# United States Department of Labor
# Employees' Compensation Appeals Board

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| **E.W., Appellant** | ) | |
| **and** | ) | **Docket No. 13-765** |
| | ) | **Issued: June 13, 2013** |
| **U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On February 1, 2013 appellant filed a timely appeal from a September 13, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and a December 31, 2012 nonmerit decision denying his 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 his burden of proof to establish that his cervical and right shoulder conditions were causally related to the April 18, 2012 employment incident; 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 May 15, 2012 appellant, then a 61-year-old motor vehicle operator, filed a traumatic injury claim alleging that on April 18, 2012 he sustained an injury to his right shoulder rotator cuff. He pushed a cage to unload a truck when it stopped suddenly. Appellant stopped work on May 15, 2012.[2]

In a May 12, 2012 return to work slip, Dr. Philippe Noel, a Board-certified internist, stated that appellant was under his care since May 14, 2012 for severe rotator cuff syndrome. He noted that appellant was able to return to work on May 29, 2012 with no restrictions.

In an undated return to work slip, Dr. Noel stated that appellant was under his care since May 14, 2012 for severe rotator cuff syndrome. Appellant was unable to return to work until further notice. In another undated note, Dr. Noel authorized appellant to return to work on May 29, 2012 without restrictions.

In a May 14, 2012 form report, Dr. Noel diagnosed cervical sprain and radiculopathy and right shoulder rotator cuff syndrome. He checked boxes indicating that appellant complained of numbness, tingling, pain and stiffness. Examination revealed abnormal and restricted range of motion of the right shoulder and spasm upon palpation. Dr. Noel marked "yes" that the incident appellant described was the medical cause of the injury or illness. He noted that appellant could not return to work due to pain and limited range of motion of the upper extremity.

In a June 5, 2012 report, Dr. Robert F. Carter, a Board-certified orthopedic surgeon, related that appellant sustained injuries to his neck and right shoulder at work last month when he pushed a cage and jammed his arm. Appellant complained of neck pain and stiffness, right shoulder pain and stiffness, radicular and right arm pain with paresthesias in the right hand. Dr. Carter reported no prior history or pain or injury to the cervical spine or right shoulder. Upon examination of the cervical spine, he observed restricted right range of motion with mild pain and mild right trapezius tenderness. Spurling's test was negative. Examination of the right shoulder revealed full motion with pain and lateral subacromial tenderness. Neer and Hawkins tests were positive. Dr. Carter noted good rotator cuff and deltoid strain. He reported that x-rays of the cervical spine revealed mild lower cervical degenerative disc disease. Dr. Carter diagnosed acute sprain to the cervical spine and right shoulder and right rotator cuff tendinitis.

In a July 12, 2012 progress note, Dr. Noel examined appellant following an accident that occurred on April 18, 2012. He diagnosed cervical sprain and radiculopathy and right rotator cuff syndrome.

In a July 12, 2012 attending physician's report, Dr. Noel stated that on April 18, 2012 appellant sustained injuries to his neck and right shoulder after lifting an object at work. He noted tenderness of appellant's right rotator cuff and cervical spine. Dr. Noel diagnosed cervical sprain and right rotator cuff syndrome. He checked "yes" that appellant's condition was caused

[2] The record reveals that appellant filed a previous traumatic injury claim for an alleged February 2, 2005 injury. (File No. xxxxxx069).

or aggravated by an employment activity. Dr. Noel noted that appellant was totally disabled since May 14, 2012 and that he was able to resume regular duty on September 1, 2012.

In a July 30, 2012 report, Dr. Carter stated that appellant's right shoulder was much better after a cortisone shot and physical therapy; but he continued to have significant cervical spine and radicular pain of the right arm and numbness of the right forearm. Examination of the cervical spine revealed restricted rotation on the right side and tenderness. Spurling's test was positive. Dr. Carter ruled out cervical herniated nucleus pulposus (HNP).

Appellant filed various claims for disability compensation for the period June 29 to August 10, 2012.

On August 9, 2012 OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional evidence to establish that the April 18, 2012 incident occurred as alleged and medical evidence to support that he sustained a diagnosed condition as a result of the alleged incident.

