United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 18-1114**
	)	**Issued: February 5, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Nyack, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 10, 2018 appellant filed a timely appeal from a January 11, 2018 merit decision and a March 15, 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 his burden of proof to establish a right knee condition causally related to the accepted November 29, 2017 employment incident; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the March 15, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence 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.*

(2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On December 2, 2017 appellant, then a 21-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2017 he tripped on a concrete sidewalk and fell on his right knee while delivering mail. He stopped work on December 2, 2017.

In a December 2, 2017 attending physician's report as part of an unsigned authorization for examination and/or treatment (Form CA-16), Dr. Lisa Better, Board-certified in emergency medicine, noted that appellant's right knee x-rays were negative. She diagnosed knee pain and checked a box marked "yes" indicating that it was caused or aggravated by the employment activity. In a December 2, 2017 form report, Dr. Better reported a date of injury of November 29, 2017 and diagnosed knee pain. In both reports, she held appellant off work for three days.

In a December 7, 2017 development letter, OWCP requested additional factual and medical evidence from appellant. It provided a questionnaire and informed him of the type of medical and factual evidence needed to establish his claim. This included a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition. OWCP afforded appellant 30 days to submit such evidence.

In a December 2, 2017 right knee x-ray report, Dr. Edward G. Chernesky, a diagnostic radiologist, indicated that no acute fracture or dislocation and no joint effusion or soft tissue abnormality was seen. He provided an impression of no acute bone abnormality in the right knee.

In a December 2, 2017 initial progress report and a December 6, 2017 subsequent progress report, Dr. Better noted that appellant tripped at work on November 29, 2017 and that his right knee had landed on concrete. She provided examination findings and assessments of right knee pain and work-related injury.

In a December 6, 2017 form report, Dr. Better again noted appellant's right knee pain and held him off work.

In a December 10, 2017 progress report, Dr. Phillip Hubel, Board-certified in emergency medicine, reported that appellant had been seen eight days prior for a right knee injury that occurred at work when he fell on concrete. He noted that appellant's x-rays were negative and that he had been referred to an orthopedic knee specialist. Dr. Hubel reported examination findings and provided an assessment of work-related right knee pain and injury.

In a December 14, 2017 duty status report (Form CA-17), Dr. Better diagnosed knee pain due to the claimed November 29, 2017 injury. She released appellant to full-time work on December 15, 2017.

In a December 18, 2017 and January 8, 2018 reports, Dr. Mark Medici, a Board-certified orthopedic surgeon, noted that appellant reported that he fell at work on November 29, 2017 and landed on his right knee. He indicated that on December 18, 2017 complete right knee x-rays with patella and tunnel views revealed patella alta. Dr. Medici reported examination findings and

provided assessments of chondromalacia of right patella and contusion of the right knee with intact skin surface. He opined that the incident that appellant had described was the competent medical cause of the injury. Dr. Medici explained that appellant's complaints were consistent with the history of injury and that the history of injury was consistent with his objective findings. He further opined that appellant was temporarily totally disabled.

In a December 18, 2017 duty status report (Form CA-17), Dr. Medici diagnosed a right knee contusion due to the injury. He indicated that appellant was unable to work. In a December 21, 2017 work capacity evaluation form (OWCP-5c), Dr. Medici indicated that appellant was able to work in a sedentary capacity. In his January 8, 2018 report, he ordered a magnetic resonance imaging scan of the right knee.

By decision dated January 11, 2018, OWCP denied appellant's claim. It found that the evidence submitted was sufficient to establish that the November 29, 2017 employment incident occurred, as alleged. However, the medical evidence submitted was insufficient to establish causal relationship between the diagnosed right knee conditions and the accepted November 29, 2017 employment incident.

Following its decision, OWCP received duplicative evidence previously of record along with additional medical reports and work excuse notes from Dr. Medici.

In an appeal request form dated and postmarked February 20, 2018, appellant requested a review of the written record before an OWCP hearing representative.

By decision dated March 15, 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 made within 30 days of the issuance of the January 11, 2018 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[3] 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4] 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.[5]

[3] *Supra* note 1.

[4] *See A.C.*, Docket No. 18-0683 (issued November 6, 2018); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *See A.C., id.*; *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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.[6] 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.[7] 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.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[9] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is causal relationship between the employee's diagnosed condition and the compensable employment factors.[10] 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 factors identified by the employee.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a right knee condition causally related to the accepted November 29, 2017 employment incident.

