

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 59-year-old painter, filed a traumatic injury claim (Form CA-1) on April 8, 2009 alleging that on March 31, 2009 she bruised her right knee when she slipped on paint and fell down. The claim form did not indicate whether she stopped work.³ OWCP accepted her claim for right knee contusion, right knee medial meniscus tear, and right knee lateral meniscus tear.

On July 5, 2009 appellant underwent authorized right knee surgery. She stopped work on July 27, 2009 and returned on August 25, 2009. OWCP paid disability compensation. Appellant continued to receive medical treatment for her right knee injury.

On May 27, 2014 appellant filed claim for recurrence of medical treatment (Form CA-2a) alleging that she sustained a recurrence of the March 31, 2009 employment injury. She indicated that her right knee never stopped hurting and her right calf and ankle remained swollen. On the back of the Form CA-2a, the employing establishment reported that they provided work accommodations during appellant's recuperation period. It noted that appellant had been performing light-duty work, sitting all day in a workstation, since February 14, 2010.

In a July 15, 2014 letter, A.H., an injury compensation program administrator at the employing establishment, controverted appellant's recurrence claim. She noted that the 2009 injury claim was closed out in 2013 and only approved for right knee contusion and medial and lateral meniscus tears. A.H. alleged that appellant had not provided evidence of any medical treatment since the March 31, 2009 employment injury until the medical reports she provided with her recurrence claim. She also alleged that the medical evidence submitted did not sufficiently explain how appellant's current right knee conditions were related to her March 31, 2009 employment injury. A.H. further contended that appellant had failed to identify the specific employment factors which she believed caused or contributed to her medical condition.

By letter dated March 30, 2015, OWCP informed appellant that based on the description she provided on the Form CA-2a, she was claiming a new occupational disease related to factors of her federal employment. It advised her that it would administratively convert her recurrence claim to an occupational disease claim (Form CA-2).⁴

In a March 31, 2015 letter, OWCP advised appellant that the evidence submitted was insufficient to establish her occupational disease claim. It requested that she respond to an attached questionnaire in order to substantiate the factual elements of her claim and that she provide additional factual and medical evidence to establish that she sustained a diagnosed condition causally related to her federal employment. Appellant was afforded 30 days to submit

² *Order Remanding Case*, Docket No. 15-1838 (issued October 4, 2016).

³ OWCP assigned File No. xxxxxx618.

⁴ OWCP assigned the claim File No. xxxxxx793.

the additional evidence. The employing establishment was also requested to provide further information.

The employing establishment responded in an April 6, 2015 letter that it had already controverted appellant's claim. OWCP reviewed an August 6, 2009 report from Dr. Richard Sharp, Board-certified in physical medicine and rehabilitation, who opined that appellant's right knee degenerative changes were not related to the March 31, 2009 employment injury. The employing establishment also noted that appellant's latest medical report dated January 2014 noted a diagnosis of right knee pain consistent with arthritis.

OWCP received an August 6, 2009 report from Dr. Sharp, who described that on March 31, 2009 appellant fell down at work and experienced immediate onset of right knee pain. Dr. Sharp noted that appellant has complained of persistent right knee pain since the injury. He related that an April 15, 2009 right knee magnetic resonance imaging (MRI) scan showed a complex tear of the posterior horn or lateral meniscus, probable fibular collateral ligament tear, and calcified loose body in the joint as well. Dr. Sharp indicated that a May 5, 2009 report described preexisting osteoarthritis with complex tear of the posterior horn of the lateral meniscus. Upon physical examination of appellant's right knee, he reported slight tenderness, particularly laterally, joint effusion, and warmth. Range of motion demonstrated flexion to 110 degrees but extension lacked 19 degrees. Dr. Sharp diagnosed right lateral meniscus tear, status post partial meniscectomy and premorbid degenerative changes of the right knee. He indicated that appellant's degenerative changes of the knee were not related to appellant's workers' compensation injury. Dr. Sharp noted that appellant reached maximum medical improvement as of July 24, 2009. He indicated that according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had 9 percent whole person permanent impairment or 25 percent right lower extremity permanent impairment.

The employing establishment also submitted a January 16, 2014 report and handwritten chart by Dr. Thomas Pressly, a Board-certified internist, who noted diagnoses of polyarthralgia, knee pain with flare most consistent with osteoarthritis, carpal tunnel syndrome, and hip pain secondary to trochanteric bursitis.

A January 10, 2014 radiology report of appellant's right knee by Dr. Charles A. Borrell, a Board-certified radiologist, demonstrated large joint effusion with progression of degenerative changes.

In a decision dated May 1, 2015, OWCP denied appellant's occupational disease claim. It found that the evidence of record failed to establish the employment factors which she believed caused or contributed to her condition. OWCP also determined that the medical evidence of record did not establish a diagnosed medical condition causally related to factors of her employment.

On June 1, 2015 appellant requested reconsideration.

Appellant submitted handwritten chart notes from Dr. Pressly dated September 6, 2012 and May 15, 2014, which were mostly illegible. Dr. Pressly noted diagnoses of polyarthralgia,

knee pain with flare most consistent with osteoarthritis, carpal tunnel syndrome, and hip pain secondary to trochanteric bursitis.

Appellant also resubmitted Dr. Borrell's January 10, 2014 right knee radiology report.

By decision dated August 19, 2015, OWCP denied further merit review of appellant's claim. It found that appellant's reconsideration request failed to raise a substantive legal question and that appellant failed to submit relevant and pertinent new evidence sufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board. In an order dated October 4, 2016, the Board remanded appellant's case for OWCP to combine appellant's current case file with the previous claim, OWCP File No. xxxxxx618.

