

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

J.J., Appellant)	
)	
and)	Docket No. 13-21
)	Issued: May 8, 2013
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Latham, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 3, 2012 appellant filed a timely appeal of the June 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for compensation. His request was also timely filed from an August 16, 2012 OWCP decision denying his request for an oral hearing. Pursuant to the Federal Employees' Compensation Act¹ (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 established that he sustained an injury in the performance of duty on November 10, 2011; and (2) whether OWCP properly denied his request for an oral hearing.

On appeal, appellant contends that he sustained an injury/pain as a direct result of work activities. He contends that his general practitioner treated him with anti-inflammatories and a

¹ 5 U.S.C. § 8101 *et seq.*

knee brace and referred him to an orthopedic specialist, who stated that the injured knee was swollen and painful due to inflammation, probably secondary to chondromalacia patella.

FACTUAL HISTORY

On November 17, 2011 appellant, then a 30-year-old criminal investigator, filed a traumatic injury claim alleging severe pain in his right knee due to repetitive stress from moving large bales from a tractor-trailer on November 10, 2011.

Appellant submitted progress reports dated November 14 and December 5, 2011 from Dr. Lauris J. Petersen, a Board-certified family practitioner, who noted that appellant, was treated with anti-inflammatory medicine, a knee brace and cold packs. Dr. Petersen diagnosed right knee tenderness with an increase in pain when squatting and referred appellant to an orthopedic surgeon. He completed an attending physician's report on November 14, 2011 in which he noted that appellant's right knee pain was probably tendinitis.

In a December 7, 2011 patient visit note, Dr. Richard L. Katz, a Board-certified orthopedic surgeon, stated that appellant related a history that, on November 10, 2011, while he was removing large bales from a tractor-trailer, he noticed pain and discomfort in his right knee which progressively became worse. He stated that appellant's knee was swollen and painful. Dr. Katz injected a steroid into the knee for inflammation which was probably secondary to chondromalacia patella. He concluded that appellant's pain and discomfort were causally related to repetitive use of his knee in November 2011.

By letter dated May 16, 2012, OWCP notified appellant that his claim had insufficient supporting evidence, and detailed the information that he should submit within 30 days. In response, appellant resubmitted the December 7, 2011 note from Dr. Katz and the November 14 and December 5, 2011 notes from Dr. Petersen.

By decision dated June 20, 2012, OWCP denied appellant's claim. It found that fact of injury had not been established as there was no firm medical diagnosis causally related to the November 10, 2011 work activities.

On July 30, 2012 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. The request was dated July 20, 2012 and postmarked July 26, 2012.

By decision dated August 16, 2012, OWCP denied appellant's request for an oral hearing, finding that it was untimely filed. It denied the request after determining that the issue could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which established that he sustained an injury in the performance of his employment.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged

and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident or exposure which is alleged to have occurred.³ In order to meet his or her burden of proof to establish the fact that he or she sustained an injury in the performance of duty, an employee must submit factual evidence to establish that he or she experienced the employment incident or exposure at the time, place and in the manner alleged.⁴

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁵ The medical evidence required to establish causal relationship is usually rationalized medical 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.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that the November 10, 2011 incident of moving bales from a tractor-trailer occurred as alleged. It denied appellant's claim finding that he did not submit sufficient medical evidence to establish that the employment incident caused a right knee injury. The Board finds that he did not submit sufficient medical evidence to establish a right knee injury causally related to the November 10, 2011 incident.

The medical evidence of record does not establish a firm medical diagnosis of his right knee condition. In notes dated November 14 and December 5, 2011, Dr. Petersen indicated that appellant had right knee pain and tenderness. In a December 7, 2011 note, Dr. Katz noted pain and discomfort in the right knee. The Board has noted that pain and tenderness are general descriptions of symptoms rather than a firm diagnosis of a medical condition.⁷ Neither

² *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

⁴ *Linda S. Jackson*, 49 ECAB 486 (1998).

⁵ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

⁶ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

⁷ The Board has consistently held that pain is a symptom rather than a compensable medical diagnosis. *K.W.*, Docket No. 12-1590 (issued December 18, 2012); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

Dr. Petersen nor Dr. Katz provided any medical rationale explaining the relationship of appellant's right knee condition to the employment incident. Dr. Petersen indicated that appellant's right knee pain was probably tendinitis while Dr. Katz noted that the inflammation in appellant's right knee was probably chondromalacia patella. These reports are speculative in nature and insufficient to establish a firm diagnosis.⁸ A medical opinion need not be of absolute medical certainty, but neither can it be speculative.⁹ Accordingly, as appellant did not submit a physician's report establishing a medical diagnosis causally related to the November 10, 2011 incident, OWCP properly denied his claim.

Appellant submitted new medical evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal.¹⁰ Appellant may submit this or any other 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 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.¹¹ 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.¹² 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 carriers' date marking and before the claimant has requested reconsideration.¹³ 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 a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁴

ANALYSIS -- ISSUE 2

By decision dated June 20, 2012, OWCP denied appellant's claim. Appellant had 30 calendar days from this decision or until July 20, 2012, to request an oral hearing before an OWCP hearing representative. Because his hearing request was postmarked July 26, 2012, it was not received within the requisite 30 days and therefore his request was untimely.

⁸ *G.M.*, Docket No. 11-1152 (issued January 20, 2012); *M.P.*, Docket No. 09-1752 (issued June 7, 2010).

⁹ *M.H.*, Docket No. 11-1117 (issued December 2, 2011).

¹⁰ See 20 C.F.R. § 501.2(c)(1).

¹¹ 5 U.S.C. § 8124(b)(1).

¹² *Id.* at § 10.626, 10.617.

¹³ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁴ See *M.W.*, Docket No. 12-1267 (issued November 2, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

Accordingly, appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA. In its May 8, 2012 decision, OWCP further exercised its discretion to grant an oral hearing and denied his request on the grounds that he could equally well address the relevant issue in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issue raised by OWCP's June 20, 2012 decision, the Board finds that it did not abuse its discretion in denying appellant's untimely request for an oral hearing as untimely.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on November 10, 2011. The Board further finds that OWCP properly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 16 and June 20, 2012 are affirmed.

Issued: May 8, 2013
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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