In support of his claim, appellant submitted progress and form reports from Dr. Better. In her initial December 2, 2017 report, Dr. Better reported that he tripped at work on November 29, 2017 and that his right knee had landed on concrete. In her subsequent reports, she provided assessments of knee pain and work-related injury. A mere conclusion without the necessary rationale explaining how work activities could result in the diagnosed conditions is insufficient to meet the employee's burden of proof.[12] The Board has also consistently held that pain is a symptom, rather than a compensable medical diagnosis.[13] Additionally, in her December 2, 2017 attending physician's report, Dr. Better had opined with a checkmark "yes" that the diagnosed knee pain was caused or aggravated by the employment activity. However, the Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is

[6] *See A.C., supra* note 4; *B.F.*, Docket No. 09-0060 (issued March 17, 2009).

[7] *See A.C., supra* note 4; *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[8] *See A.C., supra* note 4; *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008).

[9] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

[10] *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[11] *See A.C., supra* note 4; *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] *See D.P.*, Docket No. 17-0148 (issued May 18, 2017).

[13] *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

insufficient to establish a claim.[14] Accordingly, the reports from Dr. Better are insufficient to establish appellant's claim.

In his medical report, Dr. Hubel provided assessments of right knee pain and a work-related injury. However, he did not provide a firm medical diagnosis of appellant's right knee condition or set forth an opinion regarding causal relationship. The Board has held that a medical report is of no probative value if it does not provide a firm diagnosis of a particular medical condition or offer a specific opinion as to whether the accepted employment incident caused or aggravated the claimed condition.[15] Thus, Dr. Hubel's report is insufficient to establish appellant's claim.

In December 18, 2017 and January 8, 2018 reports, Dr. Medici noted the history of the work injury as reported by appellant, noted examination findings, and diagnosed chondromalacia of the right patella and a contusion of the right knee with intact skin surface. He opined that the incident that appellant had described was the competent medical cause of the injury. Dr. Medici explained that appellant's complaints were consistent with the history of injury and that the history of injury was consistent with his objective findings. While he provided a declarative statement of causal relationship, he did not offer a rationalized medical explanation to support his opinion. The Board has found that a physician must provide a narrative description of the identified employment incident and a reasoned opinion explaining how physiologically the employment incident described caused or contributed to appellant's diagnosed medical condition.[16] Without explaining how physiologically the movements involved in the accepted employment incident caused or contributed to the diagnosed condition, Dr. Medici's opinion on causal relationship is of limited probative value.[17]

OWCP also received diagnostic studies, however, diagnostic studies are of lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[18]

Appellant has not submitted reasoned medical evidence explaining how a right knee condition was caused by his accepted November 29, 2017 employment incident; therefore, he has not met his burden of proof.

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.

[14] *D.D.*, 57 ECAB 734, 738 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

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

[16] *See V.J.*, Docket No. 17-0358 (issued July 24, 2018).

[17] *Id.*

[18] *See J.S.*, Docket No. 17-1039 (issued October 6, 2017).

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.[19] 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.[20] 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.[21] 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.[22] OWCP procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[23]

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.

A request for a 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 February 20, 2018 request for a review of the written record was postmarked on February 20, 2018 more than 30 days after the issuance of OWCP's January 11, 2018 decision. Because the postmark date was more than 30 days after the date of OWCP's January 11, 2018 decision, the Board finds that the request was untimely filed and he was not entitled to a review of the written record as a matter of right.[24]

The Board further finds that OWCP's hearing representative properly exercised her discretion in denying appellant's request for a review of the written record because the issue could equally well be addressed by requesting reconsideration and submitting new evidence.[25] The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An

[19] 5 U.S.C. § 8124(b)(1).

[20] 20 C.F.R. §§ 10.616, 10.617.

[21] *Id.* at § 10.616(a).

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

[23] *See R.T.*, Docket No. 08-0408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record,* Chapter 2.1601.2(a) (October 2011).

[24] The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. *See Donna A.Christley,* 41 ECAB 90 (1989).

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

abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.[26] In this case, the evidence of record does not indicate that OWCP's hearing representative abused her discretion in denying appellant's request for a review of the written record under these circumstances. Accordingly, the Board finds that OWCP properly denied his request for a review of the written record as untimely filed under section 8124.[27]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a right knee condition causally related to the accepted November 29, 2017 employment incident. The Board further finds that OWCP properly denied his request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the March 15 and January 11, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 5, 2019
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

[26] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[27] *See C.L.*, Docket No. 18-0213 (issued June 18, 2018); *R.P.*, Docket No. 16-0554 (issued May 17, 2016).