United States Department of Labor
Employees' Compensation Appeals Board

P.E., Appellant	)	
and	)	**Docket No. 13-987**
	)	**Issued: August 21, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, 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
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 15, 2013 appellant filed a timely appeal from a November 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her traumatic injury claim and a February 27, 2013 decision denying her request for an oral hearing. 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 her burden of proof to establish that she sustained an injury in the performance of duty on September 5, 2012; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed under 5 U.S.C. § 8124.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 2, 2012 appellant, then a 54-year-old mail processing clerk, filed a traumatic injury claim alleging that on September 5, 2012 at 8:00 a.m. she sustained a left shoulder injury when she lifted trays and tubs full of money out of a cage. She did not stop work.[2]

On the claim form, Lena Marie Clem, a witness, stated that on Monday morning appellant was sitting at a break room table and holding her shoulder. She asked appellant what happened and appellant responded that she hurt her shoulder over the weekend at home. The employing establishment controverted the claim alleging that the September 5, 2012 alleged injury did not occur in the performance of duty. It reported that appellant stated that she did not know how she hurt her left shoulder.

In a September 27, 2012 report, Dr. Daniel M. Burchfield, a Board-certified orthopedic surgeon, related that he examined appellant for left shoulder pain. He explained that at the beginning of the month she experienced an acute onset of left shoulder pain when she lifted packages in tubs. Dr. Burchfield noted no previous history of left shoulder pain. Upon examination, he observed normal hand, wrist, forearm and elbow motion. Hawkin's and Neer's signs were positive. Speed's, Yergason's and Jobe's signs were negative. Dr. Burchfield diagnosed left shoulder impingement syndrome.

In a September 27, 2012 x-ray report, Dr. Burchfield noted appellant's complaints of left shoulder pain. He observed no evidence of trauma, dislocation and glenohumeral osteoarthritis. Dr. Burchfield reported bigliani type 2 acromion and normal x-ray appearance of the left shoulder.

In an October 3, 2012 e-mail, Janet Meldrum, appellant's supervisor, stated that about three weeks ago appellant mentioned to her that her left shoulder hurt but appellant stated that she did not know how it happened. After a physician's visit, appellant brought a report stating that she would be off work for 30 days and explained that her physician would find out if the injury was related to work. Appellant's supervisor stated that she asked about OWCP forms and filed a traumatic injury claim form on October 2, 2012. Appellant told her supervisor that she lifted trays of mail and rested the tray mostly on her left forearm to compensate for a previously injured right shoulder.

In an October 4, 2012 letter, Ms. Meldrum noted that according to the Employee Clock Ring Report appellant began her tour at 8:30 a.m. on September 5, 2012 even though she reported that the alleged injury occurred at 8:00 a.m. Appellant's timesheet was attached.

By letters dated October 12, 2012, the employing establishment controverted appellant's claim alleging that the September 5, 2012 shoulder strain did not occur in the performance of duty. It noted that a witness stated that she informed the witness that she injured herself over the weekend at home. The employing establishment also reported that three weeks prior to the

[2] The record reflects that appellant filed a previous traumatic injury claim (File No. xxxxxx090) and a previous occupational disease claim (File No. xxxxxx269).

traumatic injury filing appellant notified her supervisor that she did not know how she injured her shoulder. It requested that her claim for traumatic injury and continuation of pay be denied.

On October 24, 2012 OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual evidence to establish that she experienced the incident alleged to have caused her injury and a medical report, which included dates of examination and treatment, history of injury, description of findings, a medical diagnosis and an opinion, supported by medical rationale, explaining how the alleged employment incident caused or aggravated her medical condition.

In an October 25, 2012 report and prescription slip, Dr. Burchfield stated that appellant had been off work for the last four weeks and related that she felt better following a shoulder injection. Upon examination, he observed that her examination was normal. Dr. Burchfield diagnosed left shoulder impingement syndrome. He authorized appellant to return to work on October 29, 2012 with restrictions of no casing, no throwing and no lifting over 20 pounds.

