

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

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**K.S., Appellant**

**and**

**U.S. POSTAL SERVICE, COTTAGE GROVE  
ANNEX, Cottage Grove, MN, Employer**

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**Docket No. 17-1814  
Issued: February 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

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On August 22, 2017 appellant filed a timely appeal from a March 27, 2017 merit decision and a June 6, 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 to consider the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish an occupational disease causally related to the accepted factors of her federal employment; and (2) whether OWCP abused its discretion in denying appellant's request for review of the written record before a representative of the Branch of Hearings and Review as untimely filed pursuant to 5 U.S.C. § 8124.

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

<sup>2</sup> The Board notes that appellant submitted additional evidence with her appeal to the Board. However, the Board may only review evidence that was of record at the time OWCP issued its final decision. Thus, the Board is unable to review this additional evidence for the first time on appeal. See 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-0176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

## **FACTUAL HISTORY**

On January 24, 2017 appellant, then a 57-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that on January 6, 2017 she realized that walking her postal route, placing her foot on the gas pedal and brake, and getting out of the postal truck resulted in the development of a right ankle fibular fracture and Achilles tendon damage. She stopped work on January 20, 2017.

In a letter dated February 14, 2017, OWCP advised appellant that the evidence of record was insufficient to establish her occupational disease claim. It explained that further medical evidence was required. Appellant was afforded 30 days to submit the necessary evidence.

In a December 30, 2016 report, Dr. John Simon, Board-certified in internal medicine, related that appellant was seen for complaints of right ankle pain which began on December 21, 2016 while she was delivering mail on her postal route. Appellant's physical examination revealed significant pain over the right peroneal tendons, as well as the anterior drawer, and mild edema. Diagnostic tests of her right foot and ankle revealed negative x-ray results and negative ultrasound for blood clot. Dr. Simon diagnosed right ankle impingement and effusion, right ankle lateral ligamentous pain, right ankle pain, and right peroneal tendon disease.

Dr. Simon, in a disability note dated December 30, 2016, diagnosed right ankle strain and acute tendinitis and related that appellant was disabled from work.

A January 5, 2017 magnetic resonance imaging (MRI) scan of appellant's right ankle revealed mild Achilles tendinopathy, mild posterior tenosynovitis, mild-to-moderate insertional tibialis anterior tendon tendinopathy, residual of a marked fibular attachment sprain, less than one centimeters low grade peroneus brevis tendon fraying and tearing, and fibular stress reaction without a discrete fracture line.

In a January 6, 2017 report, Dr. Benjamin L. Clair, a treating podiatrist, diagnosed right fibular stress fracture, peroneal tenosynovitis, and tendinopathy. A physical examination revealed right ankle fibula, peroneal, and percussive pain. Dr. Clair reviewed a right ankle MRI scan which showed a right fibular stress fracture reaction. OWCP continued to receive progress notes from him in which he related that appellant was disabled from work.

On January 20, 2017 appellant was seen by Dr. Clair for right post ankle sprain and right fibular stress fracture. Physical findings included significant fibula pain on percussion and palpitation and improved edema. Dr. Clair recommended that appellant remain off work for two more weeks.

In a letter dated January 20, 2017, Dr. Clair advised that appellant was unable to work due to right ankle injury and fibular stress fracture. He noted that the right ankle MRI scan revealed a right fibular stress fracture, which explained her pain. On February 3, 2017 Dr. Clair reported that examination of appellant's right ankle revealed fibula percussive and palpatory pain, which had improved since her last evaluation. He released her to sedentary light-duty work for two weeks with gradual progression to full-duty work.

By decision dated March 27, 2017, OWCP denied appellant's occupational disease claim. It found that none of the medical evidence of record contained a rationalized medical opinion

explaining how her diagnosed right ankle conditions were causally related to accepted factors of her federal employment.

On May 23, 2017 OWCP received appellant's request for review of the written record by an OWCP hearing representative. The form was dated May 11, 2017 and postmarked May 20, 2017. Appellant continued to submit medical evidence to the record.

By decision dated June 6, 2017, a representative of OWCP's Branch of Hearings and Review denied appellant's request for review of the written record by an OWCP hearing representative as it was untimely filed. After exercising its discretion, the hearing representative further denied the request finding that the issue could be equally well addressed through a request for reconsideration before OWCP's district office.

