

FACTUAL HISTORY

On January 12, 2017 appellant, then a 56-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that he strained his left shoulder on August 26, 2016 when he tried to pick up a carrier case that had tipped over. He explained that he did not initially feel any major pain, but his left shoulder got heavier. Appellant did not stop work.

In a September 6, 2016 left shoulder magnetic resonance imaging (MRI) scan report, Dr. Austin Belton, a Board-certified diagnostic radiologist, noted a clinical history of left shoulder pain. He related that appellant “lifted a 120-pound box and heard a ‘pop.’” Dr. Belton indicated that appellant had left shoulder surgery on July 12, 2007. He reported a large full-thickness tear of the distal-anterior supraspinatus tendon with extensive fraying of the torn tendon margins, partial-thickness tear of the distal-superior fibers of the subscapularis tendon with associated medial subluxation of the long head of the biceps tendon, tendinopathy of the intrascapular portion of the long head of the biceps tendon, mild degenerative hypertrophy of the acromioclavicular (AC) joint, mild degenerative changes of the glenohumeral joint, and a thin layer of fluid in the subacromial-subdeltoid bursa.

By letter dated January 25, 2017, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It requested that he respond to the attached factual development questionnaire in order to substantiate that the claimed August 26, 2016 work incident occurred as alleged and to provide medical evidence to establish a diagnosed condition causally related to the alleged incident. Appellant was afforded 30 days to submit this evidence.

Appellant was treated by Dr. Douglas J. Keele, an orthopedic surgeon. In a January 30, 2017 attending physician’s report (Form CA-20), Dr. Keele noted a date of injury of August 26, 2016. He explained that appellant squatted down to lift a case, approximately weighing 120 pounds, and felt immediate pain in his left shoulder. Dr. Keele reported clinical findings as noted in the September 6, 2016 left shoulder MRI scan and diagnoses of other injury of muscles and tendons of the left shoulder rotator cuff (ICD-840.4). He checked a box marked “yes” indicating that appellant’s condition was caused or aggravated by the described employment activity. Dr. Keele noted: “directly related to lifting 120-pound case at work” and indicated that appellant was able to resume regular work on September 21, 2016.

OWCP denied appellant’s claim by decision dated February 28, 2017, finding that the evidence of record was insufficient to establish that the August 26, 2016 incident occurred as alleged. It noted that he failed to respond to the specific questions posed in the January 25, 2017 development letter and attached questionnaire.

Following OWCP’s February 28, 2017 decision, appellant submitted a September 1, 2016 report by Shauna L. Christopherson, a nurse practitioner. Ms. Christopherson related that on August 26, 2016 appellant squatted down to lift a box, weighing approximately 120 pounds, and felt immediate pain in his left shoulder once he was standing up and holding the box at waist level. Appellant indicated that he still experienced pain in the lateral aspect of his shoulder radiating halfway down the upper arm. Upon physical examination of appellant’s left shoulder, Ms. Christopherson noted tenderness in the left shoulder in the infraspinatus and supraspinatus tendons and pain on range of motion with flexion and abduction. She related that shoulder x-ray

examination showed no acute avulsions, fractures, or dislocation. Ms. Christopherson diagnosed left shoulder pain.

On March 28, 2017 OWCP also received a September 13, 2016 report from Dr. Keele. Dr. Keele noted that appellant was evaluated for causation of left shoulder pain following an August 26, 2016 work injury. He described that appellant squatted down to lift a case, weighing approximately 120 pounds, and felt immediate pain in his left shoulder when he stood up and held the case at waist level. Dr. Keele reviewed appellant's history and conducted an examination. He reported tenderness on the left shoulder and abnormal impingement test bilaterally. Dr. Keele also noted that O'Brien's test caused mild discomfort in the anterior shoulder. He diagnosed other injury of muscles and tendon of the left shoulder rotator cuff (ICD-840.4), left shoulder primary osteoarthritis (ICD-715.11), and left shoulder pain (ICD-719.41). Dr. Keele noted that appellant did not have any problems or pain in his left shoulder until after he lifted the 120-pound object at work. He opined that, if the history given by appellant was accurate, "the medical presentation [was] a direct result of a work-related activity, specifically the work injury event as described above."

OWCP did not receive any correspondence or additional evidence from appellant from March 28 to May 1, 2017.

In an appeal request form dated April 25, 2017, postmarked on April 27, 2017, and received by OWCP's Branch of Hearings and Review on May 2, 2017, appellant requested a telephonic hearing before an OWCP hearing representative.

