United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 17-0448**
	)	**Issued: October 12, 2017**
DEPARTMENT OF THE NAVY, NAVY AIR TERMINAL, Norfolk, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 23, 2016 appellant filed a timely appeal from a June 28, 2016 merit decision and an October 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has met his burden of proof to establish a right elbow injury causally related to an accepted September 22, 2015 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record.

FACTUAL HISTORY

On September 22, 2015, appellant then a 51-year-old airfreight cargo loader, filed a notice of traumatic injury (Form CA-1) alleging that on the same date, he felt pain in the right elbow and tingling in his fingers while placing a passenger's baggage in a bin. He stopped work

[1] 5 U.S.C. § 8101 *et seq.*

on September 22, 2015. Appellant's supervisor, L.M., did not dispute appellant's work duties or that appellant was performing his work duties on September 22, 2015. He noted on the CA-1 that appellant was injured in the performance of duty and confirmed that his knowledge of the facts about the injury agree with the statements of appellant. Appellant also filed a claim on the date of injury.

Appellant was treated in the emergency room by Dr. Alina M. Schmidt, an osteopath, on September 23, 2015, for right elbow pain with numbness and tingling in the fingertips. He indicated that he worked at a shipyard and hoisted heavy loads throughout his work shift. Appellant reported undergoing right elbow nerve surgery three years prior. Dr. Schmidt diagnosed ulnar nerve entrapment at the right elbow and prescribed the use of an ace bandage and pain medication. In a return to work note dated September 23, 2015, she noted that appellant was treated in the emergency room and could return to work on September 25, 2015.

Appellant was treated by Dr. Thomas Bergfield, a Board-certified orthopedic surgeon, on October 19, 2015, for right elbow pain which radiated to the finger tips. Appellant reported the injury mechanism was lifting and loading passengers' bags into a cargo bin. His history was significant for right cubital tunnel decompression and anterior subcutaneous ulnar nerve transposition on February 22, 2013. Appellant reported intermittent neurologic symptoms since his surgery which became worse over the last month. Dr. Bergfield noted an old medial surgical scar and that pain was elicited over the ulnar nerve with palpation, full active and passive range of motion, positive Tinel's sign, intact motor strength, and a sensation deficit in the ulnar and dorso-ulnar nerve distribution. He diagnosed right cubital tunnel syndrome surgically treated with residual symptoms.

In a work restriction note dated October 19, 2015, Dr. Bergfield diagnosed right cubital tunnel syndrome and noted that appellant could return to restricted duty on October 20, 2015. In a report dated November 23, 2015, he treated appellant in follow up for his right elbow. Appellant reported the medication provided minimal relief and that he still experienced tingling in his right hand. Dr. Bergfield noted positive Tinel's sign over the ulnar nerve and hypoesthesia to light touch in the ulnar and dorso-ulnar hand. He diagnosed right cubital tunnel syndrome recurrent due to ulnar nerve entrapment. Dr. Bergfield recommended a functional capacity evaluation and an impairment rating. In a November 23, 2015 work restriction note, he diagnosed right cubital tunnel syndrome and noted that appellant could return to restricted duty on October 20, 2015. In an attending physician's report (Form CA-20) dated March 23, 2016, Dr. Bergfield noted that appellant sustained an injury on September 22, 2015 from lifting and loading passengers' bags into cargo bins. He noted a 2013 diagnosis of right cubital tunnel syndrome with surgery. Dr. Bergfield noted electrodiagnostic test results from 2012 revealed evidence of ulnar neuropathy at the elbows. He diagnosed right cubital tunnel syndrome and noted by checking a box marked "yes" that the condition was caused or aggravated by an employment activity. Dr. Bergfield returned appellant to work with restrictions.

By letter dated May 19, 2016, OWCP advised appellant that his claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. It indicated that appellant's claim had been administratively handled to allow limited medical payments, but the merits of the claim had not been formally adjudicated. Because the medical bills exceeded $1,500.00, OWCP advised that his claim would be formally adjudicated. It

requested that appellant submit additional factual and medical information, including a comprehensive medical report from his treating physician regarding how specific work incident contributed to his claimed right elbow injury.

In an undated statement, appellant indicated that his position as an aircraft loader involved prolonged walking, standing, kneeling, climbing, bending, reaching, pulling, lifting, and carrying passenger bags weighing up to and over 45 pounds. His duties included uploading and downloading passenger bags that weighed between 40 and 60 pounds into an aircraft and taking the bags out of a box and placing them on a conveyor belt. Appellant related that loading a plane with passenger bags can take two to three hours. He noted uploading pallets that weighed between 2,500 and 5,000 pounds and required three people to load. Appellant reported performing these duties since 2005.

Appellant submitted copies of claims for traumatic injuries (Form CA-1) dated October 1, 2008, May 15, October 2, and November 18, 2012.

