

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

---

**S.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Valley, AL, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 18-0309  
Issued: August 13, 2018**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 20, 2017 appellant filed a timely appeal from a July 10, 2017 merit decision and a September 12, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has established a right shoulder condition causally related to the accepted factors of her federal employment; and (2) whether OWCP abused its

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its July 10, 2017 merit decision. 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 reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

discretion when it denied appellant's request for a review of the written record before the Branch of Hearings and Review as untimely filed under 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On March 24, 2017 appellant, then a rural carrier, filed an occupational disease claim (Form CA-2) alleging that she suffered from an occupational disease causally related to factors of her federal employment. She alleged that she began experiencing symptoms on February 8, 2017. The employing establishment indicated that March 23, 2017 was the last day that appellant worked her mail route and that she had not returned as of April 5, 2017. It noted that she underwent surgery on March 24, 2017.

In a magnetic resonance imaging (MRI) scan report dated February 17, 2017, Dr. Jason Hoover, a Board-certified radiologist, found that appellant had tendinosis involving the supraspinatus tendon. He further noted that there appeared to be high-grade tears near the attachment and proximal to the attachment with probable full thickness component at the undersurface and some mild differential retraction of undersurface fibers to the level of the acromion. Dr. Hoover also noted that the intra-articular course of the long head biceps tendon was never seen well and there may be tears in the intra-articular course. He noted that there appeared to be intact fibers of the tendon within the groove.

In an April 12, 2017 Family and Medical Leave Act certification of health care provider, Dr. Frazier K. Jones, appellant's treating Board-certified orthopedic surgeon, indicated that she had a complete rotator cuff tear of the right shoulder. A rotator cuff repair was performed on March 24, 2017. Dr. Jones anticipated that appellant would be incapacitated from March 24 through July 1, 2017.

In a supplemental statement received by OWCP on April 21, 2017, appellant related that she started delivering mail in 1995 and had been working full time since 2012. She noted that her job consisted of lifting, separating, and delivering mail and that she performed these duties five days a week for 8 to 10 hours a day. Appellant noted that she had severe shoulder pain.

In a March 24, 2017 operative report, Dr. Jones, a Board-certified orthopedic surgeon, noted that he performed an arthroscopy with labral debridement followed by a mini-open rotator cuff repair. He indicated that the surgery was necessitated due to appellant's persistent right dominant shoulder pain, despite conservative management. In a March 31, 2017 note, Dr. Jones diagnosed complete rotator cuff tear or rupture of right shoulder, not specified as traumatic, and a spontaneous rupture of other tendons, right shoulder. He indicated that appellant could not work for six weeks.

By development letter dated April 21, 2017, OWCP informed appellant that further medical evidence was necessary to support her claim. Appellant was advised that she should submit a comprehensive medical report from her treating physician which described her symptoms, test results, diagnosis, history of treatment, and the physician's opinion, with medical rationale, regarding the cause of her condition. OWCP afforded her 30 days to submit the necessary evidence.

By decision dated July 10, 2017, OWCP denied appellant's claim. It determined that although she had established that she was a federal employee who timely filed a claim, that an employment factor occurred in the performance of duty, as alleged, and that a medical condition had been diagnosed, she had not established that her medical condition was causally related to the accepted employment factor.

By appeal request form received by OWCP on August 15, 2017, appellant requested review of the written record. She did not sign the form, nor did she date it. The postmark for mailing this form was August 11, 2017. Appellant also submitted additional medical evidence.

By decision dated September 12, 2017, OWCP's hearing representative denied appellant's request for a review of the written record. She determined that the request was not filed within 30 days and was therefore untimely filed. The hearing representative then reviewed the request and, in her discretion, determined that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that appellant had a medical condition causally related to factors of her federal employment.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> 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, including the fact that the individual is an employee of the United States within the meaning 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.<sup>4</sup>

OWCP's regulations define an occupational disease as a condition produced by the work environment over a period longer than a single workday or shift.<sup>5</sup> To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>6</sup>

---

<sup>3</sup> *Id.*

<sup>4</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>5</sup> 20 C.F.R. § 10.5(q).

<sup>6</sup> *T.C.*, Docket No. 17-0872 (issued October 5, 2017).

## **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not established that her right shoulder condition was causally related to the accepted factors of her federal employment.

