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

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| **M.F., Appellant** | ) | |
| | ) | **Docket No. 16-0853** |
| **and** | ) | **Issued: July 18, 2016** |
| | ) | |
| **U.S. POSTAL SERVICE, POST OFFICE, Queens Village, NY, Employer** | ) | |

*Appearances:*
*Lisa Fier,* for the appellant[1]
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On March 21, 2016 appellant, through his representative, filed a timely appeal from the December 15, 2015 merit decision and February 16, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that on appeal appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

## ***ISSUES***

The issues are: (1) whether appellant met his burden of proof to establish a concussion and back injury causally related to the January 28, 2015 employment incident; and (2) whether OWCP properly denied his request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

On appeal, appellant's representative contends that appellant sustained a back injury due to his employment-related fall.

## ***FACTUAL HISTORY***

On January 28, 2015 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his head, back, and right elbow and sustained a possible concussion and back injury when he slipped on ice while walking back from a vehicle inspection on that date. He stopped work on the date of injury. The employing establishment advised that appellant was in the performance of duty.

In a January 22, 2015 duty status report (Form CA-17), a physician with an illegible signature provided a history that on January 28, 2015 appellant fell on ice and injured his head and back. The diagnosis is also illegible. The report stated that appellant had not been advised to resume work.

In an OWCP authorization for examination, Form CA-16, issued by the employing establishment on January 28, 2015, a healthcare provider with an illegible signature provided a history that appellant fell on ice and that he hit his head, right elbow, and back. The listed examination findings are illegible findings on physical examination. The provider indicated with an affirmative mark that his condition was caused or aggravated by an employment activity. Appellant was found totally disabled from January 29 to 31, 2015. In a hospital report dated January 28, 2015, the same physician with an illegible signature reiterated appellant's history of injury and provided findings on physical examination and illegible notes.

In a January 31, 2015 Form CA-17 report, another physician with an illegible signature provided a history of injury that on January 28, 2015 appellant slipped on ice and injured his head and back. The report indicated that pain and tenderness were found on examination, diagnosed contusion and strain, and related that appellant had not been advised to resume work.

Appellant submitted several medical records dated February 2, 2015 and completed by Dr. Amir M. Annabi, an attending Board-certified physiatrist. In a note, Dr. Annabi included a history of injury that appellant slipped on ice on January 28, 2015 while employed as a mail carrier. He reported findings on physical and x-ray examination. Dr. Annabi provided an impression of lumbar pain with underlying grade 1 L5-S1 spondylolisthesis of the lumbar spine. In a Form CA-17 report, he reiterated appellant's history and diagnosed lumbar pain. Dr. Annabi reported that appellant was unable to work. In a physical therapy referral form, he ordered physical therapy to treat his diagnosed lumbar condition. Dr. Annabi also prescribed a back brace to treat appellant's lumbar pain.

In a statement dated January 28, 2015, appellant related that while walking back from checking his vehicle at 6:35 a.m. he fell on ice. He banged his head, back, and elbow on the ice.

By letter dated February 20, 2015, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

In follow-up notes and letters dated February 2 and 13, and March 7, 2015, Dr. Annabi provided examination findings and reiterated his prior impressions of lumbar pain with underlying grade 1 L5-S1 spondylolisthesis of the lumbar spine and lumbar pain. He placed appellant off work from February 2 through March 13, 2015.[4] In his March 7, 2015 note, Dr. Annabi released appellant to return to work with no restrictions on March 18, 2015.

A Form CA-17 report dated February 12, 2015 was illegible. In a February 13, 2015 Form CA-17 report, a physician with an illegible signature stated that appellant could not work. In a February 18, 2015 Form CA-17 report, a physician with an illegible signature stated that appellant sustained a sprain due to his injury. Appellant was advised that he could resume work with restrictions on February 19, 2015.

Daily notes completed by appellant's physical therapists addressed the treatment of appellant's spondylolisthesis and lumbago on intermittent dates from February 10 to 18, 2015.

In a February 25, 2015 statement, appellant related that he was on the employing establishment's parking lot at the time of injury. He was given a direct order from his supervisor to perform a vehicle inspection of his postal vehicle.

In a March 25, 2015 decision, OWCP accepted that the January 28, 2015 incident occurred as alleged. However, it denied appellant's claim and determined that the medical evidence of record did not establish a causal relationship between his lumbar condition and the accepted employment incident.

In an April 3, 2015 appeal request form and letter, appellant requested a review of the written record by an OWCP hearing representative. In the April 3, 2015 letter, he contended that accompanying medical evidence and medical evidence already of record established that his lumbar condition was caused by the accepted January 28, 2015 work incident.

In an April 2, 2015 report, Dr. Annabi verified that appellant was under his care due to a lumbar strain with underlying degenerative L5-S1 spondylolisthesis. He reported that appellant sustained a work-related injury on January 28, 2015 due to his fall on the ice while working as a mail carrier. Dr. Annabi noted that a February 2, 2015 lumbar spine x-ray demonstrated grade 1 spondylolisthesis at L5-S1 and disc space narrowing and degenerative changes at the same level. He opined that this lumbar injury was directly related to the on-the-job fall.

