

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a right shoulder injury causally related to the April 30, 2015 employment incident; and (2) whether OWCP properly denied his request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

On appeal appellant contends that the medical evidence of record establishes that he sustained an employment-related right shoulder injury that required surgery.

FACTUAL HISTORY

On May 2, 2015 appellant, then a 56-year-old manager of distribution operations, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder strain when he tripped over a nut and bolt protruding from the base of a pole at work. He did not initially stop work.

In a May 14, 2015 right shoulder magnetic resonance imaging (MRI) scan report, Dr. J. Kenneth Allen, a Board-certified radiologist, provided an impression of large bony Bankart fracture of the anterior inferior glenoid, Hill-Sachs impaction fracture, superior labral tear from the anterior to posterior (SLAP) extending into the posterior labrum and posterior aspect of the inferior labrum, longitudinal split tear of the biceps tendon, small rim rent tear of the supraspinatus tendon, small joint glenohumeral effusion, fluid in the subcoracoid bursa compatible with bursitis, and mild arthropathic changes in the acromioclavicular joint.

In a June 16, 2015 note, Dr. Barton H. Reutlinger, a Board-certified orthopedic surgeon, advised that appellant may not return to work from June 3 to August 16, 2015. He reported that appellant had a shoulder injury that required surgery. Appellant would be unable to work for at least two and one-half months.

On July 8, 2015 Dr. Ryan J. Krupp, a Board-certified orthopedic surgeon, reported a diagnosis of Bankart lesion of the right shoulder and a Hill-Sachs closed fracture of the right humerus. He indicated that appellant was scheduled for surgery.⁴

A prescription bearing an unknown signature and date ordered a right ace brace. An April 30, 2015 letter contained the printed name of Denise Wilburn, a nurse practitioner, and noted that appellant could return to work on May 1, 2015. In a report of the same date, Lucretia Hovell, also a nurse practitioner, provided findings on physical examination and diagnosed, among other things, right shoulder pain.

On July 21, 2015 appellant requested authorization for his proposed right shoulder surgery.

By letter dated August 10, 2015, OWCP notified appellant that initially his claim was administratively handled to allow medical payments, as it appeared to be a minor injury resulting

⁴ The record indicates that appellant was scheduled to undergo right shoulder surgery on August 27, 2015.

in minimal or no lost time from work. It had not formally considered the merits of appellant's claim and noted that it had been reopened because he requested authorization for surgery. OWCP advised appellant of the type of evidence needed to establish his claim, including a physician's opinion explaining how the accepted work incident caused or aggravated the claimed injury. It allotted him 30 days to respond.

Appellant did not respond to OWCP within the allotted time.

In a September 18, 2015 decision, OWCP accepted that the April 30, 2015 incident occurred as alleged. However, it denied appellant's claim and determined that the medical evidence did not establish a clear history of injury or a rationalized opinion on the causal relationship between his right shoulder condition and the accepted employment incident.

In an appeal request form dated December 12, 2015, postmarked December 16, 2015, and received by OWCP's Branch of Hearings and Review on December 21, 2015, appellant requested a review of the written record by an OWCP hearing representative. In an accompanying letter dated December 12, 2015, he responded to OWCP's August 10, 2015 development letter, contending that his treating physicians had concluded that he sustained a right shoulder injury due to the April 30, 2015 employment incident. Appellant submitted additional medical evidence which addressed his right shoulder conditions.

By decision dated January 19, 2016, the Branch of Hearings and Review denied appellant's request for a review of the written record as it was untimely filed. It found that the request was not postmarked within 30 days of the issuance of the September 18, 2015 OWCP merit decision. After exercising its discretion, the Branch of Hearings and Review further found that the issue in the case could equally well be addressed through the reconsideration process.

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 by the weight of the reliable, probative, and substantial evidence⁵ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁶

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.⁷ There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.⁸

⁵ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁶ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁸ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁹ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.¹⁰ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a traumatic injury caused by the accepted April 30, 2015 employment incident as he failed to submit sufficient medical evidence in support of his claim.

Dr. Krupp's July 8, 2015 report found that appellant had a Bankart lesion of the right shoulder and a Hill-Sachs closed fracture of the right humerus and recommended surgery. He did not provide a medical opinion relating that the diagnosed conditions and need for surgery due to the accepted April 30, 2015 employment incident. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹²

Likewise, Dr. Allen's May 14, 2015 diagnostic test results are of limited probative value. He addressed appellant's right shoulder conditions, but failed to provide an opinion addressing whether the diagnosed conditions were caused or aggravated by the accepted employment incident.¹³

Dr. Reutlinger's June 16, 2015 note found that appellant could not work from June 3 to August 16, 2015 and that surgery was indicated. He related that appellant would not be able to work for at least two and one-half months. Dr. Reutlinger did not provide a firm diagnosis of a particular medical condition,¹⁴ any history of injury,¹⁵ or a specific opinion on causal relationship

⁹ *John J. Carlone*, 41 ECAB 354 (1989); 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

¹⁰ *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

¹¹ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹² *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

¹³ *Id.*

¹⁴ *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that in the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet her burden of proof).

¹⁵ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

between a diagnosed condition, appellant's need for surgery and resultant disability, and the accepted work incident.¹⁶

The reports completed by Nurse Practitioners Ms. Wilburn and Ms. Hovell are insufficient to establish appellant's claim. These reports are of no probative value as a nurse practitioner is not considered a physician as defined under FECA¹⁷ Likewise, the prescription for a right ace brace, without a legible signature, has no probative medical value, as it cannot be established that the author is a physician.¹⁸

Therefore, the Board finds that there is insufficient medical evidence to establish that appellant sustained a right shoulder injury causally related to the accepted April 30, 2015 employment incident.

On appeal appellant contends that the medical evidence of record establishes that he sustained an employment-related right shoulder injury that required surgery. The Board finds that the weight of the medical evidence does not establish that appellant sustained a right shoulder condition that warranted surgery causally related to the accepted April 30, 2015 work 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 or her claim before a representative of the Secretary.¹⁹ 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.²⁰ 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.²¹ 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

¹⁶ *Supra* note 12.

¹⁷ Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *S.H.*, Docket No. 15-336 (issued April 14, 2015).

¹⁸ *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁹ 5 U.S.C. § 8124(b)(1).

²⁰ 20 C.F.R. §§ 10.616, 10.617.

²¹ *Id.* at § 10.616(a).

powers grant or deny appellant's request and must exercise its discretion.²² OWCP 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).²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed as it was made more than 30 days after the issuance of OWCP's September 18, 2015 merit decision. The December 12, 2015 form, on which appellant requested the review, was postmarked on December 16, 2015. The time limitation to request a review of the written record from OWCP's Branch of Hearings and Review expired 30 days after OWCP's September 18, 2015 decision.²⁴ Section 8124(b)(1) sets an unequivocal time limitation for requesting a review of the written record.²⁵ Because the request was untimely filed, appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA.

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its January 19, 2016 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and 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. 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.²⁶ In this case, there is no evidence of record that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's December 12, 2015 request for a review of the written record.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish a right shoulder injury causally related to the April 30, 2015 employment incident. The Board further finds that OWCP properly denied appellant's request for a request of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

²² *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

²³ *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

²⁴ 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).

²⁵ *See William F. Osborne*, 46 ECAB 198 (1994).

²⁶ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2016 and September 18, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 8, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board