



properly denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124.

### **FACTUAL HISTORY**

On September 21, 2017 appellant, then a 46-year-old reentry affairs coordinator, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2017 she injured the inside portion of her middle digit on her right hand while conducting a security round of the housing unit. She explained: "while searching an inmate's locker I was exposed (*i.e.* pricked) by a manufacture tattoo needle." Appellant stopped work that date.

OWCP received hospital discharge instructions dated September 8, 2017, which provided information regarding medical care for postexposure prophylaxis (PEP).

In a September 25, 2017 development letter, OWCP acknowledged receipt of appellant's claim and informed her that additional evidence was needed in support of her claim. It provided her a factual questionnaire to complete and return and requested medical evidence in support of her claim. OWCP afforded appellant 30 days to submit the requested information.

By decision dated October 30, 2017, OWCP denied appellant's traumatic injury claim. It accepted that the September 8, 2017 employment incident occurred as alleged, but denied her claim because the medical evidence submitted did not contain a medical diagnosis in connection with the accepted employment incident. OWCP specifically noted that exposure alone was insufficient to establish a work-related injury. Consequently, it found that appellant had failed to establish the medical component of fact of injury.

Following the October 30, 2017 denial decision, OWCP received a hospital registration record dated September 8, 2017 by Dr. Ralph A. Jackson, Board-certified in internal and emergency medicine. Dr. Jackson noted a diagnosis/complaint of: "contact with hypodermic [needle]." He explained that appellant worked at the federal prison and was stuck by a needle. Dr. Jackson conducted an examination and indicated that she was treated for PEP. Appellant was discharged from the hospital on the same date without restrictions.

In an undated appeal request form, postmarked December 7, 2017, and received by OWCP on December 13, 2017, appellant requested a review of the written record by a hearing representative from OWCP's Branch of Hearings and Review. In a handwritten December 4, 2017 statement, she disagreed with the denial of her claim based on fact of injury. Appellant requested that OWCP review page 2 of the documentation from the hospital, which contained the doctor's note. She described her efforts to seek additional medical evidence from the hospital and indicated that she had submitted all the information that she had to support her claim.

In a November 9, 2017 hospital addendum note, Dr. Daniel J. Green, a Board-certified family practitioner, reported under clinical impression: "Needle stick injury to right 3<sup>rd</sup> digit; volar aspect of distal 3<sup>rd</sup> phalanx."

By decision dated January 11, 2018, an OWCP hearing representative denied appellant's request for a review of the written record as it was untimely filed. She found that the request was not postmarked within 30 days of the issuance of the October 30, 2017 OWCP merit decision.

After exercising her discretion, the hearing representative further found that the issue in the case could equally well be addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> 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<sup>4</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability from work for which compensation is claimed is causally related to that employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.<sup>7</sup> There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.<sup>8</sup> Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.<sup>9</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition for which compensation is being claimed is causally related to the employment incident.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has failed to establish traumatic injury causally related to the accepted September 8, 2017 employment incident.

Appellant submitted several hospital records, which indicated that she received medical treatment in the emergency room after contact with a hypodermic needle. In a September 8, 2017 report, Dr. Jackson indicated that appellant worked at a federal prison and was stuck by a needle. He provided examination findings and noted that appellant was treated for PEP. The Board notes that Dr. Jackson did not provide a medical diagnosis, but only identified the prophylactic medical treatment that appellant was provided. Dr. Jackson did not identify a specific, compensable

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>5</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>7</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>8</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>9</sup> *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

disease or illness resulting from the needle stick.<sup>11</sup> Likewise, Dr. Green's November 9, 2017 addendum note also fails to identify a diagnosed condition. He merely described a "needle stick injury" to appellant's right 3<sup>rd</sup> digit. For this reason, these reports did not provide a firm, medical diagnosis in connection with the accepted condition.<sup>12</sup>

Section 10.303 of OWCP's regulations provide that simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under FECA unless the employee has sustained an identifiable injury or medical condition as a result of that exposure.<sup>13</sup> Thus, the fact that appellant was exposed to a potentially contaminated needle is, in itself, insufficient to establish that she sustained an injury. To meet her burden of proof, appellant must establish, with sufficient medical rationale, that she sustained an identifiable injury. The Board finds that appellant has provided insufficient medical evidence to establish that she sustained an identifiable injury as a result of being stuck by a needle.

The Board notes that OWCP regulations and procedures provide that preventive treatment can be authorized where an employee experiences complications of preventive measures which are provided or sponsored by an agency, such as an adverse reaction to prophylactic immunization, or where there is actual or probable exposure to a known contaminant due to an injury.<sup>14</sup> However, the Board has held that OWCP can only authorize preventive treatment after an injury has been established.<sup>15</sup> As noted above, appellant did not establish that she sustained an injury as a result of exposure. Thus, the provision does not apply in the instant case.

