United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Hampton, VA, Employer**	)))))))))	**Docket No. 18-0664** **Issued: August 12, 2019**

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 6, 2018 appellant filed a timely appeal from an October 25, 2017 merit decision and a January 9, 2018 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.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that a right wrist/hand condition causally related to the accepted November 28, 2016 employment incident;

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

and (2) whether OWCP 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 December 1, 2016 appellant, then a 40-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2016 she suffered a right wrist strain attending to a patient while in the performance of duty. She was performing perineal cleaning and injured her right wrist when turning the patient, who weighed 500 pounds.

Appellant was initially treated at the employing establishment's health unit. In a November 29, 2016 radiology report, Dr. Dennis D. Walker, a staff physician, related appellant's complaints of right hand and wrist pain and swelling. He noted findings of multilevel joint space narrowing and relative preservation of the metaphalangeal joints without evidence of erosive or inflammatory arthropathy. Dr. Walker diagnosed mild diffuse osteoarthritis.

In a December 1, 2016 duty status report (Form CA-17), Michelle A. Barron, a nurse practitioner, diagnosed right wrist strain. She indicated that appellant could return to work on December 1, 2016 with restrictions. Ms. Barron saw appellant for a follow up on December 5, 2016 and she extended her work restrictions pending additional diagnostic studies.

A January 6, 2017 right hand magnetic resonance imaging (MRI) scan showed a small central perforation within the central portion of the articular disc of the triangular fibrocartilage complex (TFC).

Appellant was treated by Dr. Michael T. Davis, an orthopedic hand surgeon. In a January 24, 2017 examination report, Dr. Davis noted examination findings of tenderness to palpation and palpable bony prominence of the mid-dorsal right wrist. Finklestein's test was positive. Tinel's and Phalen's tests were negative. Dr. Davis diagnosed "right wrist carpal boss and right wrist de Quervain's."

In an August 7, 2017 progress note, Dr. Davis related that appellant's symptoms had improved, but she still complained of discomfort of the dorsal wrist and over the dorsal bony prominence. Physical examination of appellant's right wrist revealed tenderness to palpation over the dorsal prominence. Dr. Davis indicated that the computerized tomography (CT) scan demonstrated a small subchondral cyst at the base of the capitate. He diagnosed left third carpometacarpal joint and pain, status post attempted arthrodesis.

OWCP received a short-term disability claim form dated August 21, 2017, completed by Dr. Davis, in which he indicated: "workload exacerbates preexisting condition." Dr. Davis noted a diagnosis of radial styloid tenosynovitis. He noted that appellant was pending surgery on September 8, 2017 and would be disabled from work beginning that date.

In an August 29, 2017 attending physician's report (Form CA-20), Dr. Davis noted a date of injury of November 28, 2017.[3] He related that appellant experienced swelling and pain in her right wrist and hand after lifting a patient at work. Dr. Davis indicated that she had preexisting a metacarpal and carpal fracture. He diagnosed right wrist radial styloid tenosynovitis and right wrist pain. Dr. Davis checked a box marked "yes" indicating that the medical condition was caused or aggravated by an employment activity. He explained that the "reported incident [was] more likely than not exacerbated condition." Dr. Davis noted that appellant was pending surgery.

On September 8, 2017 appellant underwent right wrist surgery performed by Dr. Davis. The operative report indicated a preoperative diagnosis of right wrist painful carpal boss/enthesopathy. Appellant stopped work and filed several claims for wage-loss compensation (Forms CA-7) for total disability beginning September 8, 2017.

In a development letter dated September 22, 2017, OWCP informed appellant that her claim was initially accepted as a minor injury, but was being reopened for review of the merits because a claim for wage loss had been received. It requested that she respond to an attached development questionnaire and provide medical evidence to establish a diagnosed condition as a result of the alleged employment incident. OWCP afforded appellant 30 days to submit the necessary evidence.

A September 26, 2017 right wrist radiology report showed postoperative changes of ulnar positive variance and decreased bone mineral density.

On October 11, 2017 OWCP received appellant's response to its development letter. Appellant related that the immediate effects of the injury were pain and difficulty with range of motion. She explained that she reported the incident to her supervisor and sought medical treatment at the occupational health office at the employing establishment. Appellant indicated that she did not sustain any other injury, but that she had a preexisting condition of dislocation of carpal and metacarpal bone in her right hand.

