United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 16-0994**
	)	**Issued: September 9, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Reading, PA, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 11, 2016 appellant filed a timely appeal from a December 1, 2015 merit decision and a March 3, 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 sustained an injury causally related to an October 19, 2015 employment incident; and (2) whether OWCP properly denied his request for a review of the written record under 5 U.S.C. § 8124 as untimely.

[1] Appellant submitted new evidence with his appeal and subsequent to the December 1, 2015 merit decision. The Board has no jurisdiction to review evidence which was not before OWCP at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c)(1). Thus, the Board may not review it for the first time on appeal.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 22, 2015 appellant, then a 61-year-old truck driver, filed a traumatic injury claim (Form CA-1) alleging that on October 19, 2015 he injured his knee pushing mail out of a truck. He stopped work on October 19, 2015.

Appellant received treatment for right knee pain on October 20, 2015 from a physician assistant.

In a report dated October 21, 2015, Dr. Vera N. Guertler, Board-certified in family medicine, noted a history of appellant experiencing pain in the back of his right knee after unloading mail from a truck and rolling carts. She diagnosed acute right knee pain and unspecified osteoarthritis. Dr. Guertler advised appellant to file an incident report at work. In an October 21, 2015 work status summary form, she diagnosed right knee pain and unspecified osteoarthritis and found that he should remain off work.

By letter dated October 27, 2015, OWCP requested additional factual and medical information from appellant, including a detailed report from his attending physician addressing the causal relationship between any diagnosed condition and work factors.

In a duty status report (Form CA-17) dated November 5, 2015, Dr. Guertler diagnosed right knee pain and checked the box marked "yes" that the history of injury given by appellant corresponded to experiencing knee pain after pushing an overloaded container. She found work restrictions. In a work status summary dated November 5, 2015, Dr. Guertler advised that appellant could resume work with restrictions on that date. The form provided a diagnosis of right knee pain, unspecified osteoarthritis, and an unspecified meniscus tear of the right knee. Dr. Guertler also completed a work restriction evaluation (Form OWCP-5c) providing limitations.

A physician assistant, on November 13, 2015, diagnosed right knee osteoarthritis and medial meniscus tear. On November 23, 2015 a nurse evaluated appellant for right knee pain.

By decision dated December 1, 2015, OWCP denied appellant's claim as the medical evidence was insufficient to establish a diagnosed medical condition as a result of the accepted work incident.

On February 23, 2016 appellant requested a review of the written record by a hearing representative of OWCP's Branch of Hearings and Review. In a decision dated March 3, 2016, OWCP's Branch of Hearings and Review denied his request as it was not made within 30 days of the December 1, 2015 decision. It exercised its discretion by performing a limited review and found that the matter could be equally well resolved by submitting a request for reconsideration to OWCP with supporting evidence.

On appeal appellant describes the work duties to which he attributed his condition. He notes that the containers that he pushed were overloaded and violated standards of the Occupational Safety & Health Administration (OSHA). Appellant maintains that he did not receive proper treatment from the physician assistant. He notes that he ultimately underwent an

ultrasound and was diagnosed in the hospital with deep vein thrombosis and a pulmonary embolism.

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.[3] 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.[4]

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition relates to the employment incident.[7]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an injury to his right knee on October 19, 2015 after he pushed containers filled with mail off of his truck. OWCP accepted that the incident occurred at the time, place, and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that he sustained an injury as a result of this employment incident.

The Board finds that appellant has not established that the October 19, 2015 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[8]

On October 21, 2015 Dr. Guertler discussed appellant's history of pain in his right knee after unloading mail from a truck and rolling carts. She diagnosed acute right knee pain and unspecified osteoarthritis and noted that he should fill out an incident report at work. In an

[3] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[4] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

[6] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[7] *Id.*

[8] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

October 21, 2015 work status summary form, Dr. Guertler diagnosed right knee pain and unspecified osteoarthritis and found that appellant should remain off work. In her October 21, 2015 reports, however, she did not specifically attribute the diagnosed conditions to the October 19, 2015 work incident or provide any rationale for her opinion. A physician must provide a narrative description of the employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.[9]

In a November 5, 2015 form report, Dr. Guertler diagnosed right knee pain and checked a box marked "yes" that the history of injury given by appellant corresponded to his knee pain after pushing an overloaded container. She found work restrictions. The Board has held, however, that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[10]

In a work status summary dated November 5, 2015, Dr. Guertler advised that appellant could resume work with restrictions on that date. The form provided a diagnosis of right knee pain, unspecified osteoarthritis, and an unspecified meniscus tear of the right knee. Dr. Guertler also completed a work restriction evaluation. She did not, however, address the cause of the diagnosed conditions. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[11]

Appellant received treatment from a physician assistant on October 20 and November 13, 2015 and from a nurse on November 23, 2015. Evidence from a physician assistant or nurse does not constitute competent medical evidence under FECA as neither is defined as a "physician" by section 8101(2) of FECA.[12]

On appeal appellant alleges that he pushed containers that were overloaded in violation of OSHA standards. The Board's jurisdiction, however, is limited to reviewing final adverse decisions of OWCP in matters arising under FECA.[13]

Appellant further contends that the physician assistant did not provide appropriate treatment and notes that he was later diagnosed with deep vein thrombosis and a pulmonary embolism. He has the burden, however, to submit evidence showing that he sustained a

[9] *John W. Montoya*, 54 ECAB 306 (2003).

[10] *Deborah L. Beatty*, 54 ECAB 334 (2003) (the checking of a box "yes" in a form report, without additional explanation or rationale, is insufficient to establish causal relationship).

[11] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[12] 5 U.S.C. § 8101(2) provides that a physician includes, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *V.C.*, Docket No. 16-0642 (issued April 19, 2016); *Allen C. Hundley*, 53 ECAB 551 (2002).

[13] 20 C.F.R. §§ 501.2(c); 501.3(a).

diagnosed condition as a result of the October 19, 2015 work incident.[14] This appellant has not done.

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 and 20 C.F.R. §§ 10.605 through 10.607.

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.[15] 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.[16] 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.[17] 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.[18]

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.[19]

ANALYSIS -- ISSUE 2

In its December 1, 2015 decision, OWCP found that appellant had not submitted sufficient medical evidence to establish an injury on October 19, 2015. On February 23, 2016 appellant requested a review of the written record. His request was made more than 30 days after the December 1, 2015 decision. Consequently, appellant's request was untimely and he was not entitled to a review of the written record as a matter of right.[20]

OWCP has the discretionary authority to grant an oral hearing or review of the written record even though a claimant is not entitled to such as a matter of right. In its March 3, 2016 decision, it properly exercised its discretion by considering the matter in relation to the issue involved and determining that the issue could be equally well addressed by appellant requesting

[14] *See Jaja J. Asaramo*, 55 ECAB 104 (2004).

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. § 10.615.

[17] *Id*. at § 10.616(a).

[18] *See Leona B. Jacobs*, 55 ECAB 753 (2004).

[19] 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).

[20] *Id*. at § 10.616(a).

reconsideration and submitting medical evidence supporting that he sustained an injury on October 19, 2015. The Board has held that 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.[21] OWCP did not abuse its discretion in this case by denying a discretionary hearing.

CONCLUSION

The Board finds that appellant has not established an injury causally related to an October 19, 2015 employment injury. The Board further finds that OWCP properly denied his request for a review of the written record under 5 U.S.C. § 8124 as untimely.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2016 and December 1, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 9, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] *See Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).