United States Department of Labor
Employees' Compensation Appeals Board

H.F., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, NATIONAL CEMETERY ADMINISTRATION, FORT McPHERSON NATIONAL CEMETERY, Maxwell, NE, Employer	)	**Docket No. 12-365** **Issued: June 19, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2011 appellant filed a timely appeal from an August 29, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) that denied his claim and a November 10, 2011 decision that denied his request for a review of the written record. 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 the claim.

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 May 11, 2011; and (2) whether OWCP properly denied his request for a review of the written record.

On appeal, appellant asserts that the medical evidence of record establishes his claim.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 11, 2011 appellant, then a 63-year-old equipment operator, filed a traumatic injury claim alleging that he injured his left leg that day when he tripped over a shop door threshold. He did not stop work.

In a June 10, 2011 report, Dr. Benjamin Bissell, an orthopedic surgeon, reported a previous history of low back surgery in 2009, from which appellant had some improvement but continued pain. He noted appellant's statement that on May 11, 2011 he tripped at work and jarred his left leg and experienced pain running down the back side of his left leg with numbness, tingling and a burning sensation. Dr. Bissell provided physical examination findings and diagnosed left lower extremity radiculopathy, history of L4 laminectomy. A June 23, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated postsurgical changes at L4 and moderate canal stenosis at L4-5 and minimal epidural scar surrounding the left L5 nerve roots.

On June 24, 2011 Casey Fowler, a physician's assistant, advised that appellant had chronic and ongoing low back pain with radiation into his left leg. He provided examination findings, reviewed the MRI scan study and diagnosed low back pain with lumbar radiculopathy.

By letter dated July 19, 2011, OWCP informed appellant that, when his claim was filed, it appeared to be a minor injury, but was reopened because the medical bills exceeded $1,500.00. It informed him that the medical evidence received was insufficient to support his claim because the record did not contain a physician's opinion on how the employment incident caused his condition. Appellant was asked to provide, within 30 days, a rationalized medical explanation as to how the work incident caused or aggravated his back condition. In an August 2, 2011 questionnaire, he stated that he was fine until he tripped over the threshold of the shop door.

In a May 11, 2011 report, Dr. Gary L. Conell, Board-certified in family medicine, noted that appellant was injured at work when he caught his heel on the sidewalk but did not fall and that thereafter he had some left groin and calf pain with tingling on the bottom of his foot. He indicated that perhaps appellant had torn a muscle or possibly stretched a nerve. A June 10, 2011 lumbar spine x-ray demonstrated postsurgical changes at L4 with early mild degenerative disc disease at L4-5 and L5-S1.

By decision dated August 29, 2011, OWCP accepted the May 11, 2011 incident but denied the claim on the grounds that the medical evidence was insufficient to establish that appellant sustained a back injury causally related to the employment incident.

On September 6, 2011 appellant submitted an August 16, 2011 report from Dr. Douglas W. Beard, a Board-certified orthopedic surgeon. By letter dated September 12, 2011, OWCP informed him that it had received the August 16, 2011 report on September 16, 2011 and that it was insufficient to change the August 29, 2011 decision. It informed appellant to follow the appeal rights that accompanied the August 29, 2011 decision. On October 7, 2011 appellant requested a review of the written record and submitted a September 16, 2011 report from Dr. Conell.

In a November 10, 2011 decision, an OWCP hearing representative denied appellant's request for a review of the written record as untimely and advised him that the issue in the case could equally be addressed by requesting reconsideration with OWCP or by filing an appeal with the Board.

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 timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[2]

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[3] To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[4]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[5] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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 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.[6] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the

[2] *Gary J. Watling*, 52 ECAB 278 (2001).

[3] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Gary J. Watling*, *supra* note 2.

[5] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[6] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[7]

ANALYSIS -- ISSUE 1

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained an injury or medical condition caused by the May 11, 2011 incident.

Neither the June 10, 2011 lumbar spine x-ray nor the June 23, 2011 MRI scan study of the lumbar spine included any opinion on the issue of causal relation. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[8] The Board also notes that Mr. Fowler's June 24, 2011 report does not constitute competent medical evidence as a physician's assistant is not a physician as defined under FECA.[9]

On May 11, 2011 Dr. Conell noted that appellant was injured at work when he caught his heel on a sidewalk but did not fall. Thereafter appellant had left groin and calf pain with and tingling on the bottom of his foot. Dr. Conell opined that appellant possibly had a torn muscle or had stretched a nerve. No firm medical diagnosis was provided. In a June 10, 2011 report, Dr. Bissell noted that appellant had a prior laminectomy at L4 in 2009 and described a history that he tripped at work and thereafter had pain, tingling and numbness in his left leg. He provided physical examination findings and diagnosed left lower extremity radiculopathy. Neither Dr. Conell nor Dr. Bissell explained how the May 11, 2011 incident, caused or contributed to any lumbar radiculopathy or how the incident caused or aggravated any other diagnosed medical condition. These reports are therefore insufficient to meet appellant's burden to establish that he sustained a diagnosed condition caused by the May 11, 2011 work incident.

The Board cannot review Dr. Beard's August 16, 2011 report, received by OWCP on September 6, 2011 or Dr. Conell's September 16, 2011 report, as its review of the case is limited to the evidence that was before OWCP at the time it rendered its final decision on the merits of appellant's claim.[10]

Appellant did not submit sufficient medical evidence to establish that he sustained a diagnosed condition caused by the May 11, 2011 employment incident. He did not meet his burden of proof.[11] 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.

---

[7] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[8] *Willie M. Miller*, 53 ECAB 697 (2002).

[9] *Ricky S. Storms*, 52 ECAB 349 (2001). Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2).

[10] *J.T.*, 59 ECAB 293 (2008). Appellant may submit these reports to OWCP with a valid reconsideration request.

[11] *Gary J. Watling*, *supra* note 2.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[12] The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[13] OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a request for a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.[14]

ANALYSIS -- ISSUE 2

In its November 10, 2011 decision, OWCP denied appellant's request for a review of the written record on the grounds that it was untimely filed. It found that he was not, as a matter of right, entitled to a written record review as his request, dated October 7, 2011, was not made within 30 days of its August 29, 2011 decision. As appellant's request was dated October 7, 2011, more than 30 days after the date of the August 29, 2011 OWCP decision, the Board finds that OWCP properly determined that he was not entitled to a review of the written record as a matter of right as his request was untimely filed.

OWCP also has the discretionary power to grant a request for a hearing or review of the written record when a claimant is not entitled to such as a matter of right. In the November 10, 2011 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as 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.[15] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion.

[12] *Claudio Vazquez*, 52 ECAB 496 (2001).

[13] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[14] *Claudio Vazquez, supra* note 12.

[15] *See Mary Poller*, 55 ECAB 483 (2004).

CONCLUSION

The Board finds that appellant did not establish that he sustained an injury causally related to the May 11, 2011 employment incident and that OWCP properly denied his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the November 10 and August 29, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 19, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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