In an attending physician's report (Form CA-20) dated October 15, 2008, Dr. Gautam D. Desai, a family practitioner, indicated that appellant injured himself when lifting heavy bags at work. He noted findings of tenderness of the left rotator cuff and elbow and diagnosed left rotator cuff tendinitis and left tennis elbow. Dr. Desai noted by checking a box marked "yes" that appellant's condition was caused or aggravated by an employment activity and returned appellant to work with restrictions. On October 3, 2012 he treated appellant and advised that his condition caused him to be disabled from work on October 3, 2012. Dr. Desai returned appellant to work light duty on October 10, 2012. November 19, 2012 cervical spine x-rays revealed multilevel degenerative disc disease and neural foraminal narrowing. An electromyogram (EMG) dated December 19, 2012 revealed electrodiagnostic evidence of ulnar neuropathy at the bilateral elbows and no evidence of carpal tunnel syndrome.

Appellant was treated by Dr. Anthony Distasio, a Board-certified orthopedist, on January 15, 2013 for evaluation of right arm pain and numbness and tingling in his right upper extremity. Dr. Distasio noted findings on examination of diminished sensation in the right ulnar nerve distribution, positive right elbow flexion test and positive Tinel's sign at the cubital tunnel on the right. He noted that the December 19, 2012 EMG revealed ulnar neuropathy at both elbows. Dr. Distasio diagnosed right cubital tunnel syndrome and cervical degenerative disc disease. He recommended a right cubital tunnel decompression and subcutaneous ulnar nerve transposition. In reports dated March 19 to May 30, 2013, Dr. Distasio treated appellant in follow-up status post right cubital tunnel decompression and ulnar nerve transposition on February 22, 2013. Appellant reported doing well overall with improvement in his sensory symptoms in his right hand. Dr. Distasio noted findings of full active range of motion of the elbow and wrist, mild tenderness over the medial epicondyle, negative Tinel's sign, and intact sensation. He diagnosed improved right cubital tunnel syndrome. On March 19, 2013 Dr. Distasio diagnosed right cubital tunnel syndrome and noted that appellant was on restricted duty until July 1, 2013 when he would be released to full duty.

Appellant was treated postoperatively by a physician assistant on March 8, 2013 after undergoing the right cubital tunnel decompression and ulnar nerve transposition on

February 22, 2013. He reported that his symptoms had improved. The physician assistant diagnosed right cubital tunnel syndrome and returned appellant to work light duty.

In a June 28, 2016 decision, OWCP denied the claim as the evidence did not support that the injury or events occurred, as alleged and, therefore, fact of injury was not established. It indicated that appellant did not clarify the specific work duties performed which aggravated his condition and how often he performed such activities. Additionally, OWCP found that the medical evidence did not establish that a diagnosed condition was causally related to the alleged September 22, 2015 employment incident.

In an August 31, 2016 appeal request form, received on September 20, 2016, appellant requested a review of the written record by an OWCP hearing representative. In a statement dated August 31, 2016, he indicated that his job consisted of heavy lifting, pulling, and pushing. Appellant noted injuring his arm when lifting heavy passenger bags and felt his arm going numb. He indicated that his request was late because he was waiting for a letter from his doctor.

Appellant submitted a letter from Dr. Bergfield dated August 25, 2016, which noted a history of appellant's condition and medical treatment. Dr. Bergfield opined that appellant's right upper extremity symptoms were secondary to his initially diagnosed work-related ulnar nerve compression.

In an October 12, 2016 decision, OWCP denied appellant's request for a review of the written record. It found that the request was not timely filed as the request was not made within 30 days of the August 31, 2016 decision. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

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 of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

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. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[3]

With respect to the first component of fact of injury, the employee has the burden of establishing 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, but the employee's statements must be consistent with the surrounding facts and circumstances and her 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. 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 statements in determining whether a *prima facie* case has been established. However, 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.[4]

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.[5] A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[6] Medical rationale includes a physician's detailed opinion on the issue of whether these is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, 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 specific employment activity or factors identified by the claimant.[7]

ANALYSIS -- ISSUE 1

OWCP denied appellant's claim as he failed to establish that the events occurred as alleged. In the present case, it is undisputed that appellant's duties as an airfreight cargo loader involved reaching, pulling, lifting, and carrying passenger bags. Appellant's supervisor, L. M., did not dispute appellant's work duties or that appellant was performing his work duties on September 22, 2015. He noted on the CA-1 that appellant was injured in the performance of duty and confirmed that his knowledge of the facts about the injury agree with the statements of appellant. Appellant also filed a claim on the date of injury. Additionally, the medical records submitted most contemporaneously with the date of the alleged injury, specifically, the

[3] *T.H.*, 59 ECAB 388 (2008).

[4] *D.B.*, 58 ECAB 464, 466-67 (2007).

[5] *J.Z.*, 58 ECAB 529 (2007).

[6] *T.F.*, 58 ECAB 128 (2006).

[7] *A.D.*, 58 ECAB 149 (2006).

emergency room notes dated September 23, 2015, indicated that appellant was being evaluated for right elbow pain and numbness and appellant reported doing heavy lifting of bags at work.[8] The Board finds that the evidence establishes that on September 22, 2015, appellant placed a passenger's baggage in a bin in the performance of duty, as alleged.

