

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

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**D.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Merrick, NY, Employer**

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**Docket No. 15-1595  
Issued: January 5, 2016**

*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 July 20, 2015 appellant filed a timely appeal from an April 8, 2015 merit decision and a June 17, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant established an injury in the performance of duty on February 23, 2015, as alleged; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant submitted additional evidence after OWCP's April 8, 2015 merit decision. The Board, however, cannot consider this evidence. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final merit decision. 20 C.F.R. § 501.2(c)(1).

On appeal, appellant notes that he sent his first letter requesting an oral hearing to the wrong address.

### **FACTUAL HISTORY**

On February 23, 2015 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he slipped on ice and twisted his left knee.

By letter dated March 2, 2015, OWCP informed appellant that the evidence was insufficient to support his claim; and advised him to submit further evidence, including medical evidence, in support of his claim.

On February 27, 2015 Dr. Eric Freeman, a Board-certified orthopedic surgeon and attending physician, indicated on a form report that appellant had fallen on the walk while delivering mail. He diagnosed pain and synovitis. Dr. Freeman checked a box indicating that he believed that this condition was caused by the employment activity described. In a February 27, 2015 duty status report, he indicated that appellant had left knee pain and synovitis and was temporarily totally disabled. In a March 5, 2015 work capacity evaluation, Dr. Freeman noted that appellant would be reevaluated on March 10, 2015 for a return to work date. The record also contains progress reports dated February 24 and March 10, 2015. Dr. Freeman provided a history in his February 24, 2015 note of an employment-related accident that occurred the previous day while appellant was on a walkway delivering mail at work. He noted pain in left knee posteromedially and mild effusion. Dr. Freeman noted that he administered an injection. In a March 10, 2015 note, he indicated that appellant required therapy, and that he was going to keep him off work and see him in three weeks.

In an April 8, 2015 decision, OWCP denied appellant's traumatic injury claim as he had not established that a medical condition had been diagnosed in connection with the claimed event.

In an appeal request form received by OWCP on May 27, 2015, but signed by appellant on April 14, 2015, he requested an oral hearing. Appellant submitted new medical evidence with his request.

By decision dated June 17, 2015, OWCP denied appellant's oral hearing request as it was untimely filed. It also reviewed the request at its discretion, and determined that the issue in the case could be equally well addressed by requesting reconsideration and submitting new evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA 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 limitation period, that an injury was sustained in the performance of duty as alleged, and that any disabilities and/or specific conditions for which compensation is claimed are causally related to

the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

To determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.<sup>5</sup> In order to meet his or her burden of proof to establish the fact that he or she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he or she actually experienced the employment injury or exposure at the time, place, and in the manner alleged.<sup>6</sup>

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>7</sup> The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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 of the claimant, 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that it is undisputed that an incident occurred as alleged during appellant's employment on February 23, 2015. However, the medical evidence of record is insufficient to establish that he sustained a medical condition causally related to this accepted incident. Therefore, OWCP properly denied appellant's claim.

In support of his claim, appellant submitted reports by Dr. Freeman, who noted his history and conducted an examination. Dr. Freeman diagnosed pain and synovitis and indicated that these conditions were caused by the employment injury. Although pain is not a diagnosis,<sup>9</sup> the Board finds that he did diagnose synovitis. Accordingly, the Board finds that the evidence established a medical diagnosis. However, the Board finds that appellant failed to submit

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<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> *See supra* note 3.

<sup>6</sup> *Linda S. Jackson*, 49 ECAB 486 (1998).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

<sup>8</sup> *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

<sup>9</sup> The Board has held that the diagnosis of pain does not constitute the basis for payment of compensation. *See Robert Broome*, 55 ECAB 339 (2004); *see also K.D.*, Docket No. 14-1781 (issued August 14, 2015).

rationalized medical evidence establishing that this medical diagnosis was caused by the February 23, 2015 employment injury. While Dr. Freeman noted the history of the employment injury and indicated that it caused appellant's medical condition, he did not provide a medical explanation as to how this incident caused or contributed to appellant's synovitis. The Board has held that medical evidence that does not explain the mechanism of how the employment incident caused the medical diagnosis is of limited probative value on the issue of causal relationship.<sup>10</sup> Thus, Dr. Freeman's reports are insufficient to establish appellant's claim.

An award of compensation may not be based on surmise, conjecture, or speculation. Neither, the fact that appellant's claimed condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish causal relationship.<sup>11</sup>

Because appellant has not provided medical opinion evidence clearly explaining how his accepted employment incident resulted in a specific medical diagnosis, he failed to meet his burden of proof, and OWCP properly denied his claim for compensation.

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 claim before a representative of the Secretary.<sup>12</sup> 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.<sup>13</sup> 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 carriers' date marking and before the claimant has requested reconsideration.<sup>14</sup> 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 powers grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).<sup>15</sup>

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<sup>10</sup> *A.D.* 58 ECAB 149 (2006); *see also L.B.*, Docket No. 11-2055 (issued June 4, 2012).

<sup>11</sup> *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> *Id.* at §§ 10.626, 10.617.

<sup>14</sup> *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>15</sup> *See M.W.*, Docket No. 12-1267 (issued November 2, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

## ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's hearing request, received by OWCP on May 27, 2015 was untimely filed. Appellant's request was made more than 30 days after the issuance of the April 8, 2015 decision. Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>16</sup> For this reason, OWCP properly denied appellant's hearing as a matter of right as it was not timely filed within 30 days.<sup>17</sup>

OWCP also properly exercised its discretion, under Board precedent, to determine whether to grant a hearing in this case. It denied appellant's request as he could equally well address any issues in his case by submitting evidence not previously considered by OWCP and requesting reconsideration. OWCP correctly employed its discretionary authority and the Board finds that OWCP did not abuse its discretion in denying his hearing request.<sup>18</sup>

## CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on February 23, 2015 as alleged. The Board notes that he did establish a medical diagnosis, but did not establish that the diagnosed medical condition was causally related to the accepted employment incident. The Board further finds that OWCP acted within its discretion when it denied appellant's request for an oral hearing as untimely.

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<sup>16</sup> See *William F. Osborne*, 46 ECAB 198 (1994).

<sup>17</sup> *R.D.*, Docket No. 15-1152 (issued September 4, 2015).

<sup>18</sup> See *Lawrence C. Parr*, 48 ECAB 445 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 17, 2015 is affirmed and the decision dated April 8, 2015 is affirmed, as modified.

Issued: January 5, 2016  
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