United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 16-0947**
	)	**Issued: December 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Moravia, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 4, 2016 appellant filed a timely appeal from a November 6, 2015 merit decision and a March 9, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that his right knee conditions are causally related to an accepted August 20, 2015 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed.

[1] On appeal, appellant submitted additional evidence. However, the Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *James C. Campbell*, 5 ECAB 35, 37 n.2 (1952).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 20, 2015 appellant, then a 70-year-old postal support employee cleaner, filed a traumatic injury claim (Form CA-1) alleging that on that date he was mowing the lawn at the employing establishment when his right foot got caught in a deep hole and he fell on his right knee and twisted it. He stopped work on August 21, 2015 and returned on August 22, 2015.

In an August 20, 2015 report, Dr. Henry David, an orthopedic surgeon, noted appellant's history of injury, which included surgery on the right ankle. He explained that, on August 20, 2015, appellant was pushing a lawnmower when his right leg fell into a hole, causing him to twist his right knee. Dr. David advised that he reviewed x-rays taken of the right knee, which revealed some mild degenerative changes with a moderate-sized effusion. He diagnosed strain and sprain of the right knee and effusion of the right knee.

In a September 3, 2015 form report, Dr. Frank Pompo, an orthopedic surgeon, noted that appellant was seen in follow up from a visit to the emergency room for a work-related right knee injury. He related that appellant stepped into a hole and injured his right knee while mowing the lawn. Dr. Pompo reviewed right knee x-rays which revealed changes consistent with mild patellofemoral arthritis and no evidence of fracture or dislocation was noted. He found a notable effusion on x-ray. Dr. Pompo opined, "I think [appellant] tore his medial meniscus when he twisted his knee and fell." He advised that appellant was totally temporarily disabled. Dr. Pompo checked the box marked "yes" in response to whether appellant's complaints were consistent with his history of the injury/illness and with regard to whether appellant's history of the injury/illness was consistent with objective findings.

A September 9, 2015 magnetic resonance imaging scan of the right knee read by Dr. Kerwin Gibbs, a Board-certified diagnostic radiologist, revealed: moderate osteoarthritic changes, osseous contusions, complex degenerative tear posterior horn of medial meniscus, partial tear or sprain of the anterior cruciate ligament, and moderate chondral degeneration of the medial femoral condyle.

On September 11, 2015 Dr. Pompo repeated appellant's history of injury to the right knee, and diagnosed: effusion joint, lower leg, pain in joint, lower leg; derangement posterior horn and medial meniscus; and osteoarthritis localized primarily in the lower leg. In a September 14, 2015 report, he diagnosed right knee pain, right knee effusion, and "derangement of the posterior horn of the medial meniscus due to old tear or injury, right knee." Dr. Pompo again checked the box marked "yes" in response to whether appellant's complaints were consistent with his history of the injury/illness and with regard to whether appellant's history of the injury/illness was consistent with objective findings.

On September 21, 2015 OWCP received a notice of recurrence (Form CA-2a) dated September 10, 2015.

In a letter dated September 28, 2015, OWCP noted that appellant's claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and his claim was administratively handled to allow a limited amount of medical payments. However, appellant's claim was being reopened because he filed a claim for a recurrence. It noted that it

appeared that he had a preexisting right knee condition and he would need to provide a detailed opinion explaining the relationship of the diagnosed condition and the claimed injury of August 20, 2015. OWCP also noted that appellant would have to differentiate the claimed work injury from the symptoms of the preexisting right knee condition.

An August 20, 2015 x-ray of the right knee read by Dr. Gibbs revealed mild-to-moderate degenerative joint disease and medium-sized joint effusion.

In his progress reports dated September 14 and 23, 2015, Dr. Pompo diagnosed pain in the joint, lower limb; effusion in the joint, lower leg; and derangement posterior horn medial meniscus. In a September 23, 2015 report and summary, he found effusion of the right knee. In a September 23, 2015 disability certificate, Dr. Pompo advised that appellant was totally disabled from work for four weeks. OWCP received copies of previously submitted reports and physical therapy reports.

On November 3, 2015 OWCP accepted the claim for right knee sprain/strain.

By decision dated November 6, 2015, OWCP denied appellant's claim for derangement, posterior horn medial meniscus due to old tear, medial meniscus tear, and osteoarthritis to the right knee. It specifically noted that the medical evidence of record was suggestive of a preexisting medical condition in the right knee at the time of the August 20, 2015 incident, as it appeared there was an old tear in the right knee. OWCP found that the medical evidence of record did not establish that the claimed medical conditions resulted from the August 20, 2015 accepted work-related incident.

On December 18, 2015 appellant requested a review of the written record by an OWCP hearing representative from the November 6, 2015 decision.[3] He also submitted additional evidence.

On March 9, 2016 OWCP denied appellant's request for a review of the written record as untimely filed. The hearing representative also denied a discretionary hearing, noting that appellant could request reconsideration before OWCP.

