

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

E.A., Appellant)

and)

**DEPARTMENT OF THE NAVY, OFFICE OF
THE SECRETARY, PENTAGON,
Washington, DC, Employer**)

**Docket No. 15-0673
Issued: July 14, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 9, 2015 appellant filed a timely appeal from a December 3, 2014 merit decision and a January 23, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury on September 24, 2013, as alleged due to his employment; and (2) whether OWCP properly denied his request for review of the written record as untimely under 5 U.S.C. § 8124.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 24, 2014 appellant, then a 40-year-old lead financial management analyst, filed a traumatic injury claim alleging that on September 24, 2013 he slipped on a wet bathroom floor and reinjured his right shoulder as he hung onto the sink counter to keep from falling. No medical evidence was submitted with the claim.

By letter dated October 27, 2014, OWCP advised appellant of the deficiencies in his claim and provided him 30 days in which to submit additional factual and medical evidence, to include a diagnosis of a medical condition sustained as a result of the claimed event.

In response, OWCP received a November 13, 2014 statement from appellant, a work order dated September 23, 2013, physical therapy reports dated July 17, October 21, and 29, 2013, and diagnostic test reports dated October 26, 2011 and October 20, 2014.

Medical reports from the employing establishment's health unit dated February 24 and September 17, 2014 noted appellant's complaints of chronic right shoulder pain and knee pain. Results of previous magnetic resonance imaging (MRI) scans were also noted.

In an October 16, 2014 Form CA-20, Dr. Robert G. Najarian, a Board-certified orthopedic surgeon, related that appellant had a shoulder injury 30 years prior and injured his right shoulder on September 24, 2013. He noted MRI scan findings and diagnosed right shoulder partial thickness rotator cuff tear. By checkmark "yes" Dr. Najarian opined that this condition was caused or aggravated by appellant's fall at work.

In an October 20, 2014 medical report, Dr. Najarian requested physical therapy services for right shoulder bicipital tendinitis and rotator cuff tendinitis.

By decision dated December 3, 2014, OWCP denied appellant's claim as the medical evidence did not establish that the diagnosed condition was causally related to the work incident.

In an appeal request form postmarked January 12, 2015, received by OWCP on January 15, 2015, appellant requested review of the written record. In a January 6, 2015 report, Dr. Najarian noted that appellant fell at work in 2013. He opined that the current MRI scan showed a partial rotator cuff tear, partial intrasubstance tearing along the biceps tendon, and bicipital tendinitis consistent with appellant's work-related fall. Dr. Najarian also stated that appellant's complaints of shoulder pain and right upper extremity physical limitations had a direct correlation with the MRI scan findings and was an injury pattern consistent with his history of a fall. He noted that appellant had a previous history of shoulder injury, but that included a clavicle fracture without any rotator cuff and bicipital tendon injury.

By decision dated January 23, 2015, OWCP denied appellant's request for review of the written record as untimely without a merit review. It considered his request within its discretion, but found that his case could be addressed equally well by a request for reconsideration and the submission of evidence showing a causal relationship between his claimed condition and the work incident.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish 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 filed within the applicable time limitation, that an injury was sustained while 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.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.³

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.⁴ 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.⁵ 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.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁷ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.⁸ 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.⁹

ANALYSIS -- ISSUE 1

On September 24, 2013 appellant slipped in the bathroom at the employing establishment and claimed injury to his right shoulder. The evidence supports that the claimed work incident occurred as alleged. Therefore, the Board finds that the first component of fact of injury is established. However, the medical evidence is insufficient to establish that the employment

² *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

³ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *John J. Carlone*, 41 ECAB 354 (1989); *B.F.*, Docket No. 09-60 (issued March 17, 2009).

⁵ *D.B.*, 58 ECAB 464 (2007); *Paul Foster*, 56 ECAB 208 (2004).

⁶ *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 2; *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

⁷ *A.D.*, 58 ECAB 149 (2006); *Michael S. Mina*, 57 ECAB 379 (2006); *Y.J.*, Docket No. 08-1167 (issued October 7, 2008).

⁸ *Sedi L. Graham*, 57 ECAB 494 (2006); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

⁹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

incident on September 24, 2013 caused appellant's medically diagnosed right shoulder conditions.

