

**United States Department of Labor
Employees' Compensation Appeals Board**

M.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Broomfield, CO, Employer**

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**Docket No. 19-0428
Issued: July 15, 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
JANICE B. ASKIN, Judge

JURISDICTION

On December 18, 2018 appellant filed a timely appeal from an October 2, 2018 merit decision and a November 29, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 arm or elbow conditions causally related to the accepted August 6, 2018 employment incident; and (2) whether OWCP properly denied appellant's request for a review of the written record 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 August 9, 2018 appellant, then a 56-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 6, 2018 she passed out and fell on the workroom floor while in the performance of duty. She stopped work on the date of injury.

In an August 14, 2018 statement, S.T., a supervisor, noted that on August 6, 2018 she found appellant “face down on the workroom floor.” She noted that appellant’s hands were outstretched above her head, she was resting on her left arm, and she was clutching the mobile point of sale (MPOS) instrument in her right hand. S.T. indicated that appellant was unable to speak clearly and was transported by paramedics to the hospital. She explained that, when she contacted appellant the next day, appellant indicated that she had passed out from the heat and emotional stress and that she did not remember anything until she awoke at the hospital.

In a development letter dated August 31, 2018, OWCP advised appellant that when her claim was first submitted it appeared to be a minor injury that resulted in minimal or no lost time from work and it therefore had administratively approved payment of a limited amount of medical expenses. It explained that appellant’s claim was being reopened because appellant had not returned to work in a full-time capacity. OWCP advised her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. Appellant was afforded 30 days to submit the necessary evidence.

In an August 13, 2018 work excuse Dr. Jared Lee, Board-certified in orthopedic surgery and sports medicine, requested that appellant be excused from work for the period August 13 to 27, 2018, as she remained dizzy and continued to have left arm pain.

In an August 30, 2018 report, Dr. Nazia Javed, a Board-certified family practitioner, noted that appellant reported aching pain in her right elbow. She diagnosed right elbow sprain, right medial epicondylitis, and left elbow pain.

In a September 17, 2018 report, Dr. Javed noted that appellant was seen for follow up treatment. She diagnosed right elbow sprain and indicated that appellant was “pain free and feels 100 [percent] back to her baseline.” Dr. Javed released appellant to full duty.

By decision dated October 2, 2018, OWCP denied appellant’s claim. It found that she had established that the August 6, 2018 employment incident occurred as alleged, but the medical evidence of record was insufficient to establish causal relationship between appellant’s diagnosed conditions and the accepted August 6, 2018 employment incident.

On November 19, 2018 OWCP received an August 6, 2018 after-visit summary, which indicated that appellant was seen by Dr. Ben Mendoza, an internal medicine specialist, Dr. Jennifer Gray, an internal medicine specialist, and Dr. Jeffrey Rickard, an osteopath Board-certified in emergency medicine, for acute brain disorder, confusion, disorientation, and elbow pain.

By appeal request form postmarked November 6, 2018, appellant requested a review of the written record by a representative of OWCP’s Branch of Hearings and Review.

By decision dated November 29, 2018, an OWCP hearing representative determined that appellant was not entitled to a review of the written record as a matter of right because her request was untimely filed. She also denied a discretionary hearing, finding that the contested issue could equally well be addressed by appellant requesting reconsideration and providing new evidence or argument to establish that she sustained an injury in the performance of duty, as alleged.

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,² 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.³ 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.⁴

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁵ The second component is whether the employment incident caused a personal injury.⁶

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.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 factors identified by the employee.⁸ Neither the mere fact that a disease or condition manifests itself during a period of employment,

² *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁴ *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).

⁵ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁸ *L.D., id.*; see also *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish arm or elbow conditions causally related to the accepted August 6, 2018 employment incident.

In support of her claim appellant submitted an August 13, 2018 work excuse from Dr. Lee. Dr. Lee noted appellant's symptoms of dizziness and left arm pain. However, dizziness and pain are descriptions of symptoms rather than a clear diagnosis of a medical condition.¹⁰ The Board has previously explained that it is not possible to establish causal relationship if a medical condition has not been diagnosed.¹¹ As such, the work excuse is of no probative value on the issue of causal relationship and is insufficient to establish appellant's traumatic injury claim.¹²

In an August 30, 2018 report, Dr. Javed diagnosed right elbow sprain, right medial epicondylitis and pain in the left elbow. However, she did not offer an opinion regarding 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 no probative value.¹³ As such, this report is of no probative value on the issue of causal relationship.

As appellant has not submitted rationalized medical evidence sufficient to establish her claim that she sustained arm or elbow conditions causally related to the accepted August 6, 2018 employment incident, she has, therefore, not met her burden of proof to establish entitlement to compensation benefits.

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: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the

⁹ *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁰ *P.S.*, Docket No. 10-1560 (issued June 23, 2011).

¹¹ *Id.*

¹² *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹³ *See N.T.*, Docket No. 18-1620 (issued May 6, 2019); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”¹⁴

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: an oral hearing or a review of the written record.”¹⁵ 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 the hearing is sought.¹⁶ However, OWCP has discretion to grant or deny a request that is made after this 30-day period.¹⁷ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s November 6, 2018 request for a review of the written record before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days from OWCP’s October 2, 2018 merit decision to request a review of the written record before OWCP’s Branch of Hearings and Review. Appellant’s hearing request was postmarked November 6, 2018. As the postmark date was more than 30 days after OWCP’s October 2, 2018 decision, appellant was not entitled to a review of the written record as a matter of right.¹⁹ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.²⁰

The Board finds that OWCP properly exercised its discretion in denying appellant’s request for a review of the written record by determining that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence or argument relevant to the issue of fact of injury.²¹ The Board has held that the only limitation on OWCP’s authority is reasonableness, and an abuse of discretion is generally shown through proof of manifest error,

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ 20 C.F.R. § 10.615.

¹⁶ *Id.* at § 10.616(a).

¹⁷ See *T.L.*, Docket No. 19-0028 (issued April 26, 2019); *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

¹⁸ *James Smith, id.*

¹⁹ Under OWCP’s regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011).

²⁰ 5 U.S.C. § 8124(b)(1); see *R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

²¹ *R.H., id.; M.H.*, Docket No. 15-0774 (issued June 19, 2015).

clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²² The Board finds that the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's untimely request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's November 6, 2018 request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).²³

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish arm or elbow conditions causally related to the accepted August 6, 2018 employment incident. The Board further finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the November 29 and October 2, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 15, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²² *R.H., id.*; (citing *Daniel J. Perea*, 42 ECAB 214, 221 (1990)).

²³ *Id.*; *R.P.*, Docket No. 16-0554 (issued May 17, 2016).