

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

A.N., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Greensboro, NC,)
Employer)

**Docket No. 15-263
Issued: March 17, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 17, 2014 appellant filed a timely appeal from a December 1, 2014 nonmerit decision and a September 25, 2014 merit 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 the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the September 25, 2014 decision. Because the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final merit decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit this evidence to OWCP along with a request for reconsideration.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on December 27, 2013; and (2) whether the Branch of Hearings and Review properly denied his request for a hearing.

FACTUAL HISTORY

On December 27, 2013 appellant, then a 41-year-old electronic technician, filed a traumatic injury claim (Form CA-1) alleging a fracture and cut to the middle finger of his right hand. He stated that on this date, he momentarily lost balance while trying to determine the location of a bad bearing. A supervisor checked a box indicating that appellant was injured in the performance of duty. Appellant did not stop work.

In a note dated December 27, 2013, a physician assistant stated that appellant could return to work the next day and should see a hand specialist the next week.

By letter dated August 14, 2014, OWCP advised appellant that his claim had been reopened for consideration because medical bills had exceeded \$1,500.00. It stated that the evidence of record was insufficient to support his claim, noting that the only medical evidence of record had been signed by a physician assistant, who did not qualify as a physician under FECA. OWCP afforded appellant 30 days to submit additional medical evidence in support of his claim. Appellant did not respond.

By decision dated September 25, 2014, OWCP denied appellant's claim. It found that he had not established an injury in the performance of duty. OWCP accepted that appellant was a federal civilian employee who filed a timely claim and that the evidence supported that an employment incident occurred, but that an injury had not been established.

By letter dated November 13, 2014, appellant requested an oral hearing before an OWCP hearing representative. The request was postmarked November 17, 2014. Appellant submitted a statement with his request, which described in detail how his injury occurred and suggesting that OWCP contact his physician for medical evidence.

By decision dated December 1, 2014, the Branch of Hearings and Review denied the hearing request as untimely. The hearing representative also denied a discretionary hearing, noting that appellant could instead file a request for reconsideration along with additional relevant evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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

³ *Supra* at note 1.

limitation period of FECA, that an injury⁴ 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.⁵

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 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.⁶

OWCP procedures provide for acceptance of a claim without a medical report when the following criteria are satisfied: (1) the condition reported is a minor one which can be identified on visual inspection by a lay person (*e.g.*, burns, lacerations, insect stings, or animal bites); (2) the injury was witnessed or reported promptly and no dispute exists as to the fact of injury; and (3) no time was lost from work due to disability.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that on December 27, 2013, he sustained a fracture and cut to the middle finger of his right hand in the performance of duty. OWCP originally accepted the claim as a minor injury but reopened the claim once the medical expenses exceeded \$1,500.00. Upon further review, it denied the claim on September 25, 2014, finding that appellant had not submitted evidence to substantiate an injury as a result of this incident. The Board finds the evidence submitted in support of the claim was insufficient to establish fact of injury.

The Board also finds that appellant has not established by submission of medical evidence from a qualified physician an injury due to the accepted incident.⁸

⁴ 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).

⁵ *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3 (January 2013); *Melissa A. Carter*, 45 ECAB 618 (1994).

⁸ *Id.*

Under FECA, the reports of nonphysicians, including physician assistants, do not constitute probative medical evidence unless countersigned by a physician.⁹ The December 27, 2013 note from a physician assistant does not constitute probative medical evidence. As such, there is no probative medical evidence of record in this case. Because appellant did not submit any medical evidence from a qualified physician in support of his claim, he has not established that the employment incident of December 27, 2013 caused a personal injury.

LEGAL PRECEDENT -- ISSUE 2

A claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision.¹⁰ The hearing 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.¹¹ The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹² If the request is not made within 30 days, a claimant is not entitled to a hearing as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.¹³

ANALYSIS -- ISSUE 2

OWCP issued its latest merit decision on September 25, 2014. Appellant had 30 days to request a hearing, but the hearing request was postmarked November 13, 2014. The regulations provide that "[t]he hearing request must be sent within 30 days [...] of the date of the decision for which a hearing is sought."¹⁴ Because appellant's November 13, 2014 request was untimely, he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review also denied his hearing request because it found that his claim for traumatic injury could be equally well addressed by requesting reconsideration before OWCP. The Board finds that the hearing representative properly exercised his discretionary authority in denying appellant's request for a hearing.¹⁵

⁹ See 5 U.S.C. § 8101(2); *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998) (regarding physicians' assistants).

¹⁰ 20 C.F.R. § 10.616(a).

¹¹ *Id.*

¹² *Id.*

¹³ 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁴ *Supra* note 10.

¹⁵ *Mary B. Moss*, 40 ECAB 640, 647 (1989). 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 deductions from known facts. See *André Thyratron*, 54 ECAB 257, 261 (2002).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a traumatic injury in the performance of duty on December 27, 2013. The Board further finds that the Branch of Hearings and Review properly denied appellant's hearing request.

ORDER

IT IS HEREBY ORDERED THAT the December 1 and September 25, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 17, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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