

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

L.S., Appellant)	
)	
and)	Docket No. 15-0698
)	Issued: March 25, 2016
U.S. POSTAL SERVICE, POST OFFICE,)	
Brooklyn, NY, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 11, 2015 appellant filed a timely appeal from a September 19, 2014 merit decision and a December 19, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over merits of this case.³

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a right foot injury in the performance of duty on July 14, 2014, as alleged; and

¹ The Board notes that additional medical evidence was received after OWCP's September 19, 2014 merit decision. As this new evidence was not considered by OWCP in reaching a decision, the Board lacks jurisdiction to review this new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

² 5 U.S.C. § 8101 *et seq.*

³ Appellant filed a timely request for oral argument before the Board. By order dated December 7, 2015, the Board, after exercising its discretion, denied appellant's request for oral argument. *See Order Denying Request for Oral Argument*, Docket No. 15-0698 (issued December 7, 2015).

(2) whether OWCP properly denied his request for an oral hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On August 4, 2014 appellant, then a 51-year-old chauffeur carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 14, 2014 he experienced pain in his right foot due to excessive walking and stepping on and off truck steps and house steps. He stopped work on August 1, 2014.

With his claim, appellant submitted an August 4, 2014 statement indicating that he started feeling pain in his right foot on July 14, 2014 and pain his lower back on August 1, 2014. He indicated that his back pain intensified on August 2, 2014 and he used sick leave.⁴ Appellant requested to see a doctor as his back and foot were still painful.

In an August 4, 2014 Form CA-16, Dr. Sudha P. Patel, a general surgeon, noted the history of injury as “while on truck, patient was stepping off and felt pain in right heel and foot, excessive walking on and off truck steps and houses; right foot and right heel pain.” She diagnosed right foot and ankle derangement and possible plantar fascia with exacerbation of symptoms. Dr. Patel opined, with a checkmark in a box marked “no,” that the diagnoses were not caused or aggravated by the described employment activity. She further opined that appellant would be unable to work for three to four weeks and needed physical therapy.

In an August 4, 2014 duty status report (Form CA-17), Dr. Patel noted that on July 14, 2014 appellant was walking and climbing up and down steps. She advised there was possible plantar fascia with exacerbation of symptoms and diagnosed right foot and ankle derangement. Dr. Patel opined that appellant was totally disabled and would require physical therapy three times a week for three to four weeks.

A copy of an August 4, 2014 right foot x-ray was also submitted.

By letter dated August 12, 2014, OWCP advised appellant of the deficiencies in his claim and provided him 30 days in which to submit additional factual and medical evidence, to include a diagnosis of a medical condition sustained as a result of the claimed events. Appellant was asked to provide a statement describing his injury and explaining the delay in filing his claim and seeking treatment. He was asked to provide a statement from any persons who witnesses to the injury or had immediate knowledge of it or other documentation that supported his claim. Appellant was asked to describe his condition immediately following the occurrence and leading up to the first medical treatment. He was also asked to comment on any other disabilities and/or medical conditions that he may have. Appellant was also asked to clarify if he was claiming a traumatic injury or occupational disease based on the provided definition.

On August 24, 2014 OWCP received an August 5, 2014 report from Dr. Patel. In this narrative report, Dr. Patel stated that appellant was seen on August 4, 2014 for back injury sustained at work on August 1, 2014. Appellant was noted to have experienced lower back pain on August 1, 2014 while working lifting relays and stacking them in the relay box. A diagnosis

⁴ The record indicates that appellant has filed a separate claim for his alleged back injury of August 1, 2014, OWCP File No. xxxxxx827.

of low back derangement and lumbosacral radiculopathy was provided. Dr. Patel opined that appellant was disabled and required physical therapy three times a week for four weeks. Duplicate copies of the August 4, 2014 Form CA-16 and Form CA-17 were provided along with an August 14, 2014 letter from the nurse intervention program noting a new claim for a back injury was being adjudicated.

In an August 29, 2014 duty status report, Dr. Patel noted the date of injury of July 14, 2014 and referred to his initial report for a description. She described clinical findings of possible plantar fascia with dorsal calcaneal spur and diagnosed right foot and ankle deformity and advised appellant was totally disabled.

In a September 2, 2014 attending physician's report (Form CA-20), Dr. Patel indicated findings of plantar dorsal calcaneal spurs on right foot; subluxation of the foot; degenerative big toe and joint. He diagnosed possible plantar fascia with exacerbation of symptoms and right foot and ankle derangement. Dr. Patel opined that the diagnosed conditions were caused or aggravated by the employment activity as "walking, standing and going up and down truck, carrying heavy boxes aggravates patient's condition and pains in right foot." Authorization for a magnetic resonance imaging (MRI) scan of right foot was requested.

By decision dated September 19, 2014, OWCP denied appellant's claim as the evidence was insufficient to establish that the incident occurred as alleged since appellant did not clarify what type of injury he was claiming or explain his delay in filing his claim and receiving medical treatment. He also did not describe his condition between initial injury and first medical treatment, nor did he comment on any previous medical conditions or injuries he had. In addition, OWCP also informed appellant that the medical evidence of record was insufficient to establish that a diagnosed medical condition was causally related to the work injury or event. It therefore concluded that appellant had not established fact of injury.

Appellant requested an oral hearing before OWCP's Branch of Hearings and Review, by letter postmarked October 27, 2014. With his request for an oral hearing, appellant submitted additional medical evidence.

By decision dated December 19, 2014, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely without a merit review. It considered his request within its discretion, but found that his case could be addressed equally well by a request for reconsideration and the submission of evidence showing that he sustained an injury as defined by FECA.

