

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

E.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Juan, PR, Employer**

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**Docket No. 17-0742
Issued: June 26, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 14, 2017 appellant filed a timely appeal from an October 21, 2016 merit decision and a January 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board had jurisdiction over the merits of this case.²

ISSUES

The issue are: (1) whether appellant met his burden of proof to establish a traumatic lumbar injury in the performance of duty on August 10, 2016, as alleged; and (2) whether OWCP properly denied appellant's request for a telephonic oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new evidence accompanying his request for appeal. The Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. Thus, the Board is precluded from reviewing this evidence. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On September 9, 2016 appellant, then a 54-year-old electrical technician, filed a traumatic injury claim (Form CA-1) alleging that on August 10, 2016 he reached upward while underneath a roller conveyor and sustained a left-sided herniated lumbar disc. On the reverse of the form, the employing establishment controverted the claim, contending that appellant had an unspecified preexisting condition.

In a September 16, 2016 letter, OWCP notified appellant of the type of additional factual and medical evidence needed to establish his claim, including factual evidence supporting that the August 10, 2016 incident occurred as alleged, and a medical report from his attending physician explaining how and why that event would cause the claimed lumbar injury. It afforded him 30 days to submit such evidence.

In an October 12, 2016 report, Dr. Frank Marin Negrón, an attending family practitioner, diagnosed lumbar intervertebral disc disorders with radiculopathy. He noted performing a lumbar laminectomy and discectomy on an unspecified date.

On October 14, 2016 appellant filed a claim for compensation (Form CA-7) for the period October 1 to 14, 2016.

By decision dated October 21, 2016, OWCP denied appellant's traumatic injury claim finding that he failed to establish fact of injury. It found that the factual evidence of record was insufficient to support that the August 10, 2016 incident occurred at the time, place, and in the manner alleged. OWCP also found that appellant did not submit medical evidence referring to an August 10, 2016 incident or diagnosing an injury related to it.

In a November 1, 2016 appeal request form, postmarked November 23, 2016, appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. He provided his November 2, 2016 letter responding to OWCP's September 16, 2015 questions. In an August 11, 2016 accident report, appellant's supervisor confirmed that, on August 10, 2016, appellant had reported a low back sprain sustained when working to repair a roller beneath an incline conveyor.³ Appellant also provided medical evidence.

By decision dated January 27, 2017, OWCP's Branch of Hearings and Review denied appellant's hearing request as a matter of right, finding that his request was not timely filed within 30 days of its October 21, 2016 decision. It exercised its discretion and performed a limited review of the evidence following the October 21, 2016 decision. OWCP further denied the request as the issue in the case could be addressed equally well by submitting new, relevant evidence or argument accompanying a valid request for reconsideration.

³ Appellant filed claims for compensation (Form CA-7) for the periods October 15, 2016 to January 6, 2017, and January 21 to February 3, 2017. He also filed claims for medical reimbursement (Form OWCP-915).

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.⁴ 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.⁵

To determine whether an employee sustained a traumatic 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 that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident that is alleged to have occurred.⁶ 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.⁷

An employee’s statement 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.⁸ Moreover, an injury does not have to be confirmed by eyewitnesses. The employee’s statement, however, must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such 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 doubt on an employee’s statement in determining whether a *prima facie* case has been established.⁹

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a left-sided lumbar injury on August 10, 2016 when he reached upward while underneath a roller conveyor. OWCP denied the claim on October 21, 2016, finding that appellant failed to establish that the August 10, 2016 injury occurred at the time, place, and in the manner alleged.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁸ *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

⁹ *Betty J. Smith*, 54 ECAB 174 (2002).

In support of his claim, appellant provided an October 12, 2016 report from Dr. Negron who diagnosed lumbar intervertebral disc disorders with radiculopathy. Dr. Negron's opinion is not relevant in establishing whether or not the August 10, 2016 occurred as alleged as he does not provide a history of the alleged injury.

OWCP notified appellant by September 16, 2016 letter of the additional evidence needed to establish his claim, including factual evidence supporting that the August 10, 2016 incident occurred as alleged. As he did not submit such evidence, appellant has failed to meet his burden of proof.¹⁰

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, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.¹¹ A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.¹² A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.¹³ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.¹⁴ OWCP procedures, which require it to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.¹⁵

¹⁰ *Alvin V. Gadd*, 57 ECAB 172 (2005).

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 20 C.F.R. § 10.615.

¹³ *James Smith*, 53 ECAB 188 (2001); 20 C.F.R. § 10.616(a).

¹⁴ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁵ *Teresa M. Valle*, 57 ECAB 542 (2006).

ANALYSIS -- ISSUE 2

OWCP denied appellant's traumatic injury claim by decision issued October 21, 2016, finding that he had not established fact of injury as he provided insufficient evidence to establish the claimed August 10, 2016 incident as factual. Appellant requested a telephonic oral hearing by letter postmarked November 23, 2016 and received by OWCP on November 29, 2016. His request was made more than 30 days after the date of issuance of OWCP's prior October 21, 2016 merit decision. Therefore, OWCP properly found in its January 27, 2017 decision that appellant had not timely requested a telephonic oral hearing because his request was not made within 30 days of its October 21, 2016 decision.¹⁶

OWCP then properly exercised its discretion by declaring that it had considered the matter and had denied appellant's request for a review of the written record because the fact of injury issue could equally well be addressed through a request for reconsideration.¹⁷ The Board has held that the only limitation on OWCP's authority is reasonableness and 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.¹⁸ In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for a telephonic oral hearing. Accordingly, the Board finds that OWCP properly denied his request.¹⁹

On appeal, appellant contends that the evidence he submitted between the October 21, 2016 and January 27, 2017 decisions, including the August 11, 2016 accident report from his supervisor, was sufficient to establish the factual and medical aspects of his claim. He contends that OWCP has not yet conducted a thorough review of this evidence. As noted, OWCP's January 27, 2017 decision did not address the merits of the claim. The evidence submitted after the October 21, 2016 decision was not considered in reaching a final decision and cannot be considered by the Board for the first time on appeal.²⁰ However, appellant may request a merit review and submit this or other new evidence or argument in support of his claim, if made within one year of this decision.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish a traumatic lumbar injury in the performance of duty on August 10, 2016, as alleged. The Board further finds that OWCP properly denied appellant's request for a telephonic oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

¹⁷ *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

¹⁸ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁹ *D.P.*, Docket No. 14-308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013).

²⁰ See 20 C.F.R. § 501.2(c)(1); *Alfred Zerega*, 45 ECAB 860 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 27, 2017 and October 21, 2016 are affirmed.

Issued: June 26, 2017
Washington, DC

Christopher J. Godfrey, 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