United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 12-284**
	)	**Issued: September 4, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 23, 2011 appellant filed a timely appeal from an August 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and a November 2, 2011 nonmerit decision. 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 that he sustained an injury in the performance of duty causally related to factors of his federal employment; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely.

On appeal, appellant contends that he was unfamiliar with the process of filing a claim and requested reconsideration.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 21, 2011 appellant, then a 44-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a bone spur on the fourth toe of his left foot due to factors of his federal employment, such as walking in his work shoes. He first became aware of his condition on July 2, 2010 and attributed it to his employment on February 10, 2011.

In a July 1, 2011 statement, appellant indicated that the injury began in July 2010. He believed that his condition was caused by his daily 12- to 13-mile route in postal regulation shoes and slip-on rubbers over the shoes.

By letter dated July 14, 2011, OWCP notified appellant of the deficiencies of his claim and requested additional evidence, including medical documentation which contained a reasoned opinion from his physician regarding how employment activities caused or aggravated the claimed condition. It allotted 30 days for him to respond to its inquiries. Appellant did not respond.

By decision dated August 16, 2011, OWCP denied the claim on the basis that the evidence submitted was insufficient to establish fact of injury.

By appeal request form postmarked October 4, 2011 and received by OWCP on October 11, 2011, appellant requested an oral hearing before an OWCP hearing representative, *via* telephone, in connection with his claim.

By decision dated November 2, 2011, OWCP denied appellant's request for an oral hearing. It found that his request was untimely because it was not made within 30 days of its August 16, 2011 decision. OWCP further indicated that it had exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.[2]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. Appellant must also establish that such event, incident or exposure caused an injury.[3]

[2] The Board notes that, following the issuance of the August 16, 2011 OWCP decision, appellant submitted new evidence. The evidence was not reviewed by OWCP at the time it issued its November 2, 2011 nonmerit decision. Therefore, the Board is precluded from reviewing the evidence as it was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

[3] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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.[4]

ANALYSIS -- ISSUE 1

Appellant failed to meet his burden of proof to establish a *prima facie* claim that federal employment factors caused his left foot condition.[5] While he submitted a statement in which he identified the factors of employment that he believed caused his condition, in order to establish his claim that he sustained an employment-related injury, he must also submit rationalized medical evidence which explains how his left foot condition was caused or aggravated by the implicated factors.[6]

On July 14, 2011 OWCP notified appellant of the evidence needed to support his claim and requested a physician's report explaining how his condition was caused by factors of his federal employment. Appellant did not respond. The Board finds that he did not provide the factual and medical evidence required to establish a *prima facie* claim for compensation.[7]

Following the August 16, 2011 decision, appellant submitted medical reports to OWCP. On appeal, he contends that he was unfamiliar with the process of filing a claim and requested reconsideration. The Board cannot consider evidence for the first time on appeal, as its review is limited to the evidence of record which was before OWCP at the time of its final merit decision.[8] Appellant may submit the new evidence with a written request for reconsideration to OWCP

[4] *See J.L.*, Docket No. 11-771 (issued November 17, 2011); *Solomon Polen*, 51 ECAB 341 (2000).

[5] *See Donald W. Wenzel*, 56 ECAB 390 (2005) (where the Board found that appellant did not establish a *prima facie* claim. Appellant submitted a statement identifying employment factors without any medical documentation).

[6] *See Leslie C. Moore*, 52 ECAB 132 (2000).

[7] *See Richard H. Weiss*, 47 ECAB 182 (1995).

[8] 20 C.F.R. § 501.2(c).

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 the FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[9]

Section 10.615 of Title 20 of the Code of Federal Regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[10] 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.[11] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[12] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[13]

ANALYSIS -- ISSUE 2

Appellant had 30-calendar days from OWCP's August 16, 2011 decision or until September 15, 2011 to request an oral hearing. Because his request was postmarked October 4, 2011, his request was untimely. 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 an oral hearing, OWCP denied his 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 OWCP's August 16, 2011 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.[14]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed.

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.615.

[11] *Id*. at § 10.616(a).

[12] *See G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

[13] *Id. See also Rudolph Bermann*, 26 ECAB 354 (1975).

[14] *See Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 2 and August 16, 2011 are affirmed.

Issued: September 4, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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