United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 19-0904**
	)	**Issued: November 25, 2019**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 26, 2019 appellant filed a timely appeal from a November 9, 2018 merit decision and a January 10, 2019 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 lower back injury related to the accepted July 22, 2018 employment incident; and (2) whether OWCP properly

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the January 10, 2019 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.*

denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On August 2, 2018 appellant, then a 49-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 2018 she sustained a lower back injury when she was attempting to move a cart while in the performance of duty. She stated that she was pushing a medication cart when a wheel seemed to be stuck or stopped rolling smoothly and she attempted to shift the cart so the wheels would roll properly. While shifting the cart, appellant subsequently felt sharp pain in her lower back and heard a grinding/clicking noise. Afterwards it was difficult for her to walk/stand or push/move the cart around, as well as perform other duties that required bending or moving items. Appellant stopped working on the date of injury.

In an August 2, 2018 return to work/school verification form, Dr. Allison Martin, a Board-certified family practitioner, indicated that appellant had received treatment on August 2, 2018 and was totally disabled from August 5 to 14, 2018.

In return to work/school verification form dated September 6, 2018, Shanay Johnson, a registered medical assistant, indicated that appellant was able to resume light-duty work with a 10-pound lifting restriction for two weeks. She further indicated that appellant had been diagnosed with lumbar spondylosis causing low back pain and recommended a physical therapy program.

In a duty status report (Form CA-17) dated September 25, 2018, an unidentifiable healthcare provider diagnosed low back pain due to pushing a medication cart and advised that appellant was able to resume full-time, light-duty work.

Appellant also submitted physical therapy treatment notes dated September 6, 2018.

In a development letter dated October 4, 2018, OWCP advised appellant that when her claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, since the employing establishment had not controverted continuation of pay or challenged the case, a limited amount of medical expenses were administratively approved and paid. It noted that it had reopened the claim for formal consideration because she had requested authorization for physical therapy. OWCP informed appellant of the type of factual and medical evidence necessary to establish her claim and afforded her 30 days to submit the necessary evidence.

In response, appellant submitted physical therapy treatment notes dated October 9, 11, 16, and 18, 2018.

A medical excuse note dated October 19, 2018 from Marlon McCurine, a certified medical assistant, indicated that appellant was able to resume work on October 21, 2018.

In an October 12, 2018 narrative statement, appellant related that she was pushing a cart into an elevator at the time of injury and one of the wheels slid down into the open gap space between the floor and the elevator. The cart had to be pushed up and pulled out to release it and it weighed approximately 75 to 140 pounds due to carrying medications and other medical devices.

By decision dated November 9, 2018, OWCP accepted that the July 22, 2018 employment incident occurred as alleged, but denied appellant's claim, finding that she had not established a diagnosed medical condition causally related to the accepted employment incident and, thus, the requirements had not been met for establishing an injury as defined by FECA.

On an appeal request form postmarked on December 31, 2018, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated January 10, 2019, a representative of OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record, finding that it was untimely filed as it was not postmarked within 30 days of the issuance of the November 9, 2018 decision. After exercising its 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 by the weight of the reliable, probative, and substantial evidence, 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, that an injury was sustained 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 every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

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]

[3] *Supra* note 1.

[4] *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[5] *K.V.*, and *M.E., id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[7] *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[8] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras, supra* note 6.

Causal relationship is a medical issue, and rationalized medical opinion evidence is generally required to establish causal relationship.[9] The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between a diagnosed condition and the specific employment incident identified by the claimant.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a lower back injury causally related to the accepted July 22, 2018 employment incident.

In her August 2, 2018 report, Dr. Martin indicated that appellant was totally disabled from work for the period August 5 to 14, 2018; however, she did not provide a medical diagnosis. Lacking a firm diagnosis and rationalized medical opinion regarding causal relationship, this report is of no probative value.[11]

Appellant also submitted a September 25, 2018 duty status report (Form CA-17), which provided a diagnosis of low back pain. However, the report contained an illegible signature from an unidentifiable healthcare provider. The Board has held that reports that bear illegible signatures cannot be considered probative medical evidence because they lack proper identification that the author is a physician.[12] Moreover, the Board has held that pain is a symptom and not a compensable medical diagnosis.[13] Accordingly, this report is also insufficient to satisfy appellant's burden of proof to establish the medical component of fact of injury.[14]

The record also contains evidence from medical assistants and physical therapists, as well as a September 6, 2018 report from Ms. Johnson, a registered medical assistant, noting that appellant had been diagnosed with lumbar spondylosis, causing low back pain. The Board has held that certain medical providers, such as medical assistants and physical therapists, are not considered "physician[s]" as defined under FECA.[15] Consequently, their medical findings and/or

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

[10] *See B.J.*, Docket No. 18-1276 (issued February 4, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *See A.S.*, Docket No. 17-2010 (issued October 12, 2018); *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

[12] *J.P.*, Docket No. 19-0197 (issued June 21, 2019).

[13] *R.C.*, Docket No. 19-0376 (issued July 15, 2019).

[14] *Supra* note 9.

[15] *See* 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.W.*, Docket No. 16-1729 (issued May 12, 2017) (physical therapists); *R.S.*, Docket No. 16-1303 (issued December 2, 2016) (medical assistants); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

opinions are of no probative value and will not suffice for purposes of establishing entitlement to compensation benefits.

As appellant has not submitted rationalized medical evidence that establishes a lower back injury in connection with the accepted July 22, 2018 employment incident, she has not met her burden of proof.

On appeal appellant reiterated her claim that she sustained a back injury while on duty at work. As explained above, there is no competent medical evidence of record that establishes an injury in connection with the accepted employment incident.

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 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.[16] 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.[17] 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.[18] 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.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's December 31, 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).

OWCP's regulations provide that the request for a review of the written record must be mailed within 30 days of the date of the decision for which a review is sought. OWCP received an appeal request form postmarked on December 31, 2018. As the postmark date was more than

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. §§ 10.616, 10.617, and 10.618.

[18] *Id.* at § 10.616(a).

[19] *J.T.*, Docket No. 18-0664 (issued August 12, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

30 days after OWCP's November 9, 2018 decision, it was untimely filed and she was not entitled to a review of the written record as a matter of right.[20]

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.[21] In its January 10, 2019 decision, OWCP's hearing representative properly exercised her discretion by notifying appellant that she had considered the matter in relation to the issue of whether appellant established that she sustained an injury within the performance of duty causally related to the accepted July 22, 2018 employment incident and determined that the issue involved could be equally well addressed by a request for reconsideration before OWCP. The Board finds that the hearing representative properly exercised her discretionary authority in denying appellant's request for a review of the written record.[22] The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[23] In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied her request for a review of the written record.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a lower back injury related to the accepted July 22, 2018 employment incident. The Board further finds that OWCP properly denied her request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

[20] 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); *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

[21] *Id.*; *see also Rudolf Bermann*, 26 ECAB 354 (1975).

[22] *Id.*; *see also Mary B. Moss*, 40 ECAB 640, 647 (1989).

[23] *Id.*; *see also Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2019 and November 9, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 25, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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