United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 19-0145**
	)	**Issued: June 3, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Naples, FL, 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 October 27, 2018 appellant filed a timely appeal from a September 11, 2018 merit decision and an October 11, 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 a right elbow condition causally related to the accepted July 17, 2018 employment incident; and (2) whether

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the October 11, 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 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.*

OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 19, 2018 appellant, then a 46-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on July 17, 2018, she sustained a right elbow injury when she opened a "stuck mailbox" while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant was in the performance of duty at the time of the alleged injury.

In two state of Florida workers' compensation forms dated July 19 and 26, 2018, Lauren Bond, a nurse practitioner, diagnosed right elbow tendinitis, and Paula Mahan, a physician assistant, indicated that appellant should not use her right arm, respectively. On both forms, Ms. Bond and Ms. Mahan checked the box "work related" in response to a question as to how the injury occurred.

In a letter dated July 30, 2018, the employing establishment challenged appellant's traumatic injury claim noting that her elbow pain was a symptom, and not an illness.

In a development letter dated August 3, 2018, OWCP advised appellant regarding the deficiencies of her claim and requested additional medical evidence. It afforded her 30 days to submit the necessary evidence.

In a report dated July 19, 2018, Dr. Larry Hobbs, Board-certified in emergency medicine, diagnosed unspecified enthesopathy and noted right elbow tendinitis in the discharge instructions.

In a report dated July 26, 2018, Dr. Thomas Johnson, Board-certified in emergency medicine, diagnosed right elbow lateral epicondylitis. In the discharge instructions, he also indicated tendinitis and tennis elbow.

In a report dated August 2, 2018, Dr. Walter Simmons, an osteopath, diagnosed right elbow lateral epicondylitis and indicated that appellant could return to work, full time, with restrictions.

In a physical therapy referral form dated August 10, 2018, Frank Finch, a physician assistant, indicated that appellant should be treated for right lateral epicondylitis. In a state of Florida workers' compensation form of the same date, he diagnosed right lateral epicondylitis and mild ulnar neuropathy. Mr. Finch indicated that appellant could return to work full time with restrictions.

On September 10, 2018 the employing establishment properly executed an authorization for examination/and or treatment (Form CA-16) for appellant to obtain medical treatment at Naples Community Hospital.

By decision dated September 11, 2018, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that her diagnosed medical conditions were casually related to the accepted July 17, 2018 employment incident.

In a duty status report (Form CA-17) dated September 10, 2018, received by OWCP on September 14, 2018, Dr. Scott Thompson, a Board-certified orthopedic surgeon, diagnosed right lateral epicondylitis and indicated that appellant could perform full-time regular employment duties. In a report of even date, he referred appellant for a right elbow MRI scan.

On September 21, 2018 appellant requested reconsideration of OWCP's September 11, 2018 decision.

In an authorization for examination and/or treatment report (Form CA-16) dated September 10, 2018, received by OWCP on September 21, 2018, Dr. Thompson indicated that appellant suffered right elbow pain after lifting at work. He diagnosed elbow tendinitis and right lateral epicondylitis. Dr. Thompson checked a box marked "yes" when asked whether he believed appellant's condition was caused or aggravated by an employment activity. He noted that appellant was able to resume regular employment duties.

On October 11, 2018 OWCP also received a September 19, 2018 MRI scan of appellant's right elbow, which was interpreted by Dr. Johnny Alexander, a diagnostic radiologist, as revealing a cortical irregularity of the anterior aspect of the proximal ulna, most likely due to old trauma.

By decision dated October 11, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim. It noted the evidence received in support of the request for reconsideration, included an MRI scan order, but it did not note receipt of the September 19, 2018 MRI scan report of Dr. Alexander.

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]

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

[3] *Supra* note 1.

[4] *D.B.*, Docket No. 18-0537 (issued September 12, 2018); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[5] *J.R.*, Docket No. 18-1079 (issued January 15, 2019); *S.P.*, 59 ECAB 184 (2007); *Michael E. Smith*, 50 ECAB 313 (1999).

employment incident which is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[7]

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.[8] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 claimant.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that her right elbow condition was causally related to the accepted July 17, 2018 employment incident.