Appellant submitted reports from Dr. Najarian. In his October 16, 2014 Form CA-20, Dr. Najarian diagnosed right shoulder partial thickness rotator cuff tear and opined with a checkmark "yes" that the condition was caused or aggravated by appellant's fall at work. He, however, did not provide a probative rationalized opinion regarding whether the September 24, 2013 work incident caused a personal injury. The Board has held that, without further explanation or rationale, a checked box is insufficient to establish causation.¹⁰ In his October 20, 2014 report, Dr. Najarian provided diagnoses of right shoulder bicipital tendinitis and rotator cuff tendinitis, but provided no opinion as to the causal relationship of such conditions. Medical evidence without an opinion as to causal relationship is of little probative value.¹¹ As such, Dr. Najarian's reports are of diminished probative value to establish appellant's claim.

Notes from employing establishment's health unit dated September 17, 2014 indicate that appellant had chronic shoulder pain and knee pain. However, the Board has held that pain and spasm are generally descriptions of symptoms and are not, in themselves, considered firm medical diagnoses.¹² As such, the health unit's description of appellant's symptoms does not establish a firm medical diagnosis from the accepted incident.

Physical therapy notes are also insufficient to establish appellant's claim. Physical therapists are not physicians and a physical therapist's opinion regarding a diagnosis or causal relationship is of no probative value.¹³ Diagnostic testing is also insufficient to establish appellant's claim as it is diagnostic in nature and therefore does not address causal relationship.

The Board finds that the medical evidence of record does not establish that appellant sustained a medical condition causally related to his federal employment. An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment, nor the belief that his condition was caused, precipitated, or aggravated by his employment, is sufficient to establish causal relationship.¹⁴ Causal relationship must be established by rationalized medical opinion evidence. As noted, the medical evidence is insufficient to establish appellant's claim. Consequently, OWCP properly found that appellant did not meet his burden of proof in establishing his claim.

¹⁰ *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

¹¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹² *See B.P.*, Docket No. 12-1345 (issued November 13, 2012) (regarding pain); *C.F.*, Docket No. 08-1102 (issued October 10, 2008) (regarding pain); *J.S.*, Docket No. 07-881 (issued August 1, 2007) (regarding spasm).

¹³ A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as physician as defined in 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁴ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

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) 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.¹⁵ Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹⁶ The request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.¹⁷ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.¹⁸

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.¹⁹

ANALYSIS -- ISSUE 2

In a decision dated December 3, 2014, OWCP denied appellant's traumatic injury claim, and provide appeal rights. Appellant sought a review of the written record in a letter postmarked January 12, 2015. By decision dated January 23, 2015, OWCP denied his request for a review of the written record as untimely under section 8124 of FECA.

The 30-day time period for determining the timeliness of appellant's review of the written record began on December 4, 2014 and ended on Saturday, January 3, 2015. As January 3, 2015 was a Saturday, appellant had until Monday, January 5, 2015 to file his appeal.²⁰ As appellant's request for a review of the written record was postmarked January 12, 2015, he was not entitled to review of the written record as a matter of right.

OWCP has the discretionary power to grant a hearing or review the written record when a claimant is not entitled to a hearing or review as a matter or right. It properly exercised its

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. § 10.615.

¹⁷ *Id.* at § 10.616(a).

¹⁸ *See Leona B. Jacobs*, 55 ECAB 753 (2004).

¹⁹ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

²⁰ *See John B. Montoya*, 43 ECAB 1148 (1992). The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday.

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 resolved by submitting additional evidence to OWCP 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, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²¹ In this case, the evidence of record does not establish that OWCP committed any action in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. Consequently, OWCP properly denied his request for an oral hearing as untimely under section 8124 of FECA.

On appeal appellant argues that Dr. Najarian provided a January 6, 2015 letter which established causal relationship of his shoulder conditions. The Board notes that Dr. Najarian's January 6, 2015 letter addressing causal relationship was received after OWCP's December 3, 2014 merit decision. As this report was not considered by OWCP in reaching a decision, the Board lacks jurisdiction to review this new evidence for the first time on appeal.²²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a shoulder condition in the performance of duty on September 24, 2013, as alleged. Furthermore, the Board finds that OWCP properly denied appellant's request for review of the written record as untimely.

²¹ See *L.W.*, 59 ECAB 471 (2008).

²² See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2015 and December 3, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 14, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board