

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

K.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Metro, GA, Employer**

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

**Docket No. 17-2001
Issued: March 9, 2018**

Appearances:
Larry Walker, for the appellant¹
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

JURISDICTION

On September 26, 2017 appellant, through her representative, filed a timely appeal from a June 15, 2017 merit decision and a September 12, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a left shoulder and arm injury in the performance of duty on April 25, 2017, as alleged; and (2) whether OWCP abused its discretion in denying appellant's request for an oral hearing as untimely filed under 5 U.S.C. § 8124.

FACTUAL HISTORY

On April 26, 2017 appellant, then a 53-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 25, 2017 she sustained a left shoulder strain when a parcel fell on her left arm and shoulder. She notified her supervisor on April 26, 2017 and first received medical care on April 27, 2017. Appellant did not stop work. Appellant's supervisor controverted the claim reporting that appellant alleged that she was injured while on the back of her truck when reaching for a parcel.³

In an April 26, 2017 narrative statement, appellant reported that she was reloading her long life vehicle (LLV) and while she was stretched out a parcel fell on her arm and shoulder. An official position description for a city carrier was provided.

An April 27, 2017 modified work activity report and patient referral for strain of left shoulder and arm was submitted from Dr. Olumade Adenupe, a treating physician.

By development letter dated May 10, 2017, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the factual and medical evidence needed and was afforded 30 days to respond. OWCP informed her the evidence of record was insufficient to establish that she actually experienced the incident or employment factor alleged to have caused injury, there was no diagnosis of any condition, nor was there a physician's opinion as to the cause of her injury. It provided a questionnaire for completion and requested that appellant submit a response in order to substantiate the factual basis of her claim. The questionnaire requested further information regarding the mechanism of injury including a description of how the parcel fell on her arm or shoulder and the weight and dimensions of the parcel. Appellant was also asked whether she had a history of injury to the left shoulder and arm prior to April 25, 2017; and to provide statements from any persons who witnessed her injury or had immediate knowledge of it. She was afforded 30 days to provide the requested information. Appellant did not respond to the questionnaire.

In an April 27, 2017 medical report, Dr. Adenupe reported that a box fell on appellant's left arm, noting an April 25, 2017 date of injury. He diagnosed strain of left shoulder and strain of left rotator cuff capsule. A June 7, 2017 modified work activity report was also submitted.

By decision dated June 15, 2017, OWCP denied appellant's claim finding that the evidence of record failed to establish that the April 25, 2017 employment incident occurred as

³ The record reflects that appellant has seven prior traumatic injury claims with a date of injury ranging from May 8, 1998 through September 2, 2014. The record before the Board contains no other information pertaining to her prior claims.

alleged. It noted that she failed to respond to the questionnaire that was sent with the May 10, 2017 development letter.⁴

In an undated appeal request form, appellant requested an oral hearing before an OWCP hearing representative. The request was postmarked August 22, 2017 and received on August 25, 2017.

By decision dated September 12, 2017, an OWCP hearing representative denied appellant's request for an oral hearing finding that her request was not made within 30 days of the June 15, 2017 OWCP decision. The hearing representative further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which established that she sustained an injury.

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, 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 are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.⁶

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁷ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

When an employee claims that he or she sustained an injury in the performance of duty he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. He or she must

⁴ Following OWCP's June 15, 2017 decision, appellant submitted a properly executed Form CA-16, authorization for examination, from the employing establishment dated April 27, 2017. The form contained an accompanying attending physician's report dated April 27, 2017 from Dr. Adenupe. Appellant also submitted medical reports dated April 27 and June 7 and 28, 2017 documenting treatment for her left shoulder and arm. In a statement of certification dated June 17, 2017 and received on July 14, 2017, she responded to OWCP questionnaire regarding the circumstances surrounding the April 25, 2017 employment incident.

