

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

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| M.L., Appellant |) | |
| |) | |
| and |) | Docket No. 17-1026 |
| |) | Issued: April 20, 2018 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Syracuse, NY, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 10, 2017 appellant filed a timely appeal of an October 27, 2016 merit decision and a January 17, 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 has jurisdiction over the merits in this case.²

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a right foot injury causally related to an August 15, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence following the issuance of OWCP's October 27, 2016 decision. However, the Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore the Board is precluded from considering this new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Joseph F. McHale*, 45 ECAB 669 (1994).

FACTUAL HISTORY

On August 23, 2016 appellant, then a 50-year-old mechanic, filed a traumatic injury claim (Form CA-1), alleging that, while repositioning a staging buffer at work on August 15, 2016, he put weight on his right foot and then felt sharp pain in that same foot. He stopped work on August 23, 2016. Appellant also provided an August 23, 2016 notification to his supervisor, which also related that he felt pain in his foot while repositioning a buffer and using his feet for leverage on August 15, 2016.

Appellant came under the treatment of Dr. Frederick Lemley, a Board-certified orthopedist, on August 26, 2016, for pain/dysfunction in the right foot. He reported that on August 15, 2016 he was pushing and pulling heavy objects at work and experienced right foot pain. Appellant noted findings on examination of tenderness over the second and third metatarsal shafts. Dr. Lemley reviewed appellant's old x-rays which did not reveal a fracture. He diagnosed right foot pain and recommended an immobilization boot walker and sedentary work. In a work status form dated August 26, 2016, Dr. Lemley noted that appellant was out of work for three weeks. In an August 31, 2016 attending physician's report (Form CA-20), he noted that appellant described that on August 15, 2016 while at work he was pulling something and experienced pain in the right foot. Dr. Lemley diagnosed right foot pain and indicated that appellant was totally disabled from August 23 to September 14, 2016.

Appellant was treated by a physician assistant on August 23, 2016 who evaluated him and noted that he would be out of work until further evaluation.

By development letter dated September 16, 2016, OWCP advised appellant of the type of evidence needed to establish his claim, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors. It noted that medical evidence must be submitted by a qualified physician and that a physician assistant is not considered a qualified physician under FECA.

Appellant was treated by Dr. Lemley, on September 14, 2016, who noted that appellant presented with pain/dysfunction in the right foot. He reported that on August 15, 2016 he was pulling something at work and experienced foot pain. Appellant noted improvement with the "cam [controlled ankle movement]" boot. Dr. Lemley noted a right foot x-ray revealed no evidence of fracture. On examination, appellant had tenderness over the second and third metatarsal shafts suggestive of a stress reaction. Dr. Lemley diagnosed right foot pain and returned appellant to regular duty. In a September 14, 2016 attending physician's report, he noted that appellant reported pulling something at work on August 15, 2016 and having sharp right foot pain. Dr. Lemley diagnosed right foot pain with stress reaction. He checked a box marked "yes" indicating that appellant's condition was caused or aggravated by work activity. Dr. Lemley noted that appellant was totally disabled from August 23 to September 18, 2016 and could resume regular work on September 19, 2016.

On August 23, 2016 Dr. Michael Clarke, a Board-certified orthopedist, treated appellant for right foot pain. Appellant reported that, a week before, he was working and pulling something and felt a sharp pain on the top of the foot which has not resolved. He noted an x-ray of the right foot revealed no abnormalities. Dr. Clarke diagnosed right foot pain and prescribed a Reese shoe

to wear for comfort and pain relief. He noted that appellant was out of work until further evaluation.

Appellant responded to OWCP development questionnaire on September 23, 2016 and indicated that when he injured his right foot he felt pain, but continued to work. He noted completing a notification of injury to his supervisor, but did not file a claim because he was hoping his foot would heal. Although appellant treated his foot with ice and stayed off his feet, he indicated that his pain intensified and he sought medical attention and filed a claim.

In an October 27, 2016 decision, OWCP denied the claim, finding that appellant failed to submit medical evidence establishing that a medical condition was diagnosed in connection with the accepted work incident.

In an appeal request form dated November 28, 2016 and postmarked November 29, 2016, appellant requested a review of the written record by an OWCP hearing representative. He submitted a report from Dr. Lemley dated November 16, 2016.

In a decision dated January 17, 2017, OWCP denied appellant's request for a review of the written record as untimely filed. It informed him that his case had been considered in relation to the issues involved and that the request was further denied as it could equally 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 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.³

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 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.⁴

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical

³ *Gary J. Watling*, 52 ECAB 357 (2001).

⁴ *T.H.*, 59 ECAB 388 (2008).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵

ANALYSIS -- ISSUE 1

It is undisputed that, on August 15, 2016, while working as a mechanic, appellant repositioned a staging buffer and put weight on his right foot. However, the Board finds that he failed to submit sufficient medical evidence to establish that this work incident caused or aggravated his diagnosed right foot condition. In a letter dated September 16, 2016, OWCP requested that appellant submit a comprehensive medical report from his treating physician which included a reasoned explanation as to how the accepted work incident had caused his claimed injury.