In an October 29, 2012 statement, appellant reported that on September 12, 2012 she arrived to work at about 8:00 a.m. and asked her supervisor's boss if she could clock in to work. She noted that September 5, 2012 was an estimated date. Appellant stated that she was in the retail office getting ready to throw flats and that she was the only one in the office except for the janitor. She explained that before she could get to the flats she had to take out the 2-foot trays, which were full of money in the mail fliers and heavier than she thought. Appellant stated that when she picked them up to put them on the shelf cage she strained her left shoulder. She reported that the injury occurred on September 12, 2012 at about 8:20 a.m. and she did not stop working. Appellant stated that she did not tell her supervisor at first because it did not hurt that bad until she stopped using her arm at work. The next day the pain increased and she informed her supervisor that she wanted to go to urgent care but it was already closed. Appellant rested her arm for the weekend and it felt better until she started boxing the following Monday. She noted that she saw Dr. Burchfield on September 27, 2012. Appellant explained that between September 12 and 27, 2012 she was in constant pain and unable to sleep on her left side.

On November 2, 2012 appellant accepted a light-duty offer as a SSA clerk. Her duties included window services for 5½ hours, scanning prepaid items for ½ hour and stocking lobby with forms and packaging products as needed. The physical requirements were restricted to continuous standing for six hours, intermittent walking for six hours, intermittent lifting up to 20 pounds for six hours and intermittent bending, pushing and pulling up to six hours.

In a November 7, 2012 letter, Ms. Meldrum stated that as the supervisor she had no reason to doubt Ms. Clem's statement that appellant told Ms. Clem that she injured her shoulder at home over the weekend. She reiterated that when she asked appellant how her left shoulder became painful appellant responded that she did not know. Ms. Clem noted that appellant was not even on the clock at 8:00 a.m. on September 5, 2012. She explained that appellant had restrictions in place prior to September 5, 2012 due to a prior right shoulder injury while working at the employing establishment and that appellant did not violate these restrictions. Ms. Clem stated that appellant had new restrictions now due to her alleged left shoulder condition.

In a decision dated November 30, 2012, OWCP denied appellant's claim finding insufficient evidence to establish fact of injury. It determined that she did not provide sufficient evidence to establish that the September 5, 2012 incident occurred as alleged and that she sustained any diagnosed condition as a result of the alleged incident.

In a December 6, 2012 report, Dr. Burchfield stated that appellant had been to work six hours a day and requested increasing her work to eight hours a day. Upon examination, he observed forward flexion to 180 degrees and abduction to 90 degrees with some pain. Hawkin's and Neer's signs were both positive. Dr. Burchfield diagnosed left shoulder chronic impingement syndrome and residual mild right shoulder pain.

On February 5, 2013 OWCP received a request for a telephone hearing. This request was postmarked January 31, 2013.

In a February 21, 2013 report, Dr. Burchfield noted diagnoses of shoulder joint pain in the scapular area, osteoarthritis and shoulder impingement syndrome.

By decision dated February 27, 2013, an OWCP hearing representative denied appellant's request for a hearing as untimely filed. It noted that her request for an oral hearing was postmarked January 31, 2013, which was more than 30 days after the November 30, 2012 decision. OWCP exercised its discretion and further determined that the issue in the case could be equally well addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which establishes her claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,[4] including that he or she is an "employee" within the meaning of FECA[5] and that he or she filed her claim within the applicable time limitation.[6] The employee must also establish that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[7]

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.[8] There are two components involved in establishing the fact of injury. First, the employee must

[3] 5 U.S.C. §§ 8101-8193.

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercardo)*, 4 ECAB 357 (1951).

[6] *R.C.*, 59 ECAB 42 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954).

[7] *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008).

[8] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[9] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employing establishment incident caused a personal injury.[10]

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[11] An employee has not met his or her burden of proof establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statement in determining whether a *prima facie* case has been established. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[12]

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employing establishment incident caused a personal injury.[13] To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employing establishment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[14]

ANALYSIS -- ISSUE 1

Appellant alleges that on September 5, 2012 she sustained a left shoulder injury when she lifted trays and tubs at work. She did not stop work and filed a traumatic injury claim on October 2, 2012. In a decision dated November 30, 2012, OWCP denied appellant's claim finding insufficient evidence to establish fact of injury. The Board finds that OWCP properly found that the factual evidence is insufficient to establish that the September 5, 2012 employment incident occurred at the time, place and in the manner alleged.

[9] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[10] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[12] *Robert A. Gregory*, 40 ECAB 478 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[13] *J.Z.*, 58 ECAB 529 (2007).

[14] *Michael E. Smith*, 50 ECAB 313 (1999).