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *Elaine Pendleton*, 40 ECAB 1143 (1989).

also establish that such event, incident, or exposure caused an injury.⁸ Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof to establish an injury in the performance of duty on April 25, 2017, as alleged.¹⁰

Appellant has not provided sufficient detail to establish that a traumatic incident occurred in the performance of duty, as alleged.¹¹ On her Form CA-1 she stated that on April 25, 2017 she sustained a left shoulder strain when a parcel fell on her left arm and shoulder. Appellant's accompanying statement noted that she was reloading her LLV and while she was stretched out a parcel fell on her shoulder and arm. The Board notes that her vague description of the traumatic incident fails to provide any detail to determine the circumstances surrounding her injury.¹² The alleged mechanism of injury could not be determined as essential information such as the size and weight of the package was not provided.¹³ Moreover, appellant's supervisor controverted the claim regarding appellant's description of the mechanism of injury. By letter dated May 10 2017, OWCP requested that she describe the factual circumstances of her injury and provided her with a questionnaire for completion. Appellant did not respond to the questionnaire prior to OWCP's June 15, 2017 decision and failed to provide a detailed narrative statement describing the traumatic incident.¹⁴ The only explanation provided pertaining to the claimed April 25, 2017 traumatic incident was the vague statement noted in her Form CA-1. By failing to describe the employment incident and circumstances surrounding her alleged injury, appellant has not established that the traumatic injury occurred at the time, place, and in the manner alleged.¹⁵

The Board notes that appellant submitted additional evidence following the June 15, 2017 merit decision. The Board, however, may not consider new evidence which was not before OWCP at the time it issued its final decision.¹⁶ As appellant's statements were not part of the

⁸ See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

⁹ *Supra* note 5.

¹⁰ *J.L.*, Docket No. 16-1114 (issued October 25, 2016).

¹¹ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997); see also *G.L.*, Docket No. 17-1635 (issued December 5, 2017).

¹² *T.R.*, Docket No. 12-0012 (issued May 16, 2012).

¹³ See *R.V.*, Docket No. 17-1286 (issued December 5, 2017).

¹⁴ *G.L.*, *supra* note 11; *K.W.*, Docket No. 16-1656 (issued December 15, 2016).

¹⁵ *P.T.*, Docket No. 14-0598 (issued August 5, 2014).

¹⁶ 20 C.F.R. § 501.2(c).

record considered by OWCP in its June 15, 2017 decision, the Board may not consider this evidence for the first time on appeal.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that, before review under section 8128(a) of this title, 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.¹⁸ 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.¹⁹ OWCP regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought, as determined by postmark or other carrier's date marking, and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.²⁰

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA,²¹ 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.²² OWCP 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.²³

¹⁷ The record contains a Form CA-16 signed by the employing establishment official on April 27, 2017. When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003). The record is silent as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

¹⁸ 5 U.S.C. § 8124(b)(1).

¹⁹ 20 C.F.R. § 10.615.

²⁰ *Id.* at § 10.616(a).

²¹ *Supra* note 2.

²² *Marilyn F. Wilson*, 52 ECAB 347 (2001).

²³ *Teresa M. Valle*, 57 ECAB 542 (2006).

ANALYSIS -- ISSUE 2

In the present case, appellant requested an oral hearing before an OWCP hearing representative. The hearing representative found that the request was postmarked on August 22, 2017 and, was thus made more than 30 days after the date of issuance of OWCP's prior June 15, 2017 merit decision. The time limitation to request an oral hearing from OWCP's Branch of Hearings and Review expired on July 15, 2017, 30 days after the June 15, 2017 decision.²⁴ Therefore, OWCP's hearing representative properly found in her September 12, 2017 decision that appellant was not entitled to an oral hearing as a matter of right because her request was not made within 30 days of its June 15, 2017 decision.²⁵

OWCP's hearing representative then properly exercised her discretion by finding that she had considered the matter and denied appellant's request for a hearing because the issue could be equally well addressed through a reconsideration application.²⁶ The Board has held that the only limitation on OWCP's authority is reasonableness and an 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.²⁷ In this case, the evidence of record does not indicate that OWCP's hearing representative abused her discretion in denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request.²⁸

On appeal appellant argues that she did not know that OWCP had not received her documentation until her claim was denied and that she resent the documentation. The Board notes that OWCP's June 15, 2017 denial of her claim was accompanied with appeal rights which provided a timeline and instructions pertaining to the different forms of appeal. The additional evidence cannot be reviewed by the Board for the first time on appeal which was not before OWCP at the time it issued its June 15, 2017 merit decision.²⁹

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a left shoulder and arm injury in the performance of duty on April 25, 2017, as alleged. The Board also finds that OWCP properly denied her request for an oral hearing as untimely filed under 5 U.S.C. § 8124.

²⁴ *T.T.*, Docket No. 15-1397 (issued December 3, 2015).

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

²⁶ *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

²⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

²⁸ *D.P.*, Docket No. 14-0308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013).

²⁹ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated September 12 and June 15, 2017 are affirmed.

Issued: March 9, 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