Appellant submitted reports dated August 26 and September 14, 2016 from Dr. Lemley, who treated appellant for right foot pain/dysfunction. He reported that on August 15, 2016 he was pushing and pulling heavy objects at work and experienced foot pain. Appellant noted findings on examination of tenderness over the second and third metatarsal shafts suggestive of a stress reaction and diagnosed right foot pain. Dr. Lemley noted a right foot x-ray showed no fracture. He recommended an immobilization boot walker and sedentary work. However, Dr. Lemley merely repeated the history of injury as reported by appellant without providing his own opinion regarding whether his condition was work related. To the extent that he is providing his own opinion, the Board finds that he failed to provide a rationalized opinion regarding causal relationship between appellant's right foot condition and the accepted work incident.⁶ Therefore, this report is insufficient to meet appellant's burden of proof.

In a work status note dated August 26, 2016, Dr. Lemley noted that appellant was out of work for three weeks. This note is insufficient to establish appellant's claim as Dr. Lemley did not provide a history of injury⁷ or specifically address whether appellant's employment activities had caused or aggravated a diagnosed medical condition.⁸

Appellant submitted attending physician's reports from Dr. Lemley dated August 31 and September 14, 2016, who noted that appellant reported, that on August 15, 2016 he was pulling something at work and experienced pain in the right foot. Dr. Lemley diagnosed right foot pain with stress reaction and indicated that appellant was totally disabled from work from August 23 to September 18, 2016. On September 14, 2016 he checked a box marked "yes" indicating that appellant's condition was caused or aggravated by an employment activity. The Board has held that a physician's opinion on causal relationship which consists only of checking "yes" to a form

⁵ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁷ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

⁸ *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).

question, without explanation or rationale, is of diminished probative value and is insufficient to establish a claim.⁹

Appellant submitted an August 23, 2016 report from Dr. Clarke who treated appellant for right foot pain. He reported that, a week before, he was pulling something at work and felt a sharp pain on the top of the foot which had not resolved. Appellant noted that an x-ray of the right foot revealed no abnormalities. Dr. Clarke diagnosed right foot pain and prescribed a Reese shoe for comfort and pain relief. He noted that appellant was out of work until further evaluation. Dr. Clarke merely repeated the history of injury as reported by appellant without providing his own opinion regarding whether his condition was work related. To the extent that he is providing his own opinion, the Board finds that he failed to provide a rationalized opinion regarding the causal relationship between appellant's right foot condition and the accepted work incident.¹⁰ Therefore, this report is insufficient to meet his burden of proof.

Appellant was treated by a physician assistant on August 23, 2016 who noted that appellant was evaluated and would be out of work until further evaluation. The Board has held that document notes signed by a physician assistant lack probative value as medical evidence as physician assistants are not considered physicians under FECA.¹¹

The remainder of the medical evidence is of limited probative value as it fails to provide a physician's opinion on causal relationship between appellant's work incident and his diagnosed right foot back condition.¹² For this reason, this evidence is insufficient to meet his burden of proof.

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated, or aggravated by his employment is sufficient to establish causal relationship. Causal relationships must be established by rationalized medical opinion evidence.¹³ Appellant failed to submit such evidence and therefore he has not met his burden of proof.

⁹ *D.D.*, 57 ECAB 734 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006).

¹⁰ *Jimmie H. Duckett*, *supra* note 6.

¹¹ *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 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).

¹² *See 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).

¹³ *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

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.”¹⁴ Sections 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 record by a representative of the Secretary.¹⁵ 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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in an appeal request form dated November 28, 2016 and postmarked November 29, 2016. This was more than 30 days after the issuance of the October 27, 2016 OWCP decision. Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹⁸ Because the hearing request was not timely filed, appellant was not entitled to an oral hearing as a matter of right.

OWCP has the discretionary power to grant an oral hearing when a claimant is not entitled to one as a matter of right. It exercised this discretion in its January 17, 2017 decision, finding that appellant’s issue could equally be addressed by requesting reconsideration and submitting additional evidence. This basis for denying his request for a hearing is a proper exercise of OWCP’s authority.¹⁹ Accordingly, the Board finds that OWCP properly denied appellant’s request for a review of the written record as untimely filed.

On appeal appellant contends that his request for a review of the written record was late because he did not timely receive the information from a nurse liaison. The Board notes that OWCP’s October 27, 2016 denial of his claim was accompanied by appeal rights which provided

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ 20 C.F.R. § 10.615.

¹⁶ *Id.* at § 10.616(a).

¹⁷ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁸ *William F. Osborne*, 46 ECAB 198 (1994).

¹⁹ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

a timeline and instructions pertaining to the different avenues of appeal. Appellant's request for a review of the written record was not made within 30 days and was therefore untimely filed.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a right foot injury causally related to an August 15, 2016 employment incident. The Board further finds that OWCP properly denied his request for review of the written record as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2017 and October 27, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 20, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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