



its discretion by denying appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On August 24, 2018 appellant, then a 30-year-old staff attorney, filed an occupational disease claim (Form CA-2) alleging that she developed chronic pain and stiffness of the neck and chronic pain, stiffness, trigger points and soreness of the left shoulder, with pain radiating down from her left shoulder through her arm and into her fingers and thumb as a result of her work duties. She reported that on July 9, 2018 she drove from Pittsburgh, Pennsylvania to Philadelphia, Pennsylvania to attend a deposition, and drove back the following day. During this trip, appellant's arms and fingers began to ache and her trigger points worsened. She indicated that she first became aware of her condition on November 7, 2017 and realized it related to factors of her federal employment on August 7, 2018. On the reverse side of the claim form the employing establishment noted that appellant did not stop work.

In an August 7, 2018 report, Dr. Alcalá diagnosed cervical radiculopathy and strain of left trapezius muscle.

In an attending physician's report (Form CA-20) dated August 17, 2018, Dr. Alcalá reiterated his diagnosis of cervical radiculopathy and opined that appellant's condition was aggravated by long periods of driving. He advised that appellant was capable of returning to work with restrictions of limited long-distance driving and limited computer use.

By development letter dated September 20, 2018, OWCP requested that appellant submit additional factual and medical evidence in support of her occupational disease claim. It advised her of the type of evidence needed and provided a factual questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a supervisor's statement received by OWCP on October 1, 2018, J.S. indicated that appellant was required to spend nearly the entire workday in front of the computer, except when she was meeting with clients face-to-face, and she was required to travel for hearings, witness preparation meetings, depositions, mediations, settlement conferences, and other meetings with clients and colleagues. He noted that appellant typically traveled within the State of Pennsylvania, but was occasionally required to travel out of state in performance of her duties.

On October 8, 2018 Dr. Alcalá asserted that appellant was being treated for her condition prior to her long drive to Philadelphia, Pennsylvania and opined that the trip exacerbated her symptoms.

By decision dated November 26, 2018, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that the employment incident occurred as alleged. It noted that she had not responded to the September 20, 2018 development questionnaire. OWCP concluded, therefore, that appellant had not met the requirements to establish that she sustained an injury as defined by FECA.

On December 31, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 17, 2019, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative. It found that she was not entitled to a hearing as a matter of right because her request was not made within 30 days of the issuance of its November 26, 2018 decision. OWCP exercised its discretion and determined that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence.

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

An employee seeking benefits under FECA 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,<sup>3</sup> 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 the employment injury.<sup>4</sup> 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.<sup>5</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of a disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>6</sup>

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>7</sup> The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged

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<sup>3</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>5</sup> *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).

<sup>6</sup> See *Irene St. John*, 50 ECAB 521 (1999).

<sup>7</sup> *R.T.*, Docket No. 08-0408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 238, 241 (2005).

injury, and failure to obtain medical treatment may, if otherwise, unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.<sup>8</sup>

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

The Board finds that appellant has not met her burden of proof to establish that she sustained an occupational disease while in the performance of duty, as alleged.

On her claim form appellant alleged that she sustained injuries to her neck and left shoulder, with pain radiating down from her left shoulder through her arm and into her fingers and thumb as she drove round-trip drive from Pittsburgh, Pennsylvania to Philadelphia, Pennsylvania on July 9 and 10, 2018 to attend a deposition.

Appellant's description of the implicated employment factors is vague and fails to provide specific detail to determine the manner in which she sustained her alleged injury.<sup>9</sup> She was provided an opportunity by OWCP to establish how her alleged injury occurred. By development letter dated September 20, 2018, OWCP requested that appellant submit additional factual evidence and provided a factual questionnaire for her completion. Appellant did not respond prior to the issuance of OWCP's denial of her claim on November 26, 2018. The October 1, 2018 statement from her supervisor, J.S., confirmed that appellant's duties required travel, but it failed to establish that she was driving in the performance of duty from July 9 to 10, 2018. By failing to describe the employment factors and circumstances surrounding her alleged injury, appellant has not established that an injury occurred in the performance of duty, as alleged.<sup>10</sup> Thus, the Board finds that she has not met her burden of proof. Inasmuch as appellant has failed to establish the factual component of her claim, the Board need not review the medical evidence.<sup>11</sup>

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 of FECA<sup>12</sup> provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.<sup>13</sup>

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<sup>8</sup> *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>9</sup> *See A.E.*, Docket No. 17-0522 (issued April 13, 2018).

<sup>10</sup> *Supra* note 9.

<sup>11</sup> *R.F.*, Docket No. 18-1218 (issued February 7, 2019); *Ted A. Off.* Docket No. 96-0536 (issued February 5, 1998).

<sup>12</sup> *Supra* note 1.

<sup>13</sup> 5 U.S.C. § 8124(b)(1).

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “[a] hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: [a]n oral hearing or a review of the written record.”<sup>14</sup>

Under section 10.616(a), “[a] claimant injured on or after July 4, 1966, who had received a final adverse decision by the district OWCP may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.”<sup>15</sup>

OWCP’s regulations further provide that a request received more than 30 days after OWCP’s decision is subject to OWCP’s discretion<sup>16</sup> and the Board has held that OWCP must exercise this discretion when a hearing request is untimely.<sup>17</sup>

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

The Board finds that OWCP has not abused its discretion by denying appellant’s request for an oral hearing before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

A request for a hearing must be made within 30 days after the date of the issuance of an OWCP final decision. Appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review on December 31, 2018. As the request was submitted more than 30 days following issuance of the November 26, 2018 decision, the Board finds that it was untimely filed and appellant was not entitled to an oral hearing as a matter of right.

OWCP has the discretionary power to grant an oral hearing even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its January 17, 2019 nonmerit decision, properly exercised its discretion by indicating that it had considered the matter and had denied appellant’s request for oral hearing because her claim could be equally well addressed through a reconsideration application. Because reconsideration exists as an alternative appeal right to address the issue raised by OWCP’s November 26, 2018 merit decision, the Board finds that OWCP has not abused its discretion in denying appellant’s untimely hearing request.<sup>18</sup>

Accordingly, the Board finds that OWCP properly denied appellant’s December 31, 2018 request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

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<sup>14</sup> 20 C.F.R. § 10.615.

<sup>15</sup> *Id.* at § 10.616(a).

<sup>16</sup> *Id.* at § 10.616(b).

<sup>17</sup> *D.W.*, Docket No. 17-1413 (issued December 18, 2018); *Samuel R. Johnson*, 51 ECAB 612, 613-14 (2000).

<sup>18</sup> *See J.N.*, Docket No. 18-0646 (issued January 28, 2019).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained an occupational disease while in the performance of duty, as alleged. The Board further finds that OWCP has not abused its discretion by denying her request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2019 and November 26, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 22, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board