



## **FACTUAL HISTORY**

On January 28, 2012 appellant, then a 44-year-old city carrier, filed a traumatic injury claim alleging that on that day he jarred his back when his Long Life Vehicle was struck from behind by a privately-owned vehicle. He stopped work and returned on January 31, 2012.

On February 13, 2012 OWCP advised appellant that no evidence was submitted to establish his claim. It requested additional evidence to establish that he sustained an injury on January 28, 2012 in the performance of duty.

In a January 28, 2012 hospital report and discharge instruction sheet, Dr. Michael Shaw, Board-certified in emergency medicine, treated appellant for back pain after he was involved in a motor vehicle accident. Appellant described the pain as dull and aching. Upon examination, Dr. Shaw observed tenderness, paraspinal to the right upper, mid and lower back. He diagnosed back pain and prescribed pain medication for muscle spasms.

In a handwritten February 3, 2012 attending physician's report, Dr. Drew Anthony, a family practitioner, noted that appellant was hit from the rear while in a truck. He provided ineligible findings. Dr. Anthony stated that appellant was able to resume regular duty and submitted a duty status report listing appellant's return to full duty.

In a decision dated March 23, 2012, OWCP accepted that the January 28, 2012 incident occurred as alleged. It denied appellant's claim, finding insufficient medical evidence to establish that he sustained any diagnosed condition causally related to the accepted employment incident.

Following the decision, appellant resubmitted the January 28, 2012 hospital report and discharge instructions.

In an appeal request form dated April 23, 2012 and postmarked April 24, 2012, appellant requested a review of the written record. He resubmitted the January 28, 2012 hospital report and discharge instructions.

By decision dated May 17, 2012, OWCP denied appellant's request for review of the written record as untimely. It found that his request was postmarked April 24, 2012, more than 30 days after the last OWCP decision was issued on March 23, 2012. OWCP exercised its discretion by considering appellant's request and further denied it as the issue involved could be addressed equally well pursuant to a valid request for reconsideration and submitting evidence not previously considered to support his claim.

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

An employee seeking benefits under FECA<sup>2</sup> has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence<sup>3</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.<sup>4</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether “fact of injury” has been established.<sup>5</sup> There are two components involved in establishing the fact of injury. 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.<sup>6</sup> Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.<sup>7</sup>

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.<sup>8</sup> 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 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.<sup>9</sup> The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician’s opinion.<sup>10</sup>

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

OWCP accepted that on January 28, 2012 appellant was rear-ended while in the performance of duty. It found that the medical evidence failed to establish that he sustained a medical condition as a result of the accepted incident. The Board finds that appellant failed to provide sufficient medical evidence demonstrating that he sustained any back condition causally related to the January 28, 2012 employment incident.

Appellant submitted hospital records by Dr. Shaw who briefly described the January 28, 2012 incident and related complaints of back pain. Upon examination, he observed tenderness, paraspinal to the right upper, mid and lower back, and diagnosed back pain. Pain, however, is generally considered a symptom, not a firm medical diagnosis.<sup>11</sup> Dr. Shaw did not provide an

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<sup>4</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>5</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>6</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>7</sup> *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>9</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>10</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>11</sup> *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

opinion on the cause of appellant's back pain or explain how the January 28, 2012 employment incident caused or contributed to a specific diagnosis. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>12</sup> Dr. Shaw's records are insufficient to establish appellant's claim.

Dr. Anthony's February 3, 2012 attending physician's report does not contain a medical diagnosis or any opinion on whether the January 28, 2012 incident caused an injury. Because the record does not contain any medical evidence providing a firm medical diagnosis or rationalized medical opinion establishing that appellant sustained a back injury as a result of the January 28, 2012 employment incident, the Board finds that appellant did not meet his burden of proof to establish his claim.

On appeal, appellant resubmitted the January 28, 2012 hospital records and a hospital bill. As noted above, however, the January 28, 2012 hospital records are insufficient to establish appellant's claim. Causal relationship is a medical issue that can only be shown by reasoned medical opinion evidence that is supported by medical rationale.<sup>13</sup> Appellant has not provided such evidence in this case. Thus, the Board finds that he did not meet his burden of proof to establish his claim.

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 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> Its procedures require that it exercise its

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<sup>12</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *A.D.*, 58 ECAB 149 (2006).

<sup>13</sup> *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

<sup>14</sup> 5 U.S.C. § 8124(b)(1).

<sup>15</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>16</sup> *Id.* at § 10.616(a).

<sup>17</sup> *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

Appellant requested a review of the written record which was received by OWCP on April 27, 2012. OWCP determined that his request was made more than 30 days after the date of issuance of OWCP's March 23, 2012 decision. Accordingly, it found that appellant's request was untimely filed and he was not entitled to a review of the written record as a matter of right.

The Board notes that appellant did not submit a written request for review of the written record by April 22, 2012, within 30-calendar days from OWCP's March 23, 2012 decision. His request was received by OWCP on April 27, 2012. The request was untimely. OWCP, therefore, properly found that appellant was not entitled to an oral hearing or examination of the written record 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. In its May 17, 2012 decision, it 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. 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.<sup>19</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion in finding that appellant could further pursue the matter through the reconsideration process. Consequently, OWCP properly denied appellant's request for a review of the written record.

### **CONCLUSION**

The Board finds that appellant did not establish that he sustained a back injury in the performance of duty on January 28, 2012. The Board further finds that OWCP properly denied appellant's request for a review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

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<sup>18</sup> 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).

<sup>19</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17 and March 23, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 13, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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