

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

C.K., Appellant)	
)	
and)	Docket No. 18-0607
)	Issued: October 18, 2018
U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Milwaukee, WI,)	
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 January 30, 2018 appellant filed a timely appeal from an October 16, 2017 merit decision and a December 28, 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 the claim.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a left knee injury causally related to the accepted August 25, 2017 employment incident; and (2) whether OWCP's Branch of Hearings and Review properly denied appellant's request for review of the written record, pursuant to 5 U.S.C. § 8124(b)(1), as untimely filed.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 25, 2017 appellant, then a 44-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that, on that date she, was pulling on an all-purpose container (APC) while at work when she sustained a left knee strain. She stopped work on August 25, 2017 and returned to work on August 29, 2017.

In support of her claim, appellant submitted an August 25, 2017 emergency services excuse form signed by Kelly Anderson, a physician assistant, which indicated that appellant was excused from work until August 27, 2017.

By development letter dated September 11, 2017, OWCP requested that appellant submit additional factual and medical evidence in support of her claim including a rationalized medical opinion from a qualified physician regarding causal relationship. It attached a questionnaire for her completion and afforded her 30 days to submit the necessary evidence.

On September 25, 2017 appellant responded to the development questionnaire and provided further details with regard to how her injury occurred. She noted that the driver had taken an APC off his truck, as she grabbed it and started pulling it toward the staging area she could not place pressure on her knee.

Appellant submitted physical therapy notes from her initial visit on September 27, 2017. The physical therapist noted that appellant had chronic pain in her left knee.

By decision dated October 16, 2017, OWCP denied appellant's claim. It determined that, although appellant had established that the incident occurred as alleged, she had not submitted medical evidence supporting a diagnosed condition causally related to the accepted incident.

On November 29, 2017 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review. She submitted additional evidence from her physical therapists.

In a decision dated December 28, 2017, the hearing representative denied appellant's request for a review of the written record as it was untimely filed. She also reviewed the request at her discretion, and determined that the issue could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA² has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability claimed is causally related to the employment injury.³

² *Id.*

³ S.S., Docket No. 16-1760 (issued January 23, 2018).

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether the fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁴ The second component is whether the employment incident caused a personal injury.⁵ An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁶

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.⁷ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁸ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established her traumatic injury claim, as she has not established a diagnosed condition causally related to the accepted employment incident.

Appellant failed to submit any medical evidence to support her claim. The evidence of record prior to OWCP's October 16, 2017 merit decision consisted of reports from a physician assistant and a physical therapist. The Board has held that reports from physician assistants and physical therapists do not constitute competent medical evidence under FECA as these practitioners are not considered physicians as defined by FECA. Therefore, these reports are insufficient to establish appellant's claim.¹⁰

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

⁶ *Shirley Temple*, 48 ECAB 404, 407 (1997).

⁷ *Robert G. Morris*, 48 ECAB 238 (1996).

⁸ *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁹ *See R.E.*, Docket No. 16-1916 (issued March 8, 2018).

¹⁰ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by law. *Allen C. Hundley*, 53 ECAB 551, 554 (2002) (physician assistants); *P.T.*, Docket No. 17-0374 (issued April 19, 2018) (physical therapists).

Consequently, because appellant has failed to submit medical evidence to establish that she sustained an employment-related diagnosed medical condition causally related to the accepted employment incident, she has not met her burden of proof.¹¹

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."¹² 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.¹³ 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.¹⁴ The date of filing is fixed by postmark or other carrier's date marking.¹⁵

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.¹⁶ 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,¹⁷ when the request is made after the 30-day period for requesting a hearing,¹⁸ when the request is for a second hearing on the same issue,¹⁹ and when the request is made after a reconsideration request was previously

¹¹ See *E.G.*, Docket No. 17-0265 (issued May 25, 2018).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.615.

¹⁴ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

¹⁵ See 20 C.F.R. § 10.616(a).

¹⁶ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁷ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹⁸ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁹ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

submitted.²⁰ In these instances, OWCP will determine whether a discretionary hearing should be granted, and if not, will so advise the claimant with reasons.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b)(1).

A request for hearing or review of the written record must, as noted above, be made within 30 days after the date of the issuance of a final OWCP decision. Appellant's unsigned request for review of the written record was date stamped as having been received by OWCP on November 28, 2017, which is more than 30 days after its October 16, 2017 decision. The imaged copy of the envelope that is in the record before the Board does not contain a visible postmark date. Where the postmark is nonexistent or not legible, the hearing request will be deemed timely unless OWCP has kept evidence of the date of delivery on the record reflecting that the request is untimely.²² As noted, the appeal request form is date stamped as having been received on November 28, 2017. Accordingly, the evidence regarding the date of delivery reflects that appellant's request is untimely filed. Therefore, OWCP's hearing representative properly found in her December 28, 2017 decision that appellant was not entitled to a review of the written record as a matter of right because her request was not made within 30 days of its October 16, 2017 decision.²³

OWCP's hearing representative then properly exercised her discretion by noting that she had considered the matter and denied appellant's request for a review of the written record because the issue could equally well be addressed through a request for reconsideration.²⁴ The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion. 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 this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for a review of the written record.

Appellant contends that she submitted her request for review of the written record late because she was waiting for hospital reports. However, as explained above, OWCP properly denied appellant's request for a review of the written record. Accordingly, the Board finds that

²⁰ *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).

²¹ *L.W.*, Docket No. 18-0249 (issued May 8, 2018).

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

²³ *See Z.D.*, Docket No. 17-1315 (issued October 12, 2017).

²⁴ *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

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

OWCP properly denied appellant's request for a review of the written record as untimely filed under 5 U.S.C. § 8124(b)(1).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a left knee condition causally related to the accepted August 25, 2017 employment incident. The Board further finds that OWCP's Branch of Hearings and Review properly denied appellant's request for review of the written record as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 28 and October 16, 2017 are affirmed.

Issued: October 18, 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