Appellant submitted multiple reports by Dr. Jones, her treating orthopedic surgeon. In an April 12, 2017 report, Dr. Jones notes that she had a complete rotator cuff tear of the right shoulder. He performed an arthroscopy with rotator cuff repair on March 24, 2017. In a March 31, 2017 report, Dr. Jones indicated that appellant could not work for six weeks. However, he did not address the issue of causation of her right rotator cuff tear. The Board has held that a physician's opinion which does not address causal relationship is of limited probative value.<sup>7</sup>

Appellant also submitted a right shoulder MRI scan report dated February 17, 2017 from Dr. Hoover. The Board has held that diagnostic testing is not probative to the issue of causal relationship as it does not offer any opinion regarding the cause of an employee's condition.<sup>8</sup> As this diagnostic study did not specifically address whether the diagnosed condition was causally related to the accepted employment conditions, it was of limited probative value and insufficient to establish appellant's claim.<sup>9</sup>

The record before the Board is without rationalized medical evidence establishing that appellant sustained an injury to her right shoulder causally related to the accepted factors of her federal employment. OWCP advised her that it was her responsibility to provide a comprehensive medical report which described her symptoms, test results, diagnosis, history of treatment, and a physician's opinion, with medical reasons, on the cause of her condition. Appellant failed to submit appropriate medical documentation in response to OWCP's request. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.<sup>10</sup> An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.<sup>11</sup>

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 a representative of OWCP's Branch of Hearings and Review, provides in pertinent part, "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision

---

<sup>7</sup> *D.M.*, Docket No. 16-0346 (issued June 15, 2017).

<sup>8</sup> *See S.S.*, Docket No. 16-1760 (issued January 23, 2018).

<sup>9</sup> *See A.D.*, Docket No. 17-1136 (issued November 9, 2017).

<sup>10</sup> *Id.*

<sup>11</sup> *S.S.*, 59 ECAB 315 (2008); *J.M.*, 58 ECAB 303 (2007); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

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.”<sup>12</sup> Section 10.615 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.<sup>13</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>14</sup> OWCP’s regulations and the Board precedent provide that the request for an oral hearing or review of the written record must be sent within 30 days of the date of issuance of the decision (as determined by the postmark or other carrier’s date marking) for which an oral hearing or review of the written record is sought.<sup>15</sup>

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA,<sup>16</sup> 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.<sup>17</sup> OWCP’s procedures, which require OWCP 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.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP did not abuse its discretion when it found in its September 12, 2017 decision that appellant was not entitled to review of the written record as a matter of right because her request was not made within 30 days of its July 10, 2017 decision.

Appellant’s request for reconsideration was postmarked on August 11, 2017. As noted, the request for review of the written record must be sent within 30 days of the date of issuance of the decision as determined by the postmark or other carrier’s date marking.<sup>19</sup> The time limitation to request a review of the written record by OWCP’s Branch of Hearing and Review expired on Wednesday, August 9, 2017, 30 days after the July 10, 2017 decision. Therefore, OWCP’s hearing representative properly found in the September 12, 2017 decision that appellant was not entitled

---

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> 20 C.F.R. § 10.615.

<sup>14</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>15</sup> 20 C.F.R. § 10.616(a).

<sup>16</sup> *Supra* note 1.

<sup>17</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>18</sup> *Teresa M. Valle*, 57 ECAB 542 (2006).

<sup>19</sup> W.S., Docket No. 18-0113 (issued April 4, 2018).

to a review of the written record as a matter of right because her request was not made within 30 days of July 10, 2017.<sup>20</sup>

While OWCP also has the discretionary power to grant a review of the written record when a claimant is not entitled to review as a matter of right, OWCP's hearing representative, in her September 12, 2017 decision, properly exercised her discretion by indicating that she had carefully considered appellant's request and had determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional evidence in support of her claim for an occupational disease. The Board has held that the only limitation on OWCP's authority is reasonableness and the 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.<sup>21</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for review of the written record. Accordingly, the Board finds that OWCP properly denied her request.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a right shoulder injury causally related to the accepted factors of her federal employment. The Board further finds that OWCP properly denied her request for a review of the written record before the Branch of Hearings and Review as untimely filed under 5 U.S.C. § 8124(b).

---

<sup>20</sup> See *M.L.*, Docket No. 17-1026 (issued April 20, 2016).

<sup>21</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 12 and July 10, 2017 are hereby affirmed.

Issued: August 13, 2018  
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