By decision dated May 29, 2015, an OWCP hearing representative set aside the March 25, 2015 decision. She found that while Dr. Annabi's April 2, 2015 report was

[4] The Board notes that it appears that Dr. Annabi inadvertently stated that he had placed appellant off work through March 3, 2014 rather than March 3, 2015 as he examined him on February 2 and 13, 2015.

insufficient to accept appellant's lumbar condition as work related, it was sufficient to remand the case to OWCP for further medical development. On remand, the hearing representative instructed OWCP to prepare a statement of accepted facts (SOAF) and obtain a supplemental report from Dr. Annabi identifying the condition that was aggravated by the January 28, 2015 employment incident and providing whether the aggravation was temporary or permanent.

On October 28, 2015 OWCP requested that Dr. Annabi review the accompanying SOAF and afforded him 30 days to respond to its inquiries. Dr. Annabi did not respond.

In a December 15, 2015 decision, OWCP denied appellant's claim and determined that the medical evidence of record did not establish a causal relationship between his lumbar condition and the accepted employment incident.

In an undated appeal request form, postmarked on January 15, 2016, and received by OWCP's Branch of Hearings and Review on January 20, 2016, appellant requested an oral hearing before an OWCP hearing representative.

By decision dated February 16, 2016, the Branch of Hearings and Review denied appellant's request for an oral hearing as it was untimely filed. It found that the request was not postmarked within 30 days of the issuance of the December 15, 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[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence[6] 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.[7]

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.[8] 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.[9]

[5] *Supra* note 1.

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

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

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

[9] *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.[10] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[11] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[12]

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

The Board finds that appellant has not met his burden of proof to establish that he sustained a traumatic injury caused by the accepted January 28, 2015 employment incident. Appellant failed to submit sufficient medical evidence to establish that he sustained a concussion, back and elbow injury causally related to the accepted employment incident.

Appellant submitted several reports from Dr. Annabi, an attending physician. While Dr. Annabi opined in an April 2, 2015 report that appellant's lumbar strain with underlying degenerative L5/S1 spondylolisthesis was directly caused by the accepted January 28, 2015 employment incident, he did not explain how falling on ice caused or aggravated the diagnosed condition. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.[13] Dr. Annabi's remaining notes, reports, referral form, and prescription, addressed appellant's lumbar conditions, disability for work, and medical treatment, but failed to provide an opinion stating that the diagnosed conditions were caused or aggravated by the accepted work 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.[14] The Board notes that on October 28, 2015 OWCP provided Dr. Annabi an opportunity to further comment on appellant's condition. However, Dr. Annabi did not respond.

The daily notes of appellant's physical therapists which addressed the treatment of appellant's lumbar conditions have no probative medical value. A physical therapist is not a physician as defined under FECA.[15]

[10] *John J. Carlone*, 41 ECAB 354 (1989); *see* 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).

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

[12] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[13] *See R.C.*, Docket No. 15-315 (issued May 4, 2015); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[14] *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).

[15] 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

The reports dated January 22 to February 18, 2015 were from a provider with an illegible signature. These reports have no probative medical value, as it cannot be established that the authors are physicians.[16]

Therefore, the Board finds that there is insufficient medical evidence to establish that appellant sustained concussion, right arm, and neck injuries causally related to the accepted July 8, 2015 employment incident.

On appeal, appellant's representative contends that appellant sustained a back injury due to his employment-related fall. For reasons stated above, the Board finds that the weight of the medical evidence does not establish that appellant sustained a back condition causally related to the accepted January 28, 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.

The Board notes that the employing establishment executed a Form CA-16 on January 28, 2015 authorizing medical treatment. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim.[17] Although OWCP denied appellant's claim for an injury, it did not address whether he is entitled to reimbursement of medical expenses pursuant to the Form CA-16.

## ***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.[18] 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.[19] 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.[20] 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] *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[17] *See D.M.*, Docket No. 13-535 (issued June 6, 2013). *See also* 20 C.F.R. §§ 10.300, 10.304.

[18] 5 U.S.C. § 8124(b)(1).

[19] 20 C.F.R. §§ 10.616, 10.617.

[20] *Id.* at § 10.616(a).

powers grant or deny appellant's request and must exercise its discretion.[21] 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).[22]

## ***ANALYSIS -- ISSUE 2***

The Board finds that OWCP properly determined that appellant's request for an oral hearing was untimely filed as it was made more than 30 days after the issuance of OWCP's December 15, 2015 merit decision. The undated form, on which appellant requested the hearing, was postmarked on January 15, 2016. The time limitation to request an oral hearing from OWCP's Branch of Hearings and Review expired on January 14, 2016, 30 days after OWCP's December 15, 2015 decision.[23] Section 8124(b)(1) sets an unequivocal time limitation for requesting a hearing.[24] Because the hearing request was untimely filed, appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA.

Although appellant's request for a hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its February 16, 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.[25] In this case, there is no evidence of record that OWCP abused its discretion by denying appellant's hearing request. Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish a concussion and back injury causally related to the January 28, 2015 employment incident. The Board also finds that OWCP properly denied his request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

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

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

[23] 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).

[24] *See William F. Osborne*, 46 ECAB 198 (1994).

[25] *Samuel R. Johnson*, 51 ECAB 612 (2000).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 16, 2016 and December 15, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 18, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy 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