United States Department of Labor
Employees' Compensation Appeals Board

H.B., Appellant	)	
and	)	**Docket No. 16-1753**
	)	**Issued: March 14, 2018**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, EL PASO HEALTH CARE SYSTEM, Norfolk, VA, Employer	)	

Appearances: *Case Submitted on the Record*
Arthur G. Girton, Esq., for the appellant[1]
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2016 appellant, through counsel, timely filed an appeal from a July 1, 2016 merit decision and an August 12, 2016 nonmerit decision of the Office of Workers'

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.[4]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on April 12, 2016, as alleged; and (2) whether OWCP properly denied appellant's request for a hearing as untimely filed.

FACTUAL HISTORY

On April 22, 2016 appellant, then a 54-year-old deck engine mechanic, filed a traumatic injury claim (Form CA-1) alleging that on April 12, 2016 he injured his lower back aboard ship. He explained that he had been "welding brackets at the aft truck tunnel and working around his shop the whole day," in the performance of duty. Appellant indicated that he woke up the following day with severe pain, stiffness, and spasms in the lower back. He advised that he had low back pain with radiculopathy. Appellant did not provide any additional medical or factual evidence with his Form CA-1.

In a development letter dated April 29, 2016, OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days. It explained that no medical evidence was received, including a physician's opinion as to how his injury resulted in the diagnosed condition. OWCP also noted that no diagnosis of any condition resulting from his injury was provided. It requested other additional evidence and included a questionnaire for completion.[5] Appellant was afforded 30 days to respond.

In a statement received on May 24, 2016, appellant recounted that while he was working aboard the ship in the aft truck tunnel on April 12, 2016 doing a welding job, which involved setting up equipment, tools, *etc*. He explained that as he was welding and getting in different positions to weld, he "got stabbing pains in my lower back that became worse with every movement." Appellant indicated that by night he could not walk and the pain would not let up

[2] Appellant, through counsel, timely requested oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure* (20 C.F.R. § 501.5(b)). After exercising its discretion the Board, by order dated January 12, 2017, denied his request as the arguments on appeal could adequately be addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-1753 (issued January 12, 2017).

[3] 5 U.S.C. § 8101 *et seq.*

[4] On appeal appellant submitted additional evidence. However, as the Board's review is limited to the evidence that was before OWCP at the time it issued its final decision, it has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

[5] The additional evidence requested by OWCP included that appellant describe where he was and what he was doing at the time the injury occurred. Appellant was also requested to provide a detailed factual description as to how the injury occurred. In addition, he was asked to provide detailed factual statements from any persons who witnessed the injury or had immediate knowledge of it, or other documentation that supported his injury. Appellant was also requested details regarding any other similar disability or symptoms before the injury.

and it went from his back down to his left leg. He noted that on April 16, 2016 he was sent to the American Hospital of Dubai and diagnosed with severe lumbar radicular pain on the left. Appellant explained that he had a magnetic resonance imaging (MRI) scan performed. He also noted that, in March, he believed that he pulled off a "fork truck tire" straining his back and it bothered him prior to the welding job.[6] However, it did not cause leg pain. Appellant explained that the fork truck tire was about as small as a regular tire. He indicated that his witnesses included his chief mate and the second cargo engineer.

OWCP received an April 16, 2016 hospital discharge summary and treatment notes from Dr. Jin-Yul Lee, a Board-certified surgeon, and Dr. Collin Bullard, an emergency medicine specialist. Dr. Lee indicated the reason for the hospital admission was that appellant was admitted for further diagnostic and pain management. He advised that since four days ago, appellant had severely increasing pain symptoms with pain radiation down the left lower limb, corresponding to L5 dermatome, with associated paresthesias. Dr. Lee diagnosed severe lumbar radicular pain on the left. He noted that the MRI scan of the lumbar spine revealed marked degenerative changes with spinal canal and recess stenosis, especially at the level L4/L5. Dr. Lee indicated that appellant was unable to perform his duties. Dr. Bullard determined that the primary impression was lumbar disc prolapsed with radiculopathy (disorder).[7] Dr. Lee diagnosed severe lumbar radicular pain on the left.