On January 20, 2017 OWCP issued a *de novo* decision denying appellant's occupational disease claim. It noted that it had reviewed appellant's case after her current case record was combined with the prior file and found that the medical evidence of record was insufficient to establish her claim. OWCP accepted appellant's employment duties, but determined that the medical evidence of record did not establish a diagnosed medical condition causally related to the factors of her federal employment.

On March 8, 2017 OWCP received appellant's request for an oral hearing before an OWCP hearing representative dated February 22, 2017 and postmarked February 24, 2017.

OWCP also received a June 2, 2009 report by Dr. Douglas E. Thompson, a Board-certified internist, who noted appellant's diagnoses of right lateral meniscus tear, right knee osteoarthritis, and right knee contusion. Dr. Thompson related that appellant continued to have pain in her right knee and had been working light duty. He reported that physical examination showed tenderness throughout the right knee and good range of motion. Dr. Thompson advised appellant that she would likely continue to have some problems due to her underlying arthritis. He recommended right knee surgery.

Appellant submitted a handwritten August 30, 2012 statement. She accurately described the May 31, 2009 employment injury when she slipped and fell on paint at work.

By decision dated March 28, 2017, a representative of the Branch of Hearings and Review denied appellant's request for an oral hearing as it was untimely filed. She found that the request was not postmarked within 30 days of the issuance of the January 20, 2017 OWCP decision. After exercising her 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 FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial

⁵ *Supra* note 1.

evidence⁶ 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 In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained right knee pain and swelling, requiring medical treatment, as a result of factors of her employment. OWCP accepted her employment factors as a painter, but denied her claim because the medical evidence of record failed to establish that her diagnosed medical conditions were causally related to factors of her employment.

The Board finds that appellant has not met her burden of proof to establish her occupational disease claim.

Appellant submitted an August 6, 2009 report from Dr. Sharp, who described appellant's previous March 31, 2009 right knee employment injury and related appellant's complaints of persistent right knee pain. Dr. Sharp reviewed appellant's medical treatment and provided physical examination findings. He reported slight tenderness, particularly laterally, joint effusion, and warmth. Dr. Sharp diagnosed right lateral meniscus tear, status post partial meniscectomy and premorbid degenerative changes of the right knee. He opined that appellant's degenerative changes of the knee were not related to appellant's workers' compensation injury. The Board finds that Dr. Sharp's medical report failed to establish that appellant's current right knee condition resulted from her employment duties. On the contrary, he explicitly denied that appellant's right knee degenerative condition was related to her employment. Dr. Sharp did not explain how or why appellant's employment duties as a painter caused or contributed to her

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

⁷ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁹ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

¹⁰ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

current right knee condition.¹¹ His report, therefore, is insufficient to establish her occupational disease claim.

OWCP also received a January 16, 2014 report and various handwritten charts dated September 6, 2012 to January 16, 2014 by Dr. Pressly. Dr. Pressly noted diagnoses of polyarthralgia and knee pain with flare most consistent with osteoarthritis. Although he provided various medical diagnoses for appellant's right knee, he did not provide any opinion on the cause of appellant's right knee condition. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹²

Likewise, Dr. Borrell's January 10, 2014 radiology report also failed to contain any opinion on the cause of appellant's right knee condition. Because none of these reports offer any opinion regarding the cause of appellant's condition, they are insufficient to establish appellant's claim.¹³

On appeal appellant alleges that she continued to suffer from constant right knee pain since the March 31, 2009 employment injury. She noted that she had to use a cane to walk. As found above, however, the medical evidence of record is not of sufficient probative value to establish that appellant's current right knee condition was causally related to factors of her federal employment. Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.¹⁴ Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.¹⁵ As appellant has not submitted such evidence in this case, she has not met her burden of proof to establish her claim.

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

¹¹ See *M.M.*, Docket No. 15-607 (issued May 15, 2015); *M.W.*, Docket No. 14-1664 (issued December 5, 2014).

¹² *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).

¹³ *D.R.*, Docket No. 16-1395 (issued January 26, 2017).

¹⁴ *Jennifer Atkerson*, 55 ECAB 317 (2004).

¹⁵ *Patricia J. Bolleter*, 40 ECAB 373 (1988).

Secretary.¹⁶ 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.¹⁷ 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.¹⁸ 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 appellant's request and must exercise its discretion.¹⁹ 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).²⁰

ANALYSIS -- ISSUE 2

On January 20, 2017 OWCP denied appellant's occupational disease claim, finding that appellant had not established a work-related right knee injury causally related to factors of her federal employment. Appellant requested a telephone hearing by an appeal form postmarked February 24, 2017.

Because the postmark date was more than 30 days after the date of OWCP's January 20, 2017 decision, the Board finds that OWCP properly determined that appellant's request for an oral hearing was untimely filed. Appellant was therefore not entitled to a hearing as a matter of right.²¹ Although her request for a hearing before an OWCP hearing representative was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.²²

In its March 30, 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

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ 20 C.F.R. §§ 10.616, 10.617.

¹⁸ *Id.* at § 10.616(a).

¹⁹ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

²⁰ *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).

²¹ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review of the written record commences the day after the issuance of OWCP's decision. *See Donna A. Christley*, 41 ECAB 90 (1989).

²² *Supra* note 18.

probable deductions from established facts.²³ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing.

Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an occupational disease causally related to factors of her federal employment. The Board also finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2017 merit decision and March 30, 2017 nonmerit decision of the Office of Workers' Compensation Programs are affirmed.

Issued: November 15, 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

²³ *Samuel R. Johnson*, 51 ECAB 612 (2000).