

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a left shoulder injury causally related to factors of her federal employment; and (2) whether OWCP properly denied her request for an oral hearing.

FACTUAL HISTORY

On April 14, 2011 appellant, then a 46-year-old mail handler, filed an occupational disease claim alleging that she sustained a left shoulder injury as a result of her employment. She first attributed the cause of her medical condition to her employment on April 11, 2011.

In support of her claim, appellant submitted an emergency room report from Loyola Medical, dated April 11, 2011 by Dr. Louis J. Sharp, Board-certified in emergency medicine, who diagnosed unspecified neuralgia, neuritis and radiculitis. Dr. Sharp concluded that she could return to work on April 12, 2011 with the restriction that she not perform any lifting over five pounds.

Dr. Linda Chen, a family practice osteopathic physician, reported on April 14, 2011 that appellant could resume light-duty work on April 18, 2011. Appellant should not perform any lifting above 15 pounds until she had undergone physical therapy.

In an April 29, 2011 letter, OWCP advised appellant of the deficiencies in her claim. It requested that she explain how her left shoulder condition occurred and submit medical evidence that contained a diagnosis of her condition with medical rationale explaining how the diagnosed condition was causally related to her employment activities.

Appellant thereafter submitted a supplemental statement dated May 31, 2011. She described her various work assignments during her years of employment since 1998, specifically noting heavy lifting and sorting requirements, including manually unloading over the road containers from trucks, as well as wire cages and all-purpose containers.

In response to the letter, appellant submitted an April 19, 2011 note from Tonya Reddy, a nurse practitioner, which provided follow-up care instructions.

In a June 29, 2011 decision, OWCP denied appellant's claim on the grounds that she had not established that her left shoulder condition was causally related to her employment.

Appellant requested an oral hearing on August 10, 2011. She submitted additional medical evidence from the Rush Oak Hospital dated April 14 to 18, 2011.

By decision dated September 28, 2011, OWCP denied appellant's request for oral hearing. It found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved and was further denied as the issues could be addressed by requesting reconsideration before OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden to establish the essential elements of her claim including the fact that the individual was an employee of the United States within the meaning of FECA, that the claim was timely filed, that an injury was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁴

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵

Section 8101(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. As nurses, physician's assistants, physical and occupational therapists are not physicians as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value.⁶

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a left shoulder condition as a result of heavy lifting and loading work duties she performed at the employing establishment since 1998. The Board notes that she was diagnosed with neuralgia, neuritis and radiculitis by Dr. Sharp. Appellant has submitted insufficient medical evidence to establish that the diagnosed conditions were caused by her employment duties.

Dr. Sharp's April 11, 2011 medical report provided a diagnosis of appellant's condition; however, he provided no history of her employment duties, no history of injury and no medical explanation as to the cause of the diagnosed conditions. As such this report is of diminished probative value to establish causal relationship between appellant's employment duties and her left shoulder condition.⁷

Dr. Chen reported on April 14, 2011 that appellant could resume light-duty work on April 18, 2011 and that she should not perform any lifting above 15 pounds until she had

³ 5 U.S.C. §§ 8101-8193.

⁴ *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ *See Roy L. Humphrey*, *supra* note 5.

⁷ *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

undergone physical therapy. In addition to lacking any specific medical diagnosis. Dr. Chen did not provide a history of appellant's employment duties, history of injury or an opinion addressing the cause of her current condition. As such it is of limited probative value.

OWCP informed appellant that she needed to submit a medical report that included history of injury, diagnosis of her medical condition and medical rationale explaining the relationship of that condition to her employment. Appellant submitted the April 19, 2011 note regarding follow up care from Tonya Reddy, a nurse practitioner. This note contained none of the necessary evidence and was signed by a family nurse practitioner. As noted, nurses are not physicians and their opinions regarding diagnosis and causal relationship are of no probative medical value.

The Board finds that appellant has not submitted any probative medical report which contains a recitation of her employment duties, and which explains how physiologically she sustained the diagnosed conditions as a result of those duties.

Appellant has failed to meet her burden of proof to establish that her neuralgia, neuritis and radiculitis were caused by her federal employment duties.

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. §§ 10.605 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that, before review under section 8128(a) of this title, 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.⁸ Section 10.616(a) of the federal regulations implementing this section of FECA provides that a claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.⁹

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 OWCP must exercise this discretionary authority in deciding whether to grant a hearing. OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of FECA and Board precedent.¹⁰

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *N.M.*, 59 ECAB 511 (2008).

¹⁰ *Sandra F. Powell*, 45 ECAB 877 (1994).

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing before OWCP's Branch of Hearings and Review on August 10, 2011. As the request was submitted more than 30 days following issuance of the June 29, 2011 decision, it was untimely filed.

OWCP considered the matter in relation to the issue involved and found that additional evidence could be submitted with a request for reconsideration. It has administrative discretion in determining whether a hearing should be granted even though the request is untimely. 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.¹¹ Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's June 29, 2011 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for hearing.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that her diagnosed conditions were causally related to factors of her federal employment, and that OWCP properly denied her request for hearing as untimely.

¹¹ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 28 and June 29, 2011 decisions of the Office of Workers' Compensation Program are affirmed.

Issued: May 18, 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