By decision dated May 10, 2017, an OWCP hearing representative denied appellant's request for a telephone hearing, finding that it was untimely filed as it was not postmarked within 30 days of the issuance of the February 28, 2017 OWCP merit decision. After exercising its discretion, the hearing representative further found that the issue in the case could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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,³ including that he or she is an "employee" within the meaning of FECA,⁴ and that a claim was filed within the applicable time limitation.⁵ An employee must also establish that he or she sustained an injury in the performance of duty and that any specific condition or disability for which compensation is claimed is causally related to that employment injury.⁶

² *Supra* note 1.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951).

⁵ *R.C.*, 59 ECAB 42 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954).

⁶ *G.T.*, 59 ECAB 447 (2008); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

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.⁷ There are two components involved in establishing fact of injury. First, an employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.⁸ Second, an employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁹

The employee has the burden of proof to establish the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹⁰ An employee has not met his or her burden of proof in establishing the occurrence of an injury where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statement in determining whether a *prima facie* case has been established. An employee's statement alleging that an injury 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.¹¹

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a left shoulder injury when he tried to pick up a heavy case at work on August 26, 2016. In its February 28, 2017 decision, OWCP denied the claim, finding that he had not established that the incident occurred at the time, place, or in the manner alleged.

The Board finds that appellant failed to establish that he sustained a left shoulder injury in the performance of duty on August 26, 2016, as alleged. The only description of the alleged August 26, 2016 work incident is contained in appellant's Form CA-1. Appellant indicated that on August 26, 2016 at 6:30 a.m. he strained his left shoulder when he tried to pick up a carrier case that had tipped over. The Board finds that appellant's description of the traumatic incident is vague and fails to provide any specific detail or evidence establishing that the August 26, 2016

⁷ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁸ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁹ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

¹¹ *D.B.*, 58 ECAB 529 (2007).

incident occurred as alleged.¹² By letter dated January 25, 2017, OWCP requested that appellant respond to its factual development questionnaire and provide a more detailed description of the alleged employment incident in order to establish the factual element of his claim. Appellant did not respond to the questionnaire, nor did he provide any supplemental statement or detailed information surrounding the alleged August 26, 2016 work incident.¹³ The evidence of record does not contain a detailed account of the alleged injury sufficient to establish that the incident occurred at the time, place, and in the manner alleged.¹⁴ Appellant related that he tried to pick up a carrier case that had tipped over. He did not describe the mechanism of injury, including whether he had to reach up or down to reach the carrier case, the weight of the case, or why he was not able to actually pick up the case.¹⁵ Accordingly, the Board finds that appellant has not provided sufficient detail to establish that the August 26, 2016 traumatic incident occurred as alleged.¹⁶

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 or her claim before a representative of the Secretary.¹⁷ 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.¹⁸ 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.¹⁹ 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 claimant's request and must exercise its discretion.²⁰ Its procedures

¹² See *C.E.*, Docket No. 17-0106 (issued April 20, 2017).

¹³ See *R.V.*, Docket No. 15-1911 (issued December 11, 2015).

¹⁴ See *S.R.*, Docket No. 15-1274 (issued August 25, 2015); *M.B.*, Docket No. 11-1785 (issued February 15, 2012).

¹⁵ *Supra* note 13.

¹⁶ *P.T.*, Docket No. 14-598 (issued August 5, 2014); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹⁷ 5 U.S.C. § 8124(b)(1).

¹⁸ 20 C.F.R. §§ 10.616, 10.617.

¹⁹ *Id.* at § 10.616(a).

²⁰ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

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).²¹

ANALYSIS -- ISSUE 2

On February 28, 2017 OWCP denied appellant's traumatic injury claim, finding that he had not established work-related left shoulder injury in the performance of duty on August 26, 2016, as alleged. Appellant requested a telephonic hearing by appeal request form dated April 25, 2017, postmarked April 27, 2017, and received by OWCP on May 2, 2017. OWCP denied appellant's request for a telephone hearing by decision dated May 10, 2017 because the request was untimely filed.

The Board finds that OWCP properly determined that appellant's request for a telephone hearing was untimely as it was filed more than 30 days after the issuance of OWCP's February 28, 2017 merit decision. Because the postmark date was more than 30 days after the date of OWCP's February 28, 2017 decision, he was not entitled to a hearing as a matter of right.²² Although appellant's request for hearing before an OWCP hearing representative was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.²³ In its May 10, 2017 decision, OWCP properly considered the matter in relation to the issue involved and that additional evidence and argument 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.²⁴ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a telephone hearing. Accordingly, the Board finds that OWCP properly denied appellant's request for a telephonic hearing.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a left shoulder injury in the performance of duty on August 26, 2016, as alleged. The Board also finds that OWCP properly denied appellant's request for a telephonic hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124.

²¹ See *R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

²² 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).

²³ *Supra* note 21.

²⁴ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 10 and February 28, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 5, 2017
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