Appellant submitted several witness statements. In an October 9, 2017 statement, M.E., a registered nurse, described that she was helping appellant turn a patient who was really heavy. She noted that appellant pushed the patient and hurt her hand and wrist. In another witness statement, E.A., a registered nurse, explained that on November 28, 2016 she was helping appellant to clean a patient who weighed 500 pounds by holding him up and helping to turn him over. She explained that appellant injured her right hand when she pushed on the patient's back side in order to clean the patient better.

In an October 11, 2017 progress note, Dr. Davis noted that appellant had undergone right wrist surgery. Upon physical examination of appellant's right wrist, he provided range of motion findings and noted improved soft tissue swelling. Dr. Davis diagnosed excision of the "right wrist carpal boss with carpometacarpal arthrodesis and application of demineralized bone graft." He indicated that during the operation, it was noticed that appellant demonstrated significant post-traumatic arthritis of the third carpometacarpal joint. Dr. Davis opined: "I believe this area of

[3] The alleged date of injury is November 28, 2016. The Board notes that the November 28, 2017 date of injury appears to be a notation error.

arthritis was definitely aggravated by her job load as well as one specific event where she had to transfer and help lift a very obese patient." He reported that appellant would need to regain range of motion and grip strength before she could return to work.

By decision dated October 25, 2017, OWCP denied appellant's claim. It accepted that the November 28, 2016 employment incident had occurred as alleged and that a diagnosed right wrist condition was established, but it denied her claim finding insufficient medical evidence to establish causal relationship between her right wrist/hand condition and the accepted employment incident.

On November 29, 2017 OWCP received an undated appeal request form requesting a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP also received an October 20, 2017 work status note by Dr. Davis. Dr. Davis indicated that appellant was unable to work from September 8, 2017 through March 1, 2018 due to an injury.

In a November 29, 2017 progress note, Dr. Davis related that appellant's condition had improved, but she was still not completely recovered. He provided examination findings and diagnosed excision of right wrist carpal boss, 3rd digit, and application of demineralized bone graft at the union site. Dr. Davis opined: "I do believe that her preexisting wrist condition was exacerbated by an incident that took place on [November 28, 2016] involving a patient." He described that appellant was rolling a 500-pound patient for a bedding change when the weight of the patient was inadvertently released onto her wrist and caused a "significant compression injury with the wrist in a semi flexed position."

On December 20, 2017 OWCP received another appeal request form dated November 7, 2017 and postmarked on December 8, 2017, which indicated that appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated January 9, 2018, the Branch of Hearings and Review denied appellant's request for a review of the written record, finding that it was untimely filed as it was not postmarked within 30 days of the issuance of the October 25, 2017 decision. After exercising its discretion, the Branch of Hearings and Review 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[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 of FECA,[5] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to

[4] *Supra* note 1.

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.[6] 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.[7]

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.[8] 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.[9] 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.[10] 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.[11]

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence.[12] 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 factor(s) identified by the employee.[13] 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.[14]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[15]

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[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden*, *Sr.*, 40 ECAB 312 (1988).

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[9] *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[10] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 8.

[11] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[12] *See S.A.,* Docket No. 18-0399 (issued October 16, 2018); *see also Robert G. Morris*, 48 ECAB 238 (1996).

[13] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.,* 59 ECAB 408 (2008); *Victor J. Woodhams,* 41 ECAB 345 (1989).

[14] *James Mack,* 43 ECAB 321 (1991).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish causal relationship between her right wrist/hand condition and the accepted November 28, 2016 employment incident.

Appellant submitted medical reports from Dr. Davis dated January 24 to November 29, 2017. Upon initial examination of appellant's right wrist, he observed tenderness to palpation and palpable bony prominence of the mid-dorsal wrist. Finklestein's test was positive. Tinel's and Phalen's tests were negative. Dr. Davis diagnosed right wrist carpal boss and right wrist de Quervain's. In an August 21, 2017 short-term disability form, he reported that appellant's "workload exacerbates preexisting condition." In an August 29, 2017 Form CA-20, Dr. Davis related that appellant experienced right wrist pain and swelling after lifting a patient at work. He noted that she had preexisting metacarpal and carpal fracture and diagnosed right wrist styloid tenosynovitis and right wrist pain. Dr. Davis checked a box marked "yes" indicating that the medical condition was caused or aggravated by an employment activity. He explained that the "reported incident more likely than not exacerbated condition." The Board finds that Dr. Davis' explanation that the reported incident "more likely than not" aggravated appellant's preexisting condition is speculative in nature and, therefore, of diminished probative value to establish causal relationship.[16] Dr. Davis did not provide sufficient medical rationale explaining how the November 28, 2016 incident exacerbated appellant's preexisting right wrist condition.