The Board finds, however, that there is insufficient medical evidence in the record at the time of OWCP's June 28, 2016 decision to establish that the diagnosed medical condition is causally related to the September 22, 2015 employment incident.

Appellant submitted the October 19, 2015 report from Dr. Bergfield who treated him for radiating right elbow pain. He reported the injury mechanism was lifting and loading passengers' bags into a cargo bin. Dr. Bergfield diagnosed right cubital tunnel syndrome surgically treated with right cubital tunnel decompression and anterior subcutaneous ulnar nerve transposition. On November 23, 2015 he treated appellant in follow up and diagnosed right cubital tunnel syndrome recurrent due to ulnar nerve entrapment. However, Dr. Bergfield merely repeated the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related. To the extent that Dr. Bergfield is providing his own opinion, he failed to provide a rationalized opinion regarding the causal relationship between appellant's right cubital tunnel syndrome and the accepted work incident. Therefore, these reports are insufficient to meet appellant's burden of proof. Other reports from Dr. Bergfield are insufficient to establish the claim as he did not specifically address whether appellant's employment incident caused or aggravated a diagnosed medical condition.[9]

In a March 23, 2016 attending physician's report, Dr. Bergfield noted that appellant sustained an injury on September 22, 2015 and reported the mechanism of injury was lifting and loading passenger's bags into cargo bins. He noted appellant's history of right cubital tunnel syndrome for which he had a previous surgery. Dr. Bergfield diagnosed right cubital tunnel syndrome and noted by checking a box marked "yes" that the condition was caused or aggravated by work activity. He returned appellant to work with restrictions. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.[10] Dr. Bergfield did not explain how lifting the bag on September 22, 2015 caused or contributed to the diagnosed medical condition.

Appellant submitted the September 23, 2015 emergency room report from Dr. Schmidt who treated him for right elbow pain with numbness and tingling in the fingertips. He reported working at a shipyard and hoisting heavy loads throughout his work shift. Dr. Schmidt diagnosed ulnar nerve entrapment at the right elbow and prescribed the use of an ace bandage. However, as noted above, she merely repeated the history of injury as reported by appellant without providing her own opinion regarding whether appellant's condition was work related.

[8] The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence; *see Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

[9] *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (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).

[10] *Sedi L. Graham*, 57 ECAB 494 (2006); *D.D.*, 57 ECAB 734 (2006).

To the extent that Dr. Schmidt is providing her own opinion, she failed to provide a rationalized opinion regarding the causal relationship between appellant's right ulnar nerve entrapment and the accepted work incident. Therefore, these reports are insufficient to meet appellant's burden of proof.

Other medical reports of record either predate the claimed injury or do not specifically address whether appellant's employment activities caused or aggravated a diagnosed medical condition. These reports are of limited probative value.[11]

Appellant also submitted evidence from a physician assistant. However, the Board has held that reports from physician assistants are not considered medical evidence as these practitioners are not physicians under FECA.[12] Thus, these records are of no probative medical value in establishing appellant's claim.

Consequently, the Board finds that appellant has failed to submit sufficient medical evidence to establish that his accepted work incident on September 22, 2015 caused or aggravated a diagnosed medical condition.

On appeal appellant disagrees with OWCP's decision denying his claim for compensation. He asserts that he submitted sufficient evidence to prove that his injury occurred on the job. Appellant asserted that that he sent in CA-1 forms, x-rays, copies of examination records, and surgical reports as proof he was injured at work. As explained above, the record contains no medical evidence sufficiently explaining how and why his right cubital tunnel syndrome was caused by the September 22, 2015 work incident.

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 claim before a representative of the Secretary."[13] Section 10.617 and 10.618 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

[11] *A.D.*, 58 ECAB 149 (2006) (medical evidence which 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] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under the FECA); *Sean O'Connell*, 56 ECAB 195 (2004) (reports by nurse practitioners and physician assistants are not considered medical evidence as these persons are not considered physicians under the FECA). 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[13] 5 U.S.C. § 8124(b)(1).

record by a representative of the Secretary.[14] 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.[15] 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.[16]

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in an appeal request form dated August 31, 2016 and received on September 20, 2016. This was more than 30 days after the June 28, 2016 OWCP decision. Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.[17] Because the request for review of the written record was not timely filed, appellant was not entitled to review of the written record as a matter of right.

OWCP has the discretionary power to grant an oral hearing, including a review of the written record when a claimant is not entitled to one as a matter of right. It exercised this discretion in its October 12, 2016 decision, finding that appellant's issue could equally well be addressed by requesting reconsideration and submitting additional evidence. This basis for denying his request is a proper exercise of OWCP's authority.[18] Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish a right elbow injury causally related to a September 22, 2015 employment incident. The Board further finds that OWCP properly denied appellant's request for review of the written record as untimely.

[14] 20 C.F.R. § 10.615.

[15] *Id*. at § 10.616(a).

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

[17] *William F. Osborne*, 46 ECAB 198 (1994).

[18] *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 12 and June 28, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 12, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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