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 timely filed within the applicable time limitation period of FECA,[4] and that an injury was sustained in the performance

[3] The request for review of the written record was postmarked December 15, 2015.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989).

of duty.[5] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

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. 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.[7] 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.[8]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that, on August 20, 2015, his right foot got caught in a deep hole while mowing the lawn, causing him to fall on his right knee, and twist it while in the performance of duty. OWCP accepted that the claimed event occurred as alleged. Therefore, the Board finds that the first component of fact of injury is established. OWCP also accepted that this work incident caused a right knee sprain/strain. However, in a decision dated November 6, 2015, it denied appellant's claim for right knee posterior horn medial meniscus derangement, medial meniscus tear, and osteoarthritis. OWCP specifically noted that the medical evidence submitted was suggestive of a preexisting medical condition in the right knee at the time of the August 20, 2015 work incident.

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained right knee posterior horn medial meniscus derangement, medial meniscus tear, or osteoarthritis causally related to the August 20, 2015 work incident.

The record of evidence contains several reports from Dr. Pompo. In a September 3, 2015 report, he related that appellant stepped into a hole and injured his right knee while mowing the

[5] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *John J. Carlone*, 41 ECAB 354 (1989).

[8] *Id*.

[9] *I.J.*, 59 ECAB 408 (2008).

lawn at work. Dr. Pompo opined, "I think [appellant] tore his medial meniscus when he twisted his knee and fell." However, this opinion is merely speculative support for causal relationship and is, therefore, of diminished probative value.[10] Dr. Pompo checked the box marked "yes" in response to whether the complaints were consistent with his history of the injury/illness and with regard to whether appellant's history of the injury/illness was consistent with his objective findings. However, the checking of a box on a form report, without additional explanation or rationale, is insufficient to establish causal relationship.[11]

In his September 14, 2015 report, Dr. Pompo diagnosed: pain in the right knee; effusion in the right knee; and "derangement of the posterior horn of the medial meniscus due to old tear or injury, right knee." He again checked a box marked "yes" in response to whether the complaints were consistent with his history of the injury/illness and with regard to whether appellant's history of the injury/illness was consistent with his objective findings. However, in this case, Dr. Pompo attributed the condition to an old tear in the right knee and offered no explanation as to how he determined the injury was related to the August 20, 2015 work incident, as opposed to a prior injury. He did not provide medical reasoning to explain how the August 20, 2015 work incident caused or aggravated appellant's diagnosed medical conditions. Without further rationale, Dr. Pompo's report is of limited probative value.[12]

In an August 20, 2015 report, Dr. David noted appellant's history of injury and treatment. He diagnosed strain and sprain of the right knee and effusion of the right knee. However, Dr. David did not address whether right knee posterior horn medial meniscus derangement, medial meniscus tear, and osteoarthritis were due to the August 20, 2015 work incident. Thus, his report is of limited probative value as he did not offer an opinion on causal relationship with respect to the claimed conditions.[13]

Likewise, the other medical evidence of record is of diminished probative value as it does not address how the August 20, 2015 work incident caused or contributed to right knee posterior horn medial meniscus derangement, medial meniscus tear, or osteoarthritis.[14]

The record also contains physical therapy reports. Section 8101(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 the applicable state law. Only medical evidence from a physician as defined by FECA will be accorded probative value. Health care providers such as nurses, acupuncturists,

[10] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[11] *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).

[12] *See supra* note 9.

[13] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that 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).

[14] *See Michael E. Smith*, 50 ECAB 313 (1999).

physician assistants, and physical therapists are not considered physicians under FECA. Thus, their opinions have no probative medical value.[15]

The Board therefore finds that appellant has not established that his right knee posterior horn medial meniscus derangement, medial meniscus tear, or osteoarthritis are causally related to the August 20, 2015 work incident.

On appeal, appellant argues that he did not have a previous tear to his right knee. He explains that he had a prior injury to his left knee in 2007 and he also had surgery in that year. Appellant notes that the problem was with the documentation of his claim. However, he has not submitted evidence sufficient to establish right knee injuries causally related to the August 20, 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, concerning a claimant's entitlement to a hearing before a hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.[16] A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[17] The Branch of Hearings and Review, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and must exercise this discretionary authority in deciding whether to grant a hearing.[18] The Board has held that it must exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[19]

ANALYSIS -- ISSUE 2

A request for a hearing or review of the written record must, as noted above, be made within 30 days after the date of the issuance of an OWCP final decision. Appellant's request for

[15] *Jane A. White*, 34 ECAB 515, 518 (1983).

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.615.

[18] *D.M.*, Docket No. 08-1814 (issued January 16, 2009).

[19] *See R.T.*, Docket No. 08-0408 (issued December 16, 2008).

a review of the written record was postmarked December 15, 2015 and received on December 18, 2015. As the request was submitted more than 30 days following issuance of the November 6, 2015 decision, the Board finds that it was untimely filed.

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its March 9, 2016 decision, properly exercised its discretion by stating that it had considered the matter, but appellant's claim could be equally well addressed through a reconsideration application.

The Board has held that as the only limitation on OWCP's authority is reasonableness, 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.[20] In the present case, the evidence of record does not indicate that OWCP committed any abuse of discretion in connection with its denial of appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his right knee conditions are causally related to an accepted August 20, 2015 work incident. The Board further finds that OWCP properly denied his request for a review of the written record as untimely filed.

[20] *See Daniel J. Perea*, 42 ECAB 214 (1990). There is no evidence of record that OWCP abused its discretion in denying appellant's request for a hearing under these circumstances.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2016 and November 6, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 1, 2016
Washington, DC

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

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

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