United States Department of Labor
Employees' Compensation Appeals Board

J.O., Appellant	)	
and	)	**Docket No. 17-0789**
	)	**Issued: May 15, 2018**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Las Vegas, NV, 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 February 28, 2017 appellant filed a timely appeal from a November 30, 2016 merit decision and a February 23, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 his burden of proof to establish an injury due to the accepted October 20, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for a hearing under section 8124 of FECA as untimely filed.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 20, 2016 appellant, then a 41-year-old federal officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury while at work on October 20, 2016. He noted that, after an uncooperative suspect refused to be restrained by handcuffs and a belly chain, the suspect braced himself against a wall and spit in appellant's face. Appellant indicated that the saliva entered his mouth. He did not stop work.[2]

In an October 20, 2016 development letter, OWCP requested that appellant submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition. It requested that he complete and return an attached questionnaire which posed various questions regarding the claimed exposure to bodily fluids and the medical treatment he received after the October 20, 2016 incident. OWCP afforded appellant 30 days to respond.

Appellant subsequently submitted an October 20, 2016 report from Dr. Glen Guillermo, a Board-certified emergency medicine physician, who evaluated him on that date in the emergency department at the University Medical Center in Las Vegas. Dr. Guillermo noted that appellant reported that, while restraining a suspect at work that morning, the suspect spit in his face. Appellant felt that the spit entered his mouth and he reported that he immediately washed his face and mouth. Dr. Guillermo detailed the findings of his physical examination, noting essentially normal findings. He listed appellant's chief complaint as "exposure" and the primary diagnosis as "bodily fluid exposure." Appellant received a tetanus, diphtheria, and pertussis (TDAP) vaccine. Dr. Guillermo discharged appellant, noting that his condition was stable, and advised him to return to the emergency department if he had any new or worsening symptoms.

In an employee's claim for compensation/report of initial treatment (Form CA-4), appellant completed the top half of the form on October 20, 2016, noting that on the same date he was placing a suspect in handcuffs when the suspect spit in his face and the spit entered his mouth. Dr. Guillermo completed the bottom half of the form on October 20, 2016 and listed the diagnosis/injury description as "possible exposure, bodily fluids."[3]

In a November 30, 2016 decision, OWCP denied appellant's claim for an October 20, 2016 employment injury. It denied his claim because he failed to establish the medical aspect of the fact of injury. OWCP found that appellant failed to submit a medical report containing a well-rationalized medical opinion explaining how the October 20, 2016 described exposure or work factors caused or contributed to a diagnosed medical condition. It noted that possible exposure alone was insufficient to establish a work-related medical condition.

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[2] Appellant also filed an occupational disease claim (Form CA-2) on October 20, 2016, but OWCP properly considered his claim to be for a traumatic injury. A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

[3] Appellant also submitted an unsigned October 20, 2016 adult emergency department record which contained the notation, "Spit in face -- went in mouth."

By an appeal request form dated January 26, 2017 and postmarked January 30, 2017, appellant requested an oral hearing in connection with OWCP's November 30, 2016 decision.

In a February 23, 2017 decision, an OWCP hearing and review examiner, determined that appellant was not entitled to a hearing as a matter of right because his January 30, 2017 hearing request was not made within 30 days of OWCP's November 30, 2016 merit decision. The examiner indicated that she had, in her discretion, carefully considered appellant's request and had determined that the request was denied because the issue of the case could equally well be addressed by requesting reconsideration and submitting new evidence which established an October 20, 2016 employment injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] 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, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time and place, and in the manner alleged.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the

[4] *See supra* note 1.

[5] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

[7] *Julie B. Hawkins*, 38 ECAB 393 (1987).

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

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish an injury due to an October 20, 2016 employment incident.

Appellant claimed that he sustained an injury at work on October 20, 2016 when an uncooperative suspect spit in his face. He indicated that the saliva entered his mouth. In a November 30, 2016 decision, OWCP accepted the occurrence of the employment incident as alleged. However, it denied appellant's claim because he failed to establish the medical aspect of fact of injury. OWCP found that appellant failed to submit a medical report containing a well-rationalized medical opinion explaining how the described October 20, 2016 exposure or work factors caused or contributed to a diagnosed medical condition.

In support of his claim, appellant submitted an October 20, 2016 report from Dr. Guillermo who evaluated him on that date. Dr. Guillermo noted that appellant reported that, while restraining a suspect at work that morning, the suspect spit in his face and the spit entered his mouth. He detailed the findings of his physical examination, noting essentially normal findings. Dr. Guillermo listed appellant's chief complaint as "exposure" and the primary diagnosis as "bodily fluid exposure." Appellant received a TDAP vaccine, and Dr. Guillermo discharged him noting that his condition was stable. In a form report dated October 20, 2016, Dr. Guillermo listed the diagnosis/injury description as "possible exposure, bodily fluids."[10]

These reports are insufficient to establish appellant's claim for an October 20, 2016 employment injury because, while the reports acknowledge the occurrence of the October 20, 2016 spitting incident, they do not contain an opinion that appellant sustained a diagnosed medical condition due to the incident. The Board has held that medical evidence which does not offer an opinion regarding the nature and cause of an employee's medical condition is of no probative value in establishing a work-related condition.[11] Moreover, OWCP procedures provide that simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related medical condition.[12] The Board notes that, for these reasons, appellant did not meet his burden of proof to establish his claim for an October 20, 2016 employment injury because he failed to establish the medical aspect of the fact of injury.[13]

[9] *See I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[10] Appellant completed a portion of the form report on October 20, 2016, noting that on the same date he was placing a suspect in handcuffs when the suspect spit in his face and the spit entered his mouth.

[11] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[12] 20 C.F.R. § 10.303; *see also R.L.*, Docket No. 15-1328 (issued September 21, 2016).

[13] *See supra* notes 7 and 8.

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 representative, provides in pertinent part: "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 claim before a representative of the Secretary."[14] Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.[15] 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.[16] The date of filing is fixed by postmark or other carrier's date marking.[17]

The Board has held that OWCP, 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 that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[18] Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,[19] when the request is made after the 30-day period for requesting a hearing,[20] when the request is for a second hearing on the same issue,[21] and when the request is made after a reconsideration request was previously submitted.[22] In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[23]

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 10.615.

[16] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[17] *See* 20 C.F.R. § 10.616(a).

[18] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[19] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[20] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[21] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[22] *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007).

[23] *See supra* note 19.

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing was made on January 30, 2017, *i.e.*, a date more than 30 days after the issuance of OWCP's merit decision dated November 30, 2016. Hence, the Board finds that appellant was not entitled to a hearing as a matter of right.[24]

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP's hearing and review examiner, in its February 23, 2017 decision, properly exercised its discretion by indicating that it had carefully considered appellant's request and had determined that the request was denied for the reason that the issue of the case could equally well be addressed by requesting reconsideration and submitting new evidence which established an October 20, 2016 employment injury. 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.[25] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury due to the accepted October 20, 2016 employment incident. The Board further finds that OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

[24] *See supra* notes 16 and 20.

[25] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2017 and November 30, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 15, 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