United States Department of Labor
Employees' Compensation Appeals Board

N.M., Appellant	)	
and	)	**Docket No. 14-1189**
	)	**Issued: October 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Jamestown, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 28, 2014 appellant filed a timely appeal from a January 7, 2014 merit decision and a March 28, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employee's 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.[2]

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for review of the written record as untimely; and (2) whether appellant met his burden of proof to establish an injury in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq*.

[2] On appeal, appellant submitted new evidence and argues that the Board should consider medical evidence received after issuance of the January 7, 2014 OWCP decision. The Board, however, lacks jurisdiction to review evidence for the first time on appeal. 5 U.S.C. § 501.2(c).

FACTUAL HISTORY

On November 9, 2013 appellant, then a 27-year-old city carrier assistant, filed a traumatic injury claim alleging that on November 8, 2013 he fell and injured his left ankle in the performance of duty. He was delivering mail when he stepped onto a loose step which gave way, injuring his left ankle. Appellant stopped work on November 8, 2013.

In a November 8, 2013 medical report, David Trusel, a physician's assistant, diagnosed left ankle sprain. He noted that the injury was work related and occurred as appellant stepped onto a loose porch step, which caused him to fall and injure his left ankle. Mr. Trusel noted that appellant had prior ankle surgery in 2008. He advised that an x-ray of the left ankle did not reveal any evidence of acute fracture; however, appellant was provided with crutches and placed in an ankle splint. Mr. Trusel stated that appellant could not return to work until cleared by his orthopedist. In a November 8, 2013 duty status report (Form CA-17), he diagnosed left ankle sprain and noted that appellant was not fit to return to work. In a November 8, 2013 attending physician's report (Form CA-20), Mr. Trusel reiterated the history of the injury. He noted that appellant previously rolled his ankle while playing sports as a child. Mr. Trusel stated that appellant was experiencing swelling and pain. In response to a question asking whether the condition was caused or aggravated by an employment event, he marked "yes."

In a November 8, 2013 statement, Teresa Brady, appellant's postmaster, stated that appellant twisted his ankle as he stepped onto a loose step while delivering mail. She advised that he told her that he previously injured the same ankle while in the military. According to Ms. Brady, appellant remarked that the injury should be covered by his Veterans' benefits.

In a December 4, 2013 letter, OWCP notified appellant that, initially, his claim was administratively accepted as an uncontroverted minor injury that would likely result in little to no time off. Because appellant had not returned to work following the November 8, 2013 incident, the merits of his case would be adjudicated. OWCP advised him that the medical reports that he submitted had not been signed by a physician. It informed appellant to submit evidence from a qualified physician explaining how the reported work incident caused or aggravated his left ankle injury. Appellant did not respond.

By decision dated January 7, 2014, OWCP denied appellant's claim. It found that he did not submit medical evidence to establish that his left ankle condition was causally related to the work incident. OWCP noted that appellant had not provided medical reports from a physician as defined within the meaning of FECA.

In a letter dated and postmarked February 12, 2014, appellant requested a review of the written record. He submitted additional evidence.

By decision dated March 28, 2014, OWCP denied appellant's request because it was untimely. After considering whether to grant a discretionary hearing, it determined that the issue could be further addressed by requesting reconsideration and submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA provides that a claimant for compensation who is 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.[3] He or she is afforded the choice of either an oral hearing or a review if the written record.[4] While a claimant is no longer entitled to an oral hearing or review of the written record as a matter of right if his or her request is filed past the 30-day period, OWCP may grant the request within its discretionary power and must exercise that discretion.[5]

ANALYSIS -- ISSUE 1

Appellant filed a request for review of the written record on February 12, 2014, more than 30 days after OWCP issued its January 7, 2014 decision. Because the application was not timely filed, he was not entitled to a review of the written record as a matter of right.

OWCP has the discretionary power to grant a review of the written record when a claimant is not entitled to one as a matter of right. In this case, it exercised this discretion in its March 28, 2014 decision, finding that appellant's claim could be addressed by requesting reconsideration and submitting additional evidence. This basis for denying appellant's request for review of the written record is a proper exercise of OWCP's authority.[6] Accordingly, the Board finds that OWCP properly denied his request for a review of the written record.

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

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative and substantial evidence,[7] including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.[8] The employee must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.[9]

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[3] 5 U.S.C. § 8124(b)(1); *Joseph R. Giallanza*, 55 ECAB 186, 190-91 (2003). *See* 20 C.F.R. § 10.616(a).

[4] 20 C.F.R. § 10.615.

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

[6] *Mary B. Moss*, 40 ECAB 640, 647 (1989).

[7] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[8] *R.C.*, 59 ECAB 427 (2008).

[9] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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. There are two components involved in establishing 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. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[10]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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.[11]

ANALYSIS -- ISSUE 2

Appellant claimed that he sprained his ankle on November 8, 2013 while delivering mail when a board on a step gave way. The evidence supports the claimed incident occurred. The Board finds that the first component of fact of injury is established. However, the medical evidence of record is insufficient to establish that the employment incident on November 8, 2013 caused appellant's ankle injury.

The medical evidence submitted prior to OWCP's January 7, 2014 decision, was signed by Mr. Trusel, a physician's assistant. OWCP regulations specify that medical evidence should include "the physician's opinion, with medical reasons, as to causal relationship between the diagnosed condition and the factors or conditions of the employment."[12] Here, Mr. Trusel gives a diagnosis and provides his opinion on causal relationship; however, he is not a physician within the meaning of FECA. Under FECA, a "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.[13] Given that Mr. Trusel is not a physician, his reports have no probative value and are not entitled to any weight in a claim under FECA.[14] As a result, the medical evidence is insufficient to discharge appellant's burden of proof.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for review of the written record as untimely. The Board also finds that he did not establish that he sustained a traumatic injury in the performance of duty on November 8, 2013.

[10] *T.H.*, 59 ECAB 388 (2008).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] 20 C.F.R. §10.330.

[13] 5 U.S.C. § 8101(2).

[14] *Allen C. Hundley*, 53 ECAB 551 (2002); *Lyle E. Dayberry*, 9 ECAB 369 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 28 and January 7, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 7, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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