

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

_____)	
D.O., Appellant)	
)	
and)	Docket No. 18-0086
)	Issued: March 28, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
St. Paul, MN, 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 October 13, 2017 appellant filed a timely appeal from a June 21, 2017 merit decision and a September 12, 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 of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a back condition causally related to the accepted April 26, 2017 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record pursuant to 5 U.S.C. § 8124 as untimely filed.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that her back condition was causally related to the accepted employment incident.²

FACTUAL HISTORY

On April 27, 2017 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging on April 26, 2017 she injured her lower back and experienced pain radiating down her left leg while lifting mail tubs into a truck. She stopped work on April 27, 2017 and has not returned.

In support of her claim, appellant submitted April 27 and May 8, 2017 reports wherein Annette Lerew-Zimanski, a physician assistant, indicated that appellant had acute left-sided low back pain without sciatica caused by lifting tubs of mail on April 27, 2017. In a May 5, 2017 report, Timothy Pampusch, a physician assistant, diagnosed low back pain.

On May 11, 2017 appellant underwent a magnetic resonance imaging (MRI) scan of her lumbar spine. Dr. Peter Busselberg, a Board-certified neuroradiologist, found multilevel degenerative changes.

By development letter dated May 18, 2017, OWCP informed appellant that additional medical evidence was necessary to establish her claim. It afforded her 30 days to submit the necessary information.

In a May 15, 2017 report, Dr. Paul Hartleben, a Board-certified orthopedic surgeon, related appellant's diagnoses as acute left leg L5 radiculopathy, secondary to work-related injury occurring on March 28, 2017 causing a substantial aggravation of L4-5 degenerative-type spondylolisthesis and severe subarticular impingement of the L5 nerve root and bilateral hip osteoarthritis with minor symptoms, left worse than right. He provided a history of injury that she was injured at work on March 26, 2017 when she was lifting and moving totes to the shelves, and that on April 26, 2017 she had a recurrence of back and leg symptoms and left buttock pain radiating down the calf and dorsum of the foot with numbness and tingling. Dr. Hartleben also noted that appellant's past history of bilateral hip arthritis. He indicated that she was planning to undergo a right total hip replacement. Dr. Hartleben noted that appellant was in significant distress, and that he recommended taking her off work for a period of temporary total disability while she continued to pursue physical therapy as well as epidural injections. In a May 31, 2017 report, he noted persistent left L5 radiculopathy secondary to L4-5 disc disease and subarticular stenosis substantially aggravated or induced by a work-related event occurring at the end of April 2017. Dr. Hartleben noted that appellant's activity tolerance did not allow even light work.

By decision dated June 21, 2017, OWCP denied appellant's claim, as it determined that the medical evidence of record did not establish that her claimed medical condition was causally related to the accepted April 26, 2017 employment incident.

² Appellant submitted new evidence with her appeal. 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 evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

By appeal request form with a certified mail tracking slip dated August 19, 2017, and received by OWCP on August 23, 2017, appellant requested a review of the written record by an OWCP hearing representative.

By decision dated September 12, 2017, an OWCP hearing representative denied appellant's request for a review of the written record. She noted that the request for a review of the written record was postmarked August 19, 2017, more than 30 days after the June 21, 2017 merit decision. Thus, she was not entitled to review of the written record as a matter of right, OWCP's hearing representative exercised her discretion to review appellant's request, but determined that the issue could be equally well addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 of FECA, that an injury was caused 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.⁴ 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.⁵

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, place, and in the manner alleged.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

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, 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.⁸ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁹

³ *Id.*

⁴ *Joe D. Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Id.*

⁸ *I.J.*, 59 ECAB 408 (2008); *supra* note 5.

⁹ *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted April 26, 2017 employment incident.

In support of her claim, appellant submitted medical reports by Dr. Hartleben, who opined that her left L5 radiculopathy secondary to L4-5 disc disease and subarticular stenosis were substantially aggravated or induced by a work-related event occurring the end of April 2017. He also however noted a prior March 28, 2017 injury. Although Dr. Hartleben's opinion is generally supportive of causal relationship, he did not provide sufficient rationale explaining the basis of his conclusion that there was a causal relationship between appellant's diagnosed medical conditions and her accepted employment incident of April 26, 2017. He did not explain how lifting the tubs of mail on April 26, 2017 caused her diagnosed medical conditions. This is especially important as Dr. Hartleben had noted that appellant had a prior injury in March 2017 causing these similar conditions.¹⁰ He failed to provide sufficient medical reasoning, or rationale, explaining how the April 26, 2017 employment incident caused or aggravated a particular diagnosed condition. A mere conclusion without necessary rationale explaining why the physician believes that a claimant's accepted employment incident resulted in the diagnosed condition is not sufficient.¹¹ Thus, Dr. Hartleben's reports are insufficient to establish causal relationship.

The remaining evidence is also insufficient to establish causal relationship. Dr. Busselberg found that appellant's MRI scan revealed multilevel degenerative changes, but provided no opinion regarding causal relationship. Diagnostic studies are of limited probative value as they do not address whether her federal employment caused the diagnosed conditions.¹² As such, his opinion is insufficient to establish causal relationship.

OWCP also received reports from two physician assistants. These reports are insufficient to establish the claim as physician assistants are not considered physicians under FECA and, thus, their reports have no probative value.¹³

Appellant's belief that the April 26, 2017 employment incident caused a medical condition, however sincerely held, does not constitute medical evidence sufficient to establish causal relationship.¹⁴

¹⁰ See *A.C.*, Docket No. 16-0452 (issued October 27, 2017).

¹¹ *S.K.*, Docket No. 15-0384 (issued May 7, 2015).

¹² See *M.M.*, Docket No. 17-1641 (issued February 15, 2018).

¹³ A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as physician as defined in 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See *Merton J. Sills*, 39 ECAB 572, 575(1988). Healthcare providers such as licensed clinical social workers, nurses, acupuncturists, physician assistants, and physical therapists are not considered physicians under FECA and their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability, or causal relationship. See *D.F.*, Docket No. 17-0135 (issued June 5, 2017).

¹⁴ See *V.D.*, Docket No. 17-1463 (issued December 19, 2017).

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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

If the request is not made within 30 days, a claimant is not entitled to a review of the written record as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny the request.¹⁹

ANALYSIS -- ISSUE 2

Appellant's request for a review of the written record was sent on August 17, 2017, as noted on the certified mail tracking slip. OWCP's regulations provide that [t]he hearing request must be sent within 30 days of the date of the decision for which a hearing is sought. Because appellant's request is postmarked on the tracking slip dated August 17, 2017, more than 30 days after OWCP's last merit decision, it was untimely filed and appellant was not entitled to a review of the written record as a matter of right. OWCP exercised its discretion and reviewed appellant's request, but denied it, finding that the issue could be equally well addressed by requesting reconsideration before OWCP. The Board thus finds that OWCP properly denied appellant's request for a review of the written record.²⁰

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. § 10.615.

¹⁷ *James Smith*, 53 ECAB 188 (2001); *id.* at § 10.616(a).

¹⁸ *K.S.*, Docket No. 17-1814 (issued February 13, 2018).

¹⁹ 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

²⁰ *Mary B. Moss*, 40 ECAB 640, 647 (1989). 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 deductions from known facts. *See Andre Thyraton*, 54 ECAB 257, 261 (2002).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted April 26, 2017 employment incident. The Board further finds that OWCP properly denied appellant's request for a review of the written record pursuant to 5 U.S.C. § 8124 as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 12 and June 21, 2017 are affirmed.

Issued: March 28, 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