In an August 6, 2012 duty status report, a provider with an illegible signature noted that on March 26, 2012 appellant sustained cervical spondylosis as a result of pushing a cage at work. Appellant was not authorized to return to work.

In an August 6, 2012 report, Dr. Noel stated that appellant was examined following an accident on April 18, 2012 when he lifted a heavy object. Examination revealed decreased range of motion and tenderness of the cervical spine. Dr. Noel diagnosed cervical spine radiculopathy and right rotator cuff syndrome.

In an August 9, 2012 nerve conduction study (NCV) and electrodiagnostic (EMG) report, Dr. Carter related appellant's complaints of neck pain and tingling in the right upper extremity. Examination revealed decreased sensation in the right thumb and index fingers. Dr. Carter reported that the NCV studies were within normal limits. The EMG revealed mild denervating potentials in the right pronator teres and extensor carpi radicalis muscles. Paraspinal musculature was normal. Dr. Carter stated that there was potential for acute radiculopathy, but there were not enough supportive findings to regard his condition as acute in nature. He concluded that the NCV was a normal study with no indication of peripheral neuropathy but the EMG was an abnormal study with potential for right side radiculopathy most probable at C6-7.

In an August 25, 2012 statement, appellant explained that on the day of the accident he was unloading his truck at the general mail facility (GMF). While pushing one of the cages the pin dropped down which caused the cage to stop suddenly and sent a jolt through his body. Appellant reported the incident to his immediate supervisors.

In an August 27, 2012 report, Dr. Carter stated that appellant's neck and shoulder were much better since his physical therapy treatment. Appellant had mild right paracervical stiffness and minimal numbness to the right arm but no weakness. Upon examination of the cervical spine, Dr. Carter observed full motion with minimal pain on rotation and minimal trapezius tenderness. Motor, sensory and reflexes were intact. Dr. Carter noted that an EMG/NCV of the cervical spine and right upper extremity revealed minimal right C6-7 radiculopathy with no peripheral neuropathy. He authorized appellant to return to work and continue physical therapy.

In an August 27, 2012 return to work slip, Dr. Carter diagnosed displacement of a thoracic/lumbar intervertebral disc and disorders of bursae tendon in his shoulder. He authorized appellant to return to work full duty on September 1, 2012. Disability notes from an unknown provider were also submitted to the record.

In a decision dated September 13, 2012, OWCP denied appellant's claim finding insufficient medical evidence to establish his claim. It accepted that the April 18, 2012 incident occurred as alleged but found that the medical evidence failed to establish that his cervical condition was causally related to the accepted incident.

In an appeal form dated October 26, 2012 and postmarked October 30, 2012, appellant requested an oral hearing. He stated that Dr. Carter reported that his injuries were causally related to the May 2012 work injury. Appellant resubmitted medical reports from Dr. Noel and Dr. Carter.

By decision dated December 31, 2012, an OWCP hearing representative denied appellant's request for a hearing as untimely under section 8124. She found that appellant's request for an oral hearing was dated and signed October 26, 2012, which was more than 30 days after the September 13, 2012 decision. The hearing representative exercised discretion to determine that the issue of whether appellant sustained a traumatic injury as a result of the April 18, 2012 employment incident could be equally well addressed by requesting reconsideration before OWCP and submitting evidence not previously considered.

## ***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 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.[5]

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.[6] 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.[7] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the

[3] 5 U.S.C. §§ 8101-8193.

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

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

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

employment incident caused a personal injury.[8] An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.[9]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[10] 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.[11] 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.[12]

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

Appellant alleged that on April 18, 2012 he sustained cervical and right shoulder conditions as a result of stopping suddenly when a pin dropped down causing the cage he was pushing to stop suddenly. OWCP accepted that the April 18, 2012 incident occurred. It denied appellant's claim finding insufficient medical evidence to establish that his cervical or shoulder conditions were causally related to the accepted incident. The Board finds that he did not meet his burden of proof to establish that his cervical and right shoulder conditions were causally related to the April 18, 2012 employment incident.