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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the

employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

OWCP regulations, at 20 C.F.R. § 10.5(ee) 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.⁷ 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.⁸ 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.⁹ 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.¹⁰

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹¹ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.¹² The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish an injury in the performance of duty on July 14, 2014, as alleged. Appellant claimed to have experienced right foot pain on July 14, 2014 due to excessive walking and stepping on and off truck steps and house steps. However, he did not file his claim until August 4, 2014 and did not seek medical care until August 4, 2014. OWCP asked appellant to provide a detailed description as to how his injury occurred, but he did not provide the requested factual information and there were no reported witnesses.

Appellant bears the burden of establishing the essential elements of his claim, which includes fact of injury. Other than noting that he had engaged in excessive walking and stepping

⁵ C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁶ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 5.

⁹ *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

¹⁰ *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 5.

¹¹ *A.D.*, 58 ECAB 149 (2006); *Michael S. Mina*, 57 ECAB 379 (2006); *Y.J.*, Docket No. 08-1167 (issued October 7, 2008).

¹² *Sedi L. Graham*, 57 ECAB 494 (2006); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

¹³ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

on and off truck steps and house steps when he felt right foot pain, he did not provide specific details of any particular work activity, such as how many hours a day of walking he performed, or the location and time of the incident regarding steps that gave rise to his right foot pain. An employee's statement alleging that an incident or exposure occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹⁴ In the absence of such a statement, OWCP properly found that appellant failed to establish fact of injury. Appellant's description fails to adequately detail the alleged work incident, as required in a traumatic injury claim. His description is vague and does not relate with specificity the circumstances of the injury, or identify the actual cause.¹⁵

The Board notes that while Dr. Patel indicates that the same history as provided by appellant in his August 4 and September 2, 2014 CA-16 form reports and diagnosed right foot and ankle derangement and possible plantar fascia with exacerbation of symptoms, he provided conflicting opinions on causal relationship. In his August 4, 2014 CA-16 form report, Dr. Patel indicated by checking a box marked "no" that appellant's conditions were not caused or aggravated by his employment activities. However, in his September 2, 2014 CA-20 form report, Dr. Patel opined that the possible plantar fascia with exacerbation of symptoms and right foot and ankle derangement were caused or aggravated by the employment activity as "walking, standing and going up and down truck, carrying heavy boxes aggravates patient's condition and pains in right foot." Due to Dr. Patel's inconsistent findings without medical rationale reconciling her changed opinion, appellant has not established that the incident occurred in the performance of duty, as alleged.¹⁶

The Board also notes that Dr. Patel prepared a narrative report dated August 5, 2014, in which he related that appellant was seen on August 4, 2014 for a work-related low back injury of August 1, 2014. In this report, Dr. Patel indicated that appellant was disabled from work for four weeks, but he did not mention appellant's right foot injury, instead he referenced appellant's back injury.

In its August 12, 2014 development letter, OWCP informed appellant that the information initially provided was insufficient to support his claim. Appellant was provided a series of questions regarding the factual circumstances of the alleged incident and advised to provide details which would clarify the nature of his claim. He provided no factual response, however, to OWCP's request for information.

Appellant has not met his burden of proof to establish that he sustained a right foot injury on July 14, 2014.¹⁷

¹⁴ *C.S.*, *supra* note 5; *Sedi L. Graham*, *supra* note 12.

¹⁵ *L.W.*, Docket No. 15-1191 (issued September 8, 2015).

¹⁶ The Board has found that the opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a completed and accurate medical and factual background of the claimant. *See L.M.*, Docket No. 09-1810 (issued March 23, 2010); *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁷ *T.C.*, Docket No. 12-579 (issued July 2, 2012); *Paul Foster*, 56 ECAB 208 (2004).

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 10.607.¹⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) 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.¹⁹ Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.²⁰ The 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.²¹ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.²²

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.²³

ANALYSIS -- ISSUE 2

In a decision dated September 19, 2014, OWCP denied appellant's traumatic injury claim. The record indicates that appeal rights accompanied the decision. Appellant requested an oral hearing in a letter postmarked October 27, 2014. By decision dated December 19, 2014, OWCP denied his request for an oral hearing as untimely under section 8124 of FECA.

The 30-day time period for determining the timeliness of appellant's review of the written record began on September 20, 2014 and ended on October 20, 2014. As appellant's request for a hearing was postmarked October 27, 2014, he was not entitled to an oral hearing as a matter of right.

¹⁸ The Board notes that the employing establishment issued a properly completed Form CA-16 to Dr. Patel which authorized medical treatment as a result of the employee's claim for an employment-related injury. The Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. On return of the record, OWCP should adjudicate whether appellant's examination or treatment is reimbursable under the form. *See W.V.*, Docket No. 14-1608 (issued November 19, 2014).

¹⁹ 5 U.S.C. § 8124(b)(1).

²⁰ 20 C.F.R. § 10.615.

²¹ *Id.* at § 10.616(a).

²² *See Leona B. Jacobs*, 55 ECAB 753 (2004).

²³ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right. It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to OWCP with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An 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.²⁴ In this case, the evidence of record does not establish that OWCP committed any action in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion. Consequently, OWCP properly denied his request for an oral hearing as untimely under section 8124 of FECA.

CONCLUSION

The Board finds that appellant has not established that he sustained a right foot condition in the performance of duty on July 14, 2014, as alleged. Furthermore, the Board finds that OWCP properly denied his request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the December 19 and September 19, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 25, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁴ See *L.W.*, 59 ECAB 471 (2008).