### **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, 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 or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> 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.<sup>5</sup>

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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.<sup>6</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>7</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is causal relationship between the employee's diagnosed condition and the compensable employment factors.<sup>8</sup> 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,

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>5</sup> S.P., 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> D.U., Docket No. 10-0144 (issued July 27, 2010); R.H., 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

<sup>7</sup> Y.J., Docket No. 08-1167 (issued October 7, 2008); A.D., 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

<sup>8</sup> J.J., Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

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.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Appellant filed an occupational disease claim alleging that her right ankle conditions were due to her walking her postal route, getting into and out of the postal vehicle, and operating her postal vehicle. OWCP denied her claim as it found the medical evidence of record failed to establish that her right ankle conditions had been caused or aggravated by the accepted federal employment factors.

In support of her claim appellant submitted medical reports from Drs. Simon and Clair. Dr. Simon diagnosed right ankle impingement and effusion, right ankle lateral ligamentous pain, and right conservative peroneal tendon disease, but offered no opinion as to the cause of these conditions. Similarly, Dr. Clair offered no opinion on the diagnosed conditions of right fibular stress fracture, post right ankle sprain, and peroneal tenosynovitis and tendinopathy. The Board has held that medical opinion evidence that offers no opinion regarding the cause of an employee's condition is of limited probative values on the issue of causal relationship.<sup>10</sup> Thus, the reports from Drs. Simon and Clair are insufficient to establish appellant's claim.

Appellant also submitted a January 5, 2017 MRI scan of her right ankle in support of her claim. The MRI scan report is insufficient to establish her claim as this report is merely a diagnostic report and contains no opinion as to the cause of the medical conditions identified on the scan.<sup>11</sup>

The Board finds that appellant has offered insufficient medical evidence to establish her claim. As noted above, causal relationship is a medical question that must be established by a probative medical opinion from a physician.<sup>12</sup> The physician must accurately describe appellant's employment duties and explain the physiological process by which these duties would have caused her right ankle conditions.<sup>13</sup> The mere recitation of patient history does not suffice for purposes of establishing causal relationship between a diagnosed condition and the employment incident.<sup>14</sup> Without explaining physiologically how the accepted employment factors caused or contributed to the diagnosed conditions, the physician's reports are of limited probative value.<sup>15</sup>

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<sup>9</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>10</sup> *M.S.*, Docket No. 16-1497 (issued December 20, 2016); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>11</sup> *T.D.*, Docket No. 17-0649 (issued June 16, 2017).

<sup>12</sup> *I.J.*, *supra* note 9; *Roy L. Humphrey*, *supra* note 6.

<sup>13</sup> *Supra* note 9.

<sup>14</sup> See *J.G.*, Docket No. 17-1382 (issued October 18, 2017).

<sup>15</sup> See *A.B.*, Docket No. 16-1163 (issued September 8, 2017).

The Board finds that, as the medical evidence of record is insufficient for the reasons set forth above, appellant has failed to meet her burden of proof.

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 or her claim before a representative of the Secretary.<sup>16</sup> A hearing is a review of an adverse decision by OWCP's 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

OWCP has discretion to grant or deny a request that is made after the 30-day period for requesting a hearing. In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>20</sup>

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

Appellant requested a review of the written record in an appeal request form dated May 11, 2017, postmarked May 20, 2017, and received by OWCP's Branch of Hearings and Review on May 23, 2017. All dates were more than 30 days after the March 27, 2017 OWCP decision. Section 8124(b)(1) is unequivocal on the time limitation for requesting a review of the written record.<sup>21</sup> Because the request for review of the written record was untimely filed, appellant was not entitled to review of the written record as a matter of right.

OWCP has the discretionary power to grant 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 June 6, 2017 decision, finding that appellant's issue could equally well be addressed by requesting

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<sup>16</sup> 5 U.S.C. § 8124(b)(1).

<sup>17</sup> 20 C.F.R. § 10.615.

<sup>18</sup> *James Smith*, 53 ECAB 188 (2001); *id.* at § 10.616(a).

<sup>19</sup> See *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

<sup>20</sup> *W.L.*, Docket No. 17-1538 (issued November 15, 2017); *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

<sup>21</sup> *William F. Osborne*, 46 ECAB 198 (1994).

reconsideration and submitting additional evidence. This basis for denying appellant's request was a proper exercise of OWCP's authority.<sup>22</sup> Accordingly, the Board finds that OWCP properly denied her request for a review of the written record as untimely filed.

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof to establish an occupational disease causally related to the accepted factors of her federal employment. The Board further finds that OWCP properly denied her request for review of the written record as untimely filed.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 6 and March 27, 2017 are affirmed.

Issued: February 13, 2018  
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

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<sup>22</sup> *D.B.*, Docket No. 17-0448 (issued October 12, 2017); *Mary B. Moss*, 40 ECAB 640 (1989).