

FACTUAL HISTORY

On September 27, 2012 appellant, then a 28-year-old industrial specialist, filed a traumatic injury claim alleging that on that date he was injured in a work-related motor vehicle accident. He stated that he sustained neck and back pain. OWCP requested additional factual and medical information by letter dated November 8, 2012. Appellant submitted a note from Stephanie Metevelis, a physician's assistant, dated September 27, 2012. He also submitted a police report regarding the motor vehicle accident.

By decision dated December 18, 2012, OWCP denied appellant's claim for traumatic injury on the grounds that he failed to submit the necessary medical evidence. Appellant requested an oral hearing in a letter received by the Branch of Hearings and Review on January 24, 2013. He submitted medical evidence.²

In a decision dated February 5, 2013, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely as it was not received within 30 days of OWCP's December 18, 2012 decision. The Branch of Hearings and Review determined that the issues in appellant's case could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and 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 or specific condition for which compensation is claimed is causally related to the employment injury.⁴ 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.⁵

OWCP defines a traumatic injury as, "[A] condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected."⁶ To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First the employee must submit sufficient evidence to establish that he or she actually experienced the employment

² On appeal to the Branch of Hearings and Review and the Board appellant submitted new evidence. As OWCP did not consider this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ 20 C.F.R. § 10.5(ee).

incident at the time, place and in the manner alleged.⁷ Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.⁸

ANALYSIS -- ISSUE 1

Appellant has submitted factual evidence in support of the traumatic incident, an automobile accident which occurred while he was in the performance of duty. However he has failed to submit any medical evidence diagnosing a condition as a result of this incident. Appellant submitted reports from a physician's assistant. The Board has held that a physician's assistant's reports are not medical evidence as a physician's assistant is not a physician under FECA.⁹ As these notes were not signed by a physician the notes have no probative value in establishing appellant's claim.¹⁰

The Board finds that appellant has not submitted the necessary medical evidence to meet his burden of establishing a traumatic injury claim. Therefore appellant has not met his burden of proof.

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.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 carrier's 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 appellant's request and must exercise its discretion.¹⁴ OWCP's procedures

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *J.Z.*, 58 ECAB 529 (2007).

⁹ 5 U.S.C. §§ 8101-8193, 8101(2); *Thomas R. Horsefall*, 48 ECAB 180 (1996).

¹⁰ *Merton J. Sills*, 39 ECAB 572 (1988).

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 20 C.F.R. §§ 10.161, 10.617.

¹³ *Id.* at § 10.616(a).

¹⁴ *P.E.*, Docket No. 13-987 (issued August 21, 2013); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

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).¹⁵

ANALYSIS -- ISSUE 2

On December 18, 2012 OWCP denied appellant's traumatic injury claim. Appellant requested an oral hearing on January 24, 2013. The Board notes that appellant's request for an oral hearing was submitted more than 30 days after the December 18, 2012 decision.¹⁶ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹⁷ 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 its February 5, 2013 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.¹⁸ 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 his burden of proof to establish that he sustained an injury in the performance of duty on September 27, 2012. The Board also finds that OWCP properly denied his request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

¹⁵ 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).

¹⁶ 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 January 18, 2013, within 30 calendar days after OWCP's December 18, 2012 decision.

¹⁷ *William F. Osborne*, 46 ECAB 198 (1994).

¹⁸ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2013 and December 18, 2012 Office of Workers' Compensation Programs' decisions are affirmed.

Issued: November 5, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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