The Board further notes that OWCP's procedures provide special procedures for high risk employment where an employee is routinely presented with situations which may lead to infection by contact with animals, human body, bodily secretions, and other substances. Conditions such as human immunodeficiency virus (HIV) infection and hepatitis B more commonly represent a work hazard in health care facilities, correctional institutions, and drug treatment centers, among others, than in the federal workplace as a whole.<sup>16</sup> In the case of *N.S.*,<sup>17</sup> the Board found that a nurse who was stuck by a contaminated needle during her employment was not required to establish with medical evidence that her exposure to hepatitis C caused a personal injury. Rather, because her employment was considered high risk, she only had to establish that the source of the infection was a known or probable carrier of the disease. In this case, however, although

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<sup>11</sup> See *B.A.*, Docket No. 08-1542 (issued February 11, 2009) (finding that OWCP did not abuse its discretion in denying reimbursement for prophylactic treatment after the claimant was stuck by a discarded needle because no disease or illness had been diagnosed in connection with the accepted needle stick). *Y.H.*, Docket No. 09-0181 (issued August 17, 2009).

<sup>12</sup> *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>13</sup> 20 C.F.R. § 10.303.

<sup>14</sup> *Id.* at § 10.313(a); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.7 (April 1992).

<sup>15</sup> See *Y.H.*, Docket No. 09-181 (issued August 17, 2009).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *High Risk Employment*, Chapter 2.805.6 (January 2013).

<sup>17</sup> 59 ECAB 422 (2008).

appellant's employment as a reentry affairs coordinator could be considered high risk, she has failed to establish the source of any infection, specifically, whether the needle she was stuck with tested positive for HIV or hepatitis C. Thus, the Board finds that the special procedures for high risk employment are not applicable in this case. The medical evidence of record is insufficient to establish that appellant sustained a specific, identifiable injury on September 8, 2017.<sup>18</sup>

There is no evidence of record that establishes a medical diagnosis in connection with the accepted employment incident. Accordingly, the Board finds that appellant failed to establish that she sustained an injury causally related to the accepted September 8, 2017 employment incident.

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 provides that "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."<sup>19</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>20</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>21</sup> Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed. OWCP's regulations provide that the request for a review of the written record must be sent within 30 days of the date of the decision for which a review is sought. Because appellant's request was postmarked December 7, 2017, more than 30 days after

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<sup>18</sup> See *L.W.*, Docket No. 15-0366 (issued April 20, 2016) (finding that OWCP's procedures for high risk employment did not apply to a corrections officer who sustained cuts on his hand and blood while restraining a prisoner because the employee failed to establish whether the prisoner was positive for HIV or hepatitis C); see also *Lillian A. Ferraro*, Docket No. 04-1957 (issued December 17, 2004) (finding that a dental hygienist who was stuck by a dirty dental instrument and became sick from the postexposure prophylactic treatment did not establish her claim because she did not submit medical evidence containing a diagnosed condition related to the incident).

<sup>19</sup> 5 U.S.C. § 8124(b)(1).

<sup>20</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>21</sup> *Id.* at § 10.616(a).

<sup>22</sup> *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

OWCP's October 30, 2017 decision, it was untimely filed and she was not entitled to a review of the written record as a matter of right.

Although appellant's request for a review of the written record was untimely filed, OWCP has the discretionary authority to grant the request and it must exercise such discretion.<sup>23</sup> In its January 11, 2018 decision, OWCP's hearing representative properly exercised her discretion by notifying appellant that she had considered the matter in relation to the issue of whether she had established a traumatic injury on September 8, 2017 and determined that the issue involved could be equally well addressed by a request for reconsideration before OWCP. The Board finds that the hearing representative properly exercised her discretionary authority in denying appellant's request for a review of the written record.<sup>24</sup> The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.<sup>25</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record.

On appeal appellant alleges that it took time to collect the documentation needed to prove her claim, so she was appealing that she had missed the deadline. The Board notes that OWCP's October 30, 2017 denial of her claim was accompanied by appeal rights which unequivocally detailed a timeline and instructions pertaining to the different avenues of appeal. As appellant's request for a review of the written record was not made within 30 days, it was, therefore, untimely filed.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish an injury causally related to a September 8, 2017 employment incident. The Board further finds that OWCP properly denied her request for review of the written record as untimely filed.

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<sup>23</sup> *Id.*

<sup>24</sup> *Mary B. Moss*, 40 ECAB 640, 647 (1989).

<sup>25</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 30, 2017 and January 11, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 5, 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