OWCP also received April 21, 2016 discharge instructions and notes from a physician assistant and the emergency physician, Dr. Elliot Wong, Board-certified in emergency medicine.[8] Appellant's history of injury was reported as a chief complaint of low back pain and that appellant presented to the emergency department for evaluation of low back pain. He noted that he had similar symptoms previously to include a back injury and back pain. Dr. Wong indicated that appellant related that his pain was sharp and similar to prior episodes with the onset one month ago and still present. He noted that appellant reported that he "reinjured his low back while lifting while working on a ship in Dubai." Dr. Wong diagnosed acute left-sided lumbar radiculopathy.

In an emergency nurses' clinical report dated April 21, 2016, appellant indicated that he got hurt on the job and the employing establishment had him for an MRI scan, which showed "L4-L5 'slipping.'" The nurse noted that he had the image of the scan with him as a compact disc (CD) but that she was unable to view it. She further noted that appellant had injured himself about four years ago in the same area.

In a May 6, 2016 report, Dr. Jeffrey Gehret, Board-certified in emergency medicine and rehabilitation, diagnosed lumbar pain and stenosis. He advised that appellant was temporarily

[6] The record contains a March 14, 2016 report from the employing establishment describing an incident at work. It noted that appellant complained of low back pain for about five days. Appellant indicated that he believed he injured his back while he was pulling a tire out of a forklift, and then moving stuff in the shop all day.

[7] Dr. Bullard electronically signed the hospital record.

[8] While a physician assistant conducted the examination (incomplete sentence). An electronic signature was associated with the physician's assistant's notes for Dr. Wong. Dr. Wong indicated that he agreed with the physician's assistant's findings and plan.

disabled. In a separate report, of even date, Dr. Gehret advised that the reason for the appointment was that appellant had low back pain on the left side and left leg pain, along with low back pain. He noted that appellant indicated that his problem began less than a month ago with a work-related accident. Dr. Gehret noted that appellant indicated that on April 12, 2016 he noted that he was pulling and lifting and experienced severe left-sided low back pain followed by left lower extremity pain and paresthesias. He related that appellant had a prior history of low back pain several years ago, which had improved. Dr. Gehret examined appellant, provided findings, and diagnosed intervertebral disc disorders with radiculopathy, lumbar region. He assessed lumbalgia and radiculopathy.

By decision dated July 1, 2016, OWCP denied appellant's claim. It found that the evidence of record was insufficient to establish that the events occurred as alleged. OWCP explained that there was no description or history of injury in any of the medical reports of record that was consistent with the history of injury described. It also found that the medical evidence did not contain a medical diagnosis in connection with the injury and or events.

On August 11, 2016 OWCP received appellant's August 5, 2016 request for a telephonic hearing before an OWCP hearing representative. The postmark on the request was also August 5, 2016.

By decision dated August 12, 2016, OWCP denied appellant's request for a hearing. It found that appellant was not entitled to a hearing because his request was not made within 30 days of the issuance of its July 1, 2016 decision. OWCP exercised its discretion and determined that it would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered pertaining to his claim for an injury in the performance of duty.

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 timely filed within the applicable time limitation period of FECA,[9] and that an injury was sustained in the performance of duty.[10] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[11]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.[12] Second,

[9] *Joe D. Cameron*, 41 ECAB 153 (1989).

[10] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[11] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[12] *John J. Carlone*, 41 ECAB 354 (1989).

the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[13]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[14]

An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[15] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[16] 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.[17] Although 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,[18] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[19]

[13] *Id*.

[14] *I.J.*, 59 ECAB 408 (2008).

[15] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[16] *Id*. at 255-56.

[17] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[18] *Id.*

[19] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[20] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[21]

ANALYSIS -- ISSUE 1

Appellant has alleged that on April 12, 2016 he was welding brackets at the aft truck tunnel and working around his shop the whole day while in the performance of duty. Furthermore, in a statement received on May 24, 2016, he indicated that he was working aboard the ship in the aft truck tunnel on April 12, 2016 doing a welding job, which involved setting up equipment tools, etc. Appellant explained that as he was welding and getting in different positions to weld, he "got stabbing pains in my lower back that became worse with every movement." OWCP denied the claim because the factual component of fact of injury had not been established. It found that there was no description or history of injury in any of the medical reports that was consistent with the history of injury described. OWCP also found that the medical evidence did not contain a medical diagnosis in connection with the injury or events.

The Board finds that appellant has not established the factual component of his claim as he failed to explain how his claimed injury occurred. In a letter dated April 29, 2016, OWCP requested that appellant submit information describing how his claimed injury occurred. While he provided the above-noted factual statement dated May 24, 2016, appellant did not provide any further details about the incident. While appellant referenced an earlier incident from March, he explained that the incident occurred when he lifted a "fork truck tire" and strained his back. The Board notes that with regard to the most recent incident, no other details were provided by appellant.

