

performance of duty on March 22, 2013. He stated that he was injured while performing demolition work when his left elbow began to hurt. A supervisor checked a box indicating that appellant was injured in the performance of duty.

Appellant submitted work status reports dated March 26 through June 3, 2013, signed by Dana Shaheen, a physicians' assistant. He also submitted medical reports signed by her dated March 26 and 28, 2013.

In notes dated April 23 through July 2, 2013, Timothy Wendling, a physical therapist, reviewed appellant's course of treatment and goals.

By letter dated August 13, 2013, OWCP advised appellant that the evidence of record was insufficient to support his claim. It afforded him 30 days to submit additional medical evidence from a qualified physician. Appellant submitted another report from Mr. Wendling dated July 9, 2013.

By decision dated September 25, 2013, OWCP denied appellant's claim. It found that he did not submit medical evidence providing a firm diagnosis from a physician. OWCP noted that a physician's assistant or physical therapist was not a "physician" as defined under FECA.

By letter postmarked December 18, 2013 and dated December 17, 2013, appellant requested a review of the written record before the Branch of Hearings and Review.

On January 16, 2014 OWCP denied appellant's request for a review of the written record as untimely. It found that he had not made his request for a review of the written record within 30 days. Further, OWCP exercised its discretion to deny the hearing request as appellant could request as reconsideration before OWCP and submit additional evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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 injury³ was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁴

² *Id.*

³ OWCP's regulations define 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. 20 C.F.R. § 10.5(ee).

⁴ *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁵

ANALYSIS -- ISSUE 1

Appellant alleged that on March 22, 2013, he sustained an injury to his left elbow in the performance of duty. OWCP has accepted that he was performing demolition work on March 22, 2013, as alleged. The Board finds that appellant did not submit sufficient medical evidence from a physician to establish that a medical condition was diagnosed in connection with this incident.

Appellant submitted several reports from Ms. Shaheen, a certified physician’s assistant and notes from Mr. Wendling, a physical therapist. As noted a physician’s assistant and physical therapist are not defined as a “physician” under FECA. Therefore, their reports do not qualify as probative medical evidence supportive of a claim for federal workers’ compensation, unless such reports are countersigned by a physician.⁶ The reports from Ms. Shaheen were not countersigned by a physician. The notes from Mr. Wendling were also unsigned by a physician. Therefore, they do not constitute probative medical evidence. Appellant did not establish a firm medical condition in connection with the work-related incident.

The Board finds that appellant did not submit sufficient medical evidence providing a diagnosis from a qualified physician. Appellant failed to establish that he had a left elbow condition resulting from the March 22, 2013 employment incident.

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 claim before a representative of the Secretary.”⁷ 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

⁵ See *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁶ See 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000) (regarding physical therapists); *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998) (regarding physicians’ assistants).

⁷ 5 U.S.C. § 8124(b)(1).

record by a representative of the Secretary.⁸ 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.⁹ 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.¹⁰ 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).¹¹

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in an appeal form dated December 17, 2013 and postmarked December 18, 2013. OWCP denied the request as untimely by decision dated January 16, 2014. As appellant's request for a review of the written record was postmarked December 18, 2013, more than 30 days after OWCP issued its September 25, 2013 decision, he was not entitled to a hearing as a matter of right.

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.¹² It properly executed its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for a review of the written record on the basis that the case could be pursued by submitting additional evidence to OWCP in support of his claim with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error or a clearly unreasonable exercise of judgment or actions taken, which is contrary to both logic and probable deductions from established facts.¹³ The evidence of record does not establish that OWCP took any action in connection with its denial of appellant's request for a review of the written record that could be found to be an abuse of discretion. For these reasons, it properly denied his request for a review of the written record as untimely under section 8124 of FECA.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a traumatic injury in the performance of duty on March 22, 2013. The Board further finds that OWCP properly denied his request for a review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. §§ 10.616-10.618.

⁹ *Id.* at § 10.616(a).

¹⁰ *Eddie Franklin*, 51 ECAB 223, 227 (1999); *Delmont L. Thompson*, 51 ECAB 155, 157 (1999).

¹¹ *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

¹² *Afegalai L. Boone*, 53 ECAB 533, 536 (2002).

¹³ *Minnie B. Lewis*, 53 ECAB 606, 609 (2002).

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2014 and September 25, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2014
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