United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 18-1272**
	)	**Issued: February 15, 2019**
U.S. POSTAL SERVICE, POST OFFICE, University Way, WA, 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 June 11, 2018 appellant filed a timely appeal from a March 1, 2018 merit decision and a May 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury causally related to the accepted October 25, 2017 employment incident; and (2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 8, 2017 appellant, then a 53-year-old box/distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 2017 she sustained neck and back strains when performing repetitive overhead lifting while in the performance of her federal duties. She stopped work on October 26, 2017 and returned to limited-duty work on November 1, 2017. Appellant continued working light duty.

In support of her claim, appellant submitted a narrative report dated October 30, 2017 from Dr. Joanna M. Torres, an attending physician Board-certified in emergency medicine. Dr. Torres related appellant's account of lumbar pain after lifting five pallets of newspapers at work on Wednesday, October 25, 2017. On examination, she found slightly restricted lumbar flexion and rotation with no neurologic deficits. Dr. Torres diagnosed a low back strain. She noted work limitations.

In a duty status report (Form CA-17) dated November 1, 2017, Dr. Azadeh Farokhi, an attending physician Board-certified in occupational medicine, diagnosed a lumbar strain and noted work restrictions.

Appellant also submitted a narrative report and physical therapy prescription dated November 20, 2017 by Leslie B. Schoneman, a physician assistant.

Dr. Laura R. Kaufman, a physician Board-certified in occupational medicine and family practice, renewed prior work limitations on November 20, 2017. In a narrative report dated December 11, 2017, she opined that appellant's lumbar strain had improved with physical therapy. Dr. Kaufman completed a duty status report (Form CA-17) outlining work restrictions.

By development letter dated January 23, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her traumatic injury claim. It advised her of the type of medical and factual evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted physical therapy treatment notes dated December 15, 2017 to January 26, 2018.

By decision dated March 1, 2018, OWCP accepted that the October 25, 2017 incident occurred at the time, place, and in the manner alleged. However, it denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between the accepted employment incident and the diagnosed lumbar strain.

In a letter postmarked April 27, 2018, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She submitted additional evidence from her physical therapists.

In a decision dated May 15, 2018, OWCP's hearing representative denied appellant's request for an oral hearing, finding that it was untimely filed as it was postmarked April 27, 2018, more than 30 days after OWCP's March 1, 2018 decision. The hearing representative exercised her discretion and reviewed the request, but determined that the issue could equally well be

addressed by appellant requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] 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.[3] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[6]

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 sufficient to establish such causal relationship.[7] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 incident identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of 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.[8]

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[2] *Id.*

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Elaine Pendleton*, *supra* note 3.

[6] *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *Supra* note 6; *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish an injury causally related to the accepted October 25, 2017 employment incident.

Appellant first sought treatment on October 30, 2017 with Dr. Torres, who related appellant's account of lumbar pain after lifting five pallets of newspapers at work on Wednesday, October 25, 2017 and diagnosed a low back strain. However, Dr. Torres did not explain how the diagnosed condition was causally related to the accepted employment incident. Her opinion is therefore insufficient to establish the claim.[9]

Appellant was also followed by Dr. Farokhi, who diagnosed a lumbar strain on November 1, 2017, and Dr. Kaufman, who found in a December 11, 2017 report that the lumbar strain had improved with physical therapy. As neither physician addressed causal relationship, their reports are insufficient to meet appellant's burden of proof.[10]

Appellant also submitted a narrative report and physical therapy prescription dated November 20, 2017 by Ms. Schoneman, a physician assistant. She also provided physical therapy treatment notes. The Board has held that medical reports signed solely by a physician assistant or physical therapist are of no probative value as such health care providers are not considered physicians as defined under FECA and are therefore not competent to provide medical opinions.[11] Consequently, this evidence is also insufficient to establish appellant's claim.

As appellant has not submitted rationalized medical evidence sufficient to establish an injury causally related to the accepted employment incident, she has not met her burden of proof.

On appeal, appellant contends that the evidence of record was sufficient to establish her claim. As set forth above, she did not submit sufficient rationalized medical evidence to meet her burden of proof to establish causal relationship.

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

[9] *D.H.*, Docket No. 17-1913 (issued December 13, 2018).

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

[11] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA); *J.M.*, 58 ECAB 448 (2007) (physical therapists are not considered physicians under FECA).

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 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 an oral hearing 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 request for an oral hearing was postmarked April 27, 2018, which is more than 30 days after its March 1, 2018

[12] 5 U.S.C. § 8123(b)(1).

[13] 20 C.F.R. § 10.615.

[14] *C.K.*, Docket No. 18-0607 (issued October 18, 2018); *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[15] *See* 20 C.F.R. § 10.616(a).

[16] *C.K.*, *supra* note 14; *Henry Moreno*, 39 ECAB 475, 482 (1988).

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

[18] *C.K.*, *supra* note 14; *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

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

[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 nor 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).

decision. Accordingly, the evidence reflects that her request is untimely filed. Therefore, OWCP's hearing representative properly found in her May 15, 2018 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 March 1, 2018 decision.[22]

OWCP's hearing representative then properly exercised her discretion by noting that she had considered the matter and denied appellant's request for an oral hearing because the issue could equally well be addressed through a request for reconsideration.[23] 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.[24] In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing 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 an injury causally related to the October 25, 2017 employment incident. The Board further finds that OWCP properly denied her request for an oral hearing before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

[22] *C.K.*, *supra* note 14; *see Z.D.*, Docket No. 17-1315 (issued October 12, 2017).

[23] *C.K.*, *id.; M.H.*, Docket No. 15-0774 (issued June 19, 2015).

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

ORDER

IT IS HEREBY ORDERED THAT the May 15 and March 1, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 15, 2019
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