The Board finds that there are such inconsistences in the evidence as to cast serious doubt upon the validity of appellant's statement that she sustained an injury on September 5, 2012. In the October 2, 2012 claim form, appellant alleged that the injury occurred on September 5, 2012 at 8:00 a.m. In an October 29, 2012 statement, however, she reported that the alleged injury occurred on September 12, 2012 and explained that the September 5, 2012 date was just an estimated date. The Board also notes that according to a September 5, 2012 timesheet appellant did not clock in until 8:30 a.m. In addition, a witness noted that when she asked appellant how she hurt her left shoulder appellant responded that she hurt it at home over the weekend. Appellant's supervisor also explained that, when asked about her left shoulder, appellant stated that she did not know how she hurt it. The Board finds that these above-mentioned inconsistencies call into serious question appellant's account of the alleged September 5, 2012 incident.[15] Appellant has not offered any explanation for these factual inconsistencies in her claim. Such defects in the factual evidence are sufficient to cast doubt on whether the employment incident occurred as appellant alleged.

Appellant's subsequent course of conduct also fails to support that the September 5, 2012 incident occurred as alleged. The record reflects that she did not stop work and did not seek medical attention until September 27, 2012, more than three weeks after the alleged injury occurred. Appellant did not provide sufficient explanation for why she waited more than three weeks to receive medical treatment even though she reported that she was in constant pain and unable to sleep on her left side from September 12 to 27, 2012. The earliest medical report received is dated September 27, 2012 by Dr. Burchfield, who related that he examined appellant for left shoulder pain and noted that at the beginning of the month she sustained an acute onset of left shoulder pain when she lifted packages. Although Dr. Burchfield's description does not contradict appellant's allegations, he fails to provide any specific date that this alleged lifting incident occurred.[16] The Board finds that this one statement is insufficient to rebut the other inconsistencies and evidence in the record. Further, doubt is raised by the fact that appellant also delayed in filing a traumatic injury claim for the alleged September 5, 2012 work injury until October 2, 2012. As previously noted, late notification of injury, if otherwise unexplained, may cast doubt on an employee's statement that an injury occurred as alleged.[17] The Board notes that appellant did not adequately explain why she delayed so long in filing her claim.

Although an employee's statement alleging that, an injury occurred at a given time and in a given manner is generally accorded great probative value, there is strong and persuasive evidence refuting appellant's account of the events of September 5, 2012.[18] The Board finds that she has not established the occurrence of the September 5, 2012 work incident as alleged and therefore has not established that she sustained an injury on September 5, 2012 in the performance of duty.

[15] *See R.M.*, Docket No. 13-173 (issued April 16, 2013).

[16] *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001) (the Board has consistently held that medical reports based on an incomplete or inaccurate history are of limited probative value).

[17] *Supra* note 12.

[18] *D.B.*, 58 ECAB 529 (2007).

On appeal, appellant explains that when she first filed her claim she did not know that she needed the exact day. She also explained that she informed her supervisor the next day that she hurt her left shoulder and that she did not seek medical attention because her physician could not examine her right away. Appellant also alleged that the witness statement regarding her getting hurt at home was not true. Despite her explanations, the Board finds that she still has not provided a preponderance of the reliable, probative and substantial evidence that the September 5, 2012 incident occurred at the time, place and in the manner alleged. Appellant failed to establish fact of injury. She did not submit evidence to establish that she actually experienced an employment incident at the time, place and in the manner alleged.

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 or her claim before a representative of the Secretary.[19] 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.[20] 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 as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[21] 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.[22] OWCP's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[23]

ANALYSIS -- ISSUE 2

On November 30, 2012 OWCP denied appellant's traumatic injury claim. Appellant requested an oral hearing on February 5, 2013, by request postmarked January 31, 2013. The Board notes that her request for an oral hearing was submitted more than 30 days after the

[19] 5 U.S.C. § 8124(b)(1).

[20] 20 C.F.R. §§ 10.616, 10.617.

[21] *Id.* at § 10.616(a).

[22] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[23] *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.2(a) (October 2011).

November 30, 2012 decision.[24] Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.[25] The Board finds that OWCP properly determined that appellant's request for an oral hearing was not timely and, thus, she was not entitled to a hearing as a matter of statutory right under section 8124(b)(1) of FECA.

Although appellant's request for a hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its February 27, 2013 decision, it properly exercised its discretion by notifying her 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.[26] In this case, there is no evidence of record that OWCP abused its discretion in denying appellant's hearing request. Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on September 5, 2012. The Board also finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

[24] The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. *See Donna A. Christley*, 41 ECAB 90 (1989). The Board notes that appellant did not submit a written request for an oral hearing by December 30, 2012, within 30 calendar days after OWCP's November 30, 2012 decision.

[25] *William F. Osborne*, 46 ECAB 198 (1994).

[26] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2013 and November 30, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 21, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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