The history of injury, which as noted above, included that he was welding, is not described in any of the medical evidence. The physicians of record do not appear to be aware of the welding activities that appellant was performing on April 12, 2016. This is especially important, as the record also contains details related to an earlier incident involving a fork truck tire, which is not before the Board. For example, the record contains hospital discharge summary and treatment notes dated April 16, 2016 from Drs. Lee and Bullard. They noted that appellant was admitted for further diagnostic and pain management in the low back since one month ago. These reports would not be relevant to the present claim, as they did not address the alleged April 12, 2016 employment incident.

OWCP also received April 21, 2016 discharge instructions and notes from Dr. Wong. Dr. Wong reported that appellant presented to the emergency department for evaluation of low back pain. However, he found that appellant had similar symptoms previously to include a back

[20] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[21] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

injury and back pain. Dr. Wong indicated that appellant related that his pain was sharp and similar to prior episodes with the onset one month ago and still present. He noted that appellant reported that he "reinjured his low back while lifting on a ship in Dubai." However, the Board notes that he did not provide any details related to the present history of injury provided by appellant, which as noted above, was that he was welding.

Additionally, in May 6, 2016 reports, Dr. Gehret provided a history of injury, which included that appellant indicated that his problem began less than a month ago with a work-related accident. While he referenced the date of April 12, 2016, he indicated that appellant was pulling and lifting and experienced severe left-sided low back pain followed by left lower extremity pain and paresthesias. Dr. Gehret also noted that appellant had a prior history of low back pain several years ago, which had improved. However, with regard to the alleged April 12, 2016 employment incident, he did not note or indicate that he was aware of the stated activity of welding. The Board finds that the medical evidence of record fails to support the alleged facts and circumstances.[22]

The record also contains an emergency nurses' clinical report dated April 21, 2016. The nurse indicated that appellant indicated that he got hurt on the job, that the employing establishment had referred him for an MRI scan, and that he had the image with him in the form of a CD, but she was unable to view it. She also noted that he injured himself about four years ago in the same area. However, there was no description or mention of how he was injured while welding at work on April 12, 2106 and this report would also be insufficient to establish the facts of this claim.

The Board finds that the record lacks sufficient factual evidence to establish the specific details of how the claimed injury occurred. As appellant has not established the factual aspect of his claim, the medical evidence regarding causal relationship need not be addressed.[23]

For these reasons, appellant has not established that he sustained an injury in the performance of duty on April 12, 2016, as alleged.

On appeal counsel argues that appellant was totally disabled from the date of his alleged employment incident and that he established his claim. Appellant also argued that the incident occurred at work as alleged. However, as found above, he has not established the factual aspect of his 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.

[22] *R.M.*, Docket No. 11-1921 (issued April 10, 2012).

[23] *See V.F.*, 58 ECAB 321, 327 (2007).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before a hearing representative, states: 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.[24] A hearing is a review of an adverse decision by a 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.[25] The Branch of Hearings and Review, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and must exercise this discretionary authority in deciding whether to grant a hearing.[26] The Board has held that it must exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[27]

ANALYSIS -- ISSUE 2

A request for a hearing must, as noted above, be made within 30 days after the date of the issuance of an OWCP final decision. Appellant's request for oral hearing was postmarked on August 5, 2016. As the request was submitted more than 30 days following issuance of the July 1, 2016 decision, the Board finds that it was untimely filed.

OWCP also has the discretionary power to grant an oral hearing even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its August 12, 2016 decision, properly exercised its discretion by finding that it had considered the matter and had denied appellant's request for oral hearing as his claim could be equally well addressed through a reconsideration application. The Board has held that as the only limitation on OWCP's authority is reasonableness, 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.[28] The evidence of record does not indicate that OWCP committed any abuse of discretion in connection with its denial of appellant's request for an oral hearing.

[24] 5 U.S.C. § 8124(b)(1).

[25] 20 C.F.R. § 10.615.

[26] *D.M.*, Docket No. 08-1814 (issued January 16, 2009).

[27] *See R.T.*, Docket No. 08-0408 (issued December 16, 2008).

[28] *See Daniel J. Perea*, 42 ECAB 214 (1990).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on April 12, 2016, as alleged. The Board further finds that OWCP properly denied appellant's request for a hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the August 12 and July 1, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 14, 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