant's claimed injury was sustained in the performance of duty.

In a letter dated March 2, 2011, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him to submit a narrative medical report, signed by a physician, which contained a diagnosis and a rationalized opinion explaining how the claimed incident caused or aggravated the diagnosed condition.

Appellant resubmitted November 24, 2010 treatment and triage notes from Mr. Neale containing a diagnosis of right inguinal hernia and a history of injury reflecting that appellant felt groin pain while lifting pellets from a rack on November 20, 2010. The notes were countersigned by Dr. Khalad-Abasi. In a November 24, 2010 duty status report, Dr. Khalad-Abasi diagnosed inguinal hernia and stated that appellant was unable to work until November 24, 2010. He indicated that appellant felt a pop/stinging sensation in his lower back on November 20, 2010 while lifting a pallet out of a wire pen. Dr. Khalad-Abasi recommended a surgical evaluation and restrictions including lifting no more than 10 pounds and pushing and pulling no more than 15 pounds.

In a November 23, duty status report, Dr. Khalad-Abasi provided a diagnosis of right inguinal hernia due to a November 20, 2010 injury.

[2] A November 23, 2010 accident report reflected that appellant felt a pop in his low stomach when he lifted a pallet out of a pen.

By decision dated April 6, 2011, OWCP denied appellant's claim finding that he provided insufficient medical evidence to establish that his claimed hernia was causally related to the accepted work incident of November 20, 2010. The record contains a copy of the April 6, 2011 decision, which reflected that it was mailed on that date to him at his address of record.

The record contains a memorandum of a May 12, 2011 telephone call from appellant inquiring into the status of his claim. He stated that he had not received a copy of the April 6, 2011 decision as of the date of the telephone call. On May 12, 2011 OWCP mailed a copy of the April 6, 2011 decision to appellant.

On June 3, 2011 appellant requested an oral hearing. He noted that he received the April 6, 2011 decision on May 14, 2011.

By decision dated July 7, 2011, OWCP denied appellant's request for an oral hearing on the grounds that it was untimely. It determined, however, that he could equally well address any issues in his case by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his 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[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[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. 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.[6] 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.[7]

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

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden, Sr*., 40 ECAB 312 (1988).

[5] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Id*.

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.[8]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant lifted a wooden pallet out of a wire pen at work on November 20, 2010. It denied his claim, however, on the grounds that the evidence failed to establish a causal relationship between the accepted incident and his diagnosed inguinal hernia. The Board finds that appellant has not submitted sufficient medical evidence to establish that the established incident caused his diagnosed condition. Therefore, appellant has failed to meet his burden of proof.

In November 23, 2010 reports, Dr. Tujaque related appellant's report that he had developed abdominal pain while picking up a pallet from a bin on November 20, 2010. He diagnosed inguinal pain and noted a suspicion that appellant had a hernia because he had lower abdominal pain and was "pouching out." Dr. Tujaque indicated by placing a checkmark in the "yes" box his belief that appellant's condition was caused or aggravated by his employment activities, as described. He did not provide a definitive diagnosis.[9] Furthermore, Dr. Tujaque's reports do not contain a rationalized medical opinion establishing that the work-related incident caused or aggravated any particular medical condition or disability. His form report that supported causal relationship with a check mark is insufficient to establish the claim.[10] For all of these reasons, Dr. Tujaque's reports are of limited probative value.

Dr. Khalad-Abasi's reports are also insufficient to establish appellant's claim. On November 23, 2010 he provided a diagnosis of right inguinal hernia due to a November 20, 2010 injury. Dr. Khalad-Abasi's report did not contain examination findings or a complete factual or medical history. Most significantly, he did not describe the claimed incident or explain how it was responsible for the diagnosed hernia condition. In reports dated November 24, 2010, some of which were prepared by a physician's assistant and countersigned by Dr. Khalad-Abasi, he diagnosed inguinal hernia and provided a history of injury reflecting that appellant felt groin pain while lifting pallets from a wire pen on November 20, 2010. He recommended a surgical evaluation and work restrictions. In none of these reports, however, did Dr. Khalad-Abasi explain how the accepted lifting incident would have been competent to cause the hernia condition. Medical conclusions unsupported by rationale are of limited probative value.[11]

Appellant also submitted reports from a physician's assistant, Mr. Neale. As a physician's assistant is not considered a "physician" under FECA, these reports do not constitute

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

[9] The Board has consistently held that pain is a symptom, not a compensable medical diagnosis. *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[10] The Board has found that a report that addresses causal relationship with a checkmark, without a medical rationale, is of diminished probative value and is insufficient to establish causal relationship. *See Calvin E. King, Jr.*, 51 ECAB 394 (2000); *see also Frederick E. Howard, Jr.*, 41 ECAB 843 (1990).

[11] *Willa M. Frazier*, 55 ECAB 379 (2004).

probative medical evidence.[12] The remaining medical evidence, which includes reports of magnetic resonance imaging scans, x-rays and other reports, which do not contain an opinion as to the cause of appellant's condition, are of diminished probative value and are insufficient to establish his claim.[13]

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[14] OWCP advised appellant of the evidence required to establish his claim; however, he failed to submit such evidence. Appellant did not provide a medical opinion which describes or explains the medical process through which the November 20, 2010 work incident would have caused the claimed injury. Accordingly, he did not establish that he sustained an injury in the performance of duty.

On appeal, appellant contends that his condition worsened to the degree that he needed surgery as a result of OWCP's failure to approve him for medical treatment for seven months. For reasons stated the Board finds that he has failed to meet his burden of proof to establish that he sustained an injury in the performance of duty.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that prior to making a request for reconsideration, a claimant not satisfied with a final 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 an OWCP hearing representative.[15]

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.[16] OWCP has

[12] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 5 U.S.C. § 8101(2). Section 8101(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." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

The Board notes that reports prepared by Mr. Neale and countersigned by Dr. Khalad-Abasi are considered probative medical evidence and have been considered as such by the Board.

[13] Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *Michael E. Smith*, 50 ECAB 313 (1999).

[14] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. § 10.616(a).

discretion, however, to grant or deny a request that is made after this 30-day period.[17] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[18]

ANALYSIS -- ISSUE 2

Appellant had 30-calendar days from OWCP's April 6, 2011 decision to request an oral hearing. Because his request was dated June 3, 2011, it was untimely. Therefore, appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA.

Exercising its discretion to grant a discretionary hearing, OWCP denied appellant's 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 the April 6, 2011 decision, the Board finds that OWCP did not abuse its discretion in denying his untimely request for an oral hearing.[19]

Appellant alleged that he did not receive a copy of the April 6, 2011 decision until May 14, 2011. Under the mailbox rule, it is presumed that a document properly addressed and mailed to an individual in the ordinary course of business arrived at that address.[20] The record in this case reflects a properly addressed copy of the April 6, 2011 decision, which was mailed to appellant on the date the decision was issued. The Board finds that there is no evidence to rebut the presumption of receipt by him.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on November 20, 2010. The Board further finds that OWCP properly denied his request for an oral hearing.

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

[18] *Rudolph Bermann*, 26 ECAB 354 (1975).

[19] The Board has held that the denial of a hearing on these grounds is a proper exercise of OWCP's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988). Appellant has one year to make a timely request for reconsideration of OWCP's merit decision. *See* 20 C.F.R. § 10.607.

[20] *C.D.*, Docket No. 11-598 (issued September 23, 2011); *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 7 and April 6, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 1, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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