

FACTUAL HISTORY

On October 14, 2015 appellant, then a 51-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that, on September 15, 2015, she sustained injury due to an elevator door striking the left side of her head while she was pushing a clothing cart while in the performance of duty. She claimed that she sustained nausea, lightheadedness, and headache. Appellant stopped work on September 15, 2015 and returned to work on September 19, 2015.

Appellant submitted September 15, 2015 discharge notes signed by Valerie Stella-Bahner, an attending nurse practitioner. The notes contained a diagnosis of headache and noted that appellant could return to work on September 17, 2015. Appellant also submitted physical therapy notes dated between November 2015 and February 2016.

In a July 28, 2016 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim for a September 15, 2015 employment injury. It afforded her 30 days to respond.

By decision dated August 29, 2016, OWCP accepted the occurrence of an employment incident on September 15, 2015, however, it denied appellant's claim for employment injury because she failed to establish the medical aspect of the fact of injury requirement. It indicated that appellant failed to submit a medical report in which a physician related a specific, diagnosed condition to the September 15, 2015 employment incident.

On September 12, 2016 appellant requested reconsideration of the August 29, 2016 decision.

Appellant submitted a September 15, 2015 report from Sarah A. Foster-Chang, an attending nurse practitioner.² Ms. Chang noted that appellant reported that on that date an elevator door struck the left side of her head. She indicated that appellant had prior musculoskeletal problems and provided an assessment of head injury from the elevator door causing near syncope with nausea and listing to the left.

In an August 22, 2016 attending physician's report (Form CA-20), Dr. Brian McDonald, an attending Board-certified osteopath and physical medicine and rehabilitation physician, listed the date of injury as September 15, 2015 and noted that appellant reported that an elevator door struck the left side of her head on that date. He diagnosed concussion and checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by the employment incident.

By decision dated December 9, 2016, OWCP denied appellant's claim for a September 15, 2015 employment injury. It modified its August 29, 2016 decision to reflect that she had established fact of injury by submitting the August 22, 2016 report of Dr. McDonald. However, OWCP denied appellant's claim because she failed to submit rationalized medical evidence

² The report was cosigned by another individual, but the signature is illegible.

sufficient to establish causal relationship between the September 15, 2015 incident and a diagnosed medical condition.

On February 15, 2017 appellant requested reconsideration of OWCP's December 9, 2016 decision. In February 8 and March 9, 2017 letters, she argued that the evidence of record established her claim for a September 15, 2015 employment injury.

By decision dated March 29, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence/argument she submitted in support of her timely reconsideration request was either irrelevant or immaterial to the underlying issue of the case.

On May 9, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated May 23, 2017, an examiner from OWCP's Branch of Hearings and Review determined that appellant was not entitled to a review of the written record as a matter of right because she had previously requested reconsideration of her claim. The examiner indicated that she 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 a diagnosed condition causally related to the September 15, 2015 employment incident.

LEGAL PRECEDENT

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."³ 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.⁴ 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.⁵ The date of filing is fixed by postmark or other carrier's date marking.⁶

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

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

⁶ *See* 20 C.F.R. § 10.616(a).

grant a hearing.⁷ 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,⁸ when the request is made after the 30-day period for requesting a hearing,⁹ when the request is for a second hearing on the same issue,¹⁰ and when the request is made after a reconsideration request was previously submitted.¹¹ In these instances, OWCP will determine whether a discretionary hearing should be granted, and if not, will so advise the claimant with reasons.¹²

ANALYSIS

Appellant's May 9, 2017 request for a review of the written record was made after she had previously requested reconsideration of prior OWCP decisions concerning her claim for a September 15, 2015 employment injury. On September 12, 2016 she had requested reconsideration of an August 29, 2016 OWCP decision denying her claim and, on February 15, 2017, she had requested reconsideration of a December 9, 2016 OWCP decision denying her claim. Hence, OWCP was correct in finding in its May 23, 2017 decision that appellant was not entitled to a hearing in the form of a review of the written record as a matter of right.¹³

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, in its May 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 a diagnosed condition causally related to the September 15, 2015 employment incident. The Board has held that as the only limitation on OWCP's authority is reasonableness, and 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.¹⁴ 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 review of the written record which could be found to be an abuse of discretion.

⁷ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁸ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁰ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹¹ *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

¹² *See supra* note 8.

¹³ *See supra* note 11.

¹⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that OWCP's Branch of Hearings and Review properly denied appellant's request for review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board