Appellant submitted reports dated July 19 and 26, and August 2, 2018 from Drs. Hobbs, Johnson, and Simmons, respectively. In his July 19, 2018 report, Dr. Hobbs diagnosed unspecified enthesopathy and noted right elbow tendinitis in his discharge instructions. In his July 26, 2018 report, Dr. Johnson diagnosed right elbow lateral epicondylitis. Lastly, in his August 2, 2018 report, Dr. Simmons diagnosed right elbow lateral epicondylitis, and indicated that appellant could return to work, full time, with restrictions. While these reports noted that appellant had been seen for treatment, recommended work restrictions, and indicated diagnoses, they did not provide findings and opinions regarding the cause of her condition. The Board has held that medical evidence that does not offer an opinion regarding the cause of the employee's condition is of no probative value on the issue of causal relationship.[10] As such, these reports are of no probative value on the issue of causal relationship, and are insufficient to establish appellant's traumatic injury claim.[11]

Appellant submitted two Florida workers' compensation forms dated July 19 and 26, 2018 from Ms. Bond, a nurse practitioner, Ms. Mahan, a physician assistant, respectively, and a referral form from Mr. Finch, a physician assistant. The Board has held that medical reports signed solely by a physician assistant, or nurse practitioner, are of no probative value as a physician assistant and nurse practitioner are not considered physicians as defined under FECA and therefore are not

[6] *R.E.*, Docket No. 17-0547 (issued November 13, 2018); *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

[7] *Id.; see also John J. Carlone*, 41 ECAB 354 (1989).

[8] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *see M.B.*, Docket No. 17-1999 (issued November 13, 2018).

[9] *M.L.*, Docket No. 18-1605 (issued February 26, 2019).

[10] *See S.M.*, Docket No. 18-1547 (issued January 28, 2019).

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

competent to provide a medical opinion.[12] As these reports were not countersigned by a qualified physician, they are of no probative value to establish appellant's claim.[13]

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.[14] Temporal relationship alone will not suffice. Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.[15] The record lacks rationalized medical evidence establishing causal relationship between the accepted July 17, 2018 employment incident and appellant's diagnosed right elbow conditions.[16] Thus, appellant has not met her burden of proof.[17]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[18]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

[12] *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *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). *S.J.*, Docket No. 17-0783, n.2 (issued April 9, 2018) (nurse practitioners are not considered physicians under FECA).

[13] *K.C.*, Docket No. 18-1330 (issued March 11, 2019); *see K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, *id*. A report from a physician assistant or certified nurse practitioner will be considered medical evidence only if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[14] *See G.S.*, Docket No. 18-1696 (issued March 26, 2019); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[15] *See G.S.*, *id.*; *D.D.*, 57 ECAB 734 (2006).

[16] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *see J.S.*, Docket No. 17-0507 (issued August 11, 2017).

[17] The Board notes that the employing establishment issued a Form CA-16 on September 10, 2018 to Naples Community Hospital. A properly completed CA-16 form may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018), *Tracy P. Spillane*, 54 ECAB 608 (2003).

[18] 5 U.S.C. § 8128(a); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[19]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[20] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[21] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[22]

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision.

With her timely request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

OWCP's regulations however require OWCP to consider all evidence submitted appropriately.[23] OWCP did not address nor acknowledge the September 19, 2018 MRI scan report which it received on October 11, 2018, the same day it denied appellant's request for reconsideration.

Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before OWCP at the time of its final decision,[24] it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision.[25] As Board decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter which was properly submitted prior to the time of issuance of its final decision be addressed by OWCP.[26]

[19] 20 C.F.R. § 10.606(b)(3); *see J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010).

[20] *Id.* at § 10.607(a).

[21] *Id*. at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[22] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[23] 20 C.F.R. § 10.119.

[24] *See id*. at § 501.2(c)(1).

[25] *See Yvette N. Davis*, 55 ECAB 475 (2004); *William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); *see also Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where, as is the case here, OWCP did not consider a medical report received on the date of its decision).

[26] *See M.J.*, Docket No. 18-0605 (issued April 12, 2019); *J.E.*, Docket No. 12-1154 (issued January 4, 2013).

In the instant case, OWCP did not review the evidence received prior to the issuance of its October 11, 2018 decision. The Board, therefore, must set aside the decision and remand the case to OWCP to fully consider the evidence which was properly submitted by appellant.

The Board finds that this case is not in posture for decision. The Board will set aside OWCP's October 11, 2018 decision and remand the case for a proper review and final decision on appellant's timely reconsideration request.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her right elbow condition was causally related to the accepted July 17, 2018 employment incident. The Board also finds that this case is not in posture for decision as to whether OWCP properly denied her request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2018 decision of the Office of Workers' Compensation Programs is affirmed and the October 11, 2018 decision is set aside and the case is remanded for further action consistent with this decision.

Issued: June 3, 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