Dr. Davis further indicated in an October 11, 2017 progress note that he believed appellant's arthritis was "definitely aggravated by her job load as well as one specific event where she had to transfer and help lift a very obese patient." However, he did not sufficiently explain the process of how lifting and rolling an obese patient caused or contributed to appellant's right wrist condition. Dr. Davis did not explain the pathophysiological process of how assisting a heavy patient to turn over would have caused an exacerbation of her preexisting right wrist condition.[17] Because he did not provide a reasoned opinion explaining how the November 28, 2016 employment incident caused or contributed to appellant's right wrist condition, the Board finds that his reports are insufficient to establish her claim. The need for rationalized medical opinion evidence is particularly important in this case since appellant had preexisting right wrist arthritis and metacarpal fracture.

Appellant was also treated by Dr. Walker in the employee health unit. In a November 29, 2016 radiology report, Dr. Walker provided examination findings and diagnosed mild diffuse osteoarthritis. He did not, however, provide an opinion on whether appellant's right wrist condition resulted from the November 28, 2016 employment incident. Similarly, the January 8, 2017 right wrist MRI scan and September 26, 2017 radiology report are insufficient to establish appellant's traumatic injury claim. The Board has held that diagnostic reports that do not offer an

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[16] Medical opinions that are speculative or equivocal in character are not well rationalized and are of diminished probative value. *D.D.,* 57 ECAB 734, 738 (2006); *Kathy A. Kelley,* 55 ECAB 206 (2004).

[17] *See B.T.,* Docket No. 13-0138 (issued March 20, 2013).

opinion regarding the cause of an employee's condition are of no probative value on the issue of causal relationship.[18]

The employing establishment health unit treatment notes and the November 29, 2016 duty status report from Ms. Barron, a nurse practitioner, are also insufficient to meet appellant's burden of proof. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[19] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[20]

The remaining work status notes dated July 25, 2016 and Form CA-17s dated July 18 to August 10, 2016 are also insufficient to establish appellant's traumatic injury claim as they only mention her inability to work and do not address the issue of causal relationship. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[21]

In order to obtain benefits under FECA an employee 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.[22] Because appellant failed to provide such evidence demonstrating that her diagnosed right wrist/hand condition was causally related to the accepted November 28, 2016 employment incident, she has not met her burden of proof to establish her traumatic injury claim.

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."[23] 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.[24] A claimant is entitled to a hearing or review

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[18] *See L.B.,* Docket No. 18-0533 (issued August 27, 2018); *D.K.,* No. 17-1549 (issued July 6, 2018).

[19] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[20] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[21] *Supra* note 18.

[22] *Supra* note 7.

[23] 5 U.S.C. § 8124(b)(1).

[24] 20 C.F.R. §§ 10.616, 10.617.

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.[25] 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.[26]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for a review of the written record must be mailed within 30 days of the date of the decision for which a review is sought. Because appellant's request was postmarked on December 8, 2017, more than 30 days after OWCP's October 25, 2017 decision, it was untimely 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, OWCP has the discretionary authority to grant the request and it must exercise such discretion.[27] In its January 9, 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 appellant established that the diagnosed right wrist condition was causally related to the accepted November 28, 2016 employment incident 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.[28] 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.[29] 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 she did not receive the October 25, 2017 decision and attached appeal request form until November 10, 2017. She indicates that she collected and submitted additional information from her doctors, but contends that because she sent the additional evidence over the Thanksgiving holidays it may have prevented the delivery of the material in a timely manner. The record reflects that OWCP's letter was properly sent to

[25] *Id.* at § 10.616(a).

[26] *Eddie Franklin,* 51 ECAB 223 (1999); *Delmont L. Thompson,* 51 ECAB 155 (1999).

[27] *Id.*

[28] *Mary B. Moss,* 40 ECAB 640, 647 (1989).

[29] *Samuel R. Johnson,* 51 ECAB 612 (2000).

appellant's last known address and there is no indication that it was returned as undeliverable.[30] Under the mailbox rule, a document mailed in the ordinary course of the sender's business practices to the addressee's last known address is presumed to be received by the addressee. As explained above, appellant's request for a review of the written record was untimely filed.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right wrist condition causally related to the accepted November 28, 2016 employment incident. The Board further finds that OWCP properly denied her request for review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2018 and October 25, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2019
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

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[30] *See L.B.*, Docket No. 17-1892 (issued December 11, 2018). *Kenneth E. Harris,* 54 ECAB 502, 505 (2003); *J.J.*, Docket No. 13-1067 (issued September 20, 2013).