Appellant was initially treated by Dr. Noel on May 12, 2012, approximately one month after the incident, for complaints of numbness, tingling, pain and stiffness in his neck and right shoulder. Upon examination, Dr. Noel noted abnormal and restricted range of motion of the right shoulder and spasm upon palpation. He diagnosed cervical sprain and radiculopathy and severe right shoulder rotator cuff syndrome. In July 12 and August 6, 2012 reports, Dr. Noel stated that on April 18, 2012 appellant injured his neck and right shoulder when he lifted a heavy object at work. Appellant, however, explained that he sustained an injury when a pin dropped causing the cage he was pushing to stop suddenly, which caused him to jam his shoulder. It is well established that medical reports must be based on a complete and accurate factual and medical background. The Board has held that medical opinions based on an incomplete or inaccurate history are of diminished probative value.[13] Dr. Noel also checked "yes" that appellant's condition was caused or aggravated by the described employment activity. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished

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

[9] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[10] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[12] *James Mack*, 43 ECAB 321 (1991).

[13] *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

probative value and is insufficient to establish a claim.[14] Dr. Noel failed to provide an accurate history of appellant's injury or adequate rationale explaining how appellant's cervical and right shoulder conditions were causally related to the April 18, 2012 employment incident. For these reasons, the Board finds that his reports are insufficient to establish appellant's claim.

Dr. Carter related appellant's complaints of pain and numbness in his neck and right shoulder when he pushed a cage and jammed his arm at work. Upon examination, he observed restricted range of motion with mild pain of the cervical spine and mild right trapezius tenderness. Spurling's test was negative. Examination of the right shoulder revealed full motion with pain and lateral subacromial tenderness. In an August 9, 2012 report, Dr. Carter concluded that the NCV studies were normal but the EMG revealed potential for right side radiculopathy most probable at C6-7. He diagnosed acute sprain to the cervical spine and right shoulder and right rotator cuff tendinitis. While Dr. Carter had an accurate history of the accepted April 18, 2012 employment incident and provided a diagnosis based on examination findings, he did not provide any opinion on whether appellant's diagnosed conditions were causally related to the accepted incident. The Board has found 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.[15] Dr. Carter's reports, therefore, also fail to establish causal relationship.

Appellant also submitted disability slips by an unknown provider with an illegible signature which indicated that he sustained an injury at work and was able to return to full duty on September 1, 2012. The Board has held that reports that are unsigned or that bear illegible signatures cannot be considered as probative medical evidence because they lack proper identification.[16] These reports, therefore, are insufficient to establish appellant's claim.

On appeal, appellant contends that his physicians supported his injury as work related. As noted, however, the medical evidence on the record is insufficient to establish that his cervical and right shoulder conditions were causally related to the accepted April 18, 2012 employment incident. The issue of causal relationship is a medical question that must be established by probative medical opinion from a physician.[17] Accordingly, appellant did not meet his burden of proof.

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.[18]

[14] *D.D.*, 57 ECAB 734, 738 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

[15] *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[16] *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004).

[17] *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *David Apgar*, *supra* note 8.

[18] The Board notes that appellant filed various claims for disability compensation for the period June 29 to August 10, 2012. Because his traumatic injury claim was denied, appellant is not entitled to compensation for total disability.

## ***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.[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 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 September 13, 2012 OWCP denied appellant's traumatic injury claim. Appellant requested an oral hearing in an appeal form dated October 26, 2012 and postmarked October 30, 2012. The Board notes that his request for an oral hearing was submitted more than 30 days after the September 13, 2012 decision. Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.[24] The Board finds that OWCP properly determined that appellant's request for an oral hearing was not timely and, thus, he 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 a December 31, 2012 decision, the hearing representative properly exercised her discretion by notifying him that she 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.[25] In this

[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 Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

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

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

case, the hearing representative did not abuse her discretion in denying appellant's hearing request. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing.

## ***CONCLUSION***

The Board finds that appellant did not establish that his cervical and right shoulder conditions were causally related to the April 18, 2012 employment incident. The Board also finds that OWCP properly denied his request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 31 and September 13, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 13, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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