

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

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<b>J.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1101</b>
	)	<b>Issued: November 20, 2019</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Atlanta, GA, Employer</b>	)	
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*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 April 18, 2019 appellant filed a timely appeal from a November 15, 2018 merit decision and a February 11, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish an abdominal condition causally related to the accepted September 6, 2018 employment incident; and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. 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.*

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

### **FACTUAL HISTORY**

On September 28, 2018 appellant, then a 42-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left abdomen strain on September 6, 2018 after lifting a tray of mail while in the performance of duty. She indicated that she felt something tear on the left side above her abdomen. Appellant stopped working on the date of injury.

In support of her claim, appellant submitted a narrative statement dated September 6, 2018 reiterating that she bent over to pick up a tray of mail when she felt something rip below her left rib cage. She also submitted a position description.

In a September 6, 2018 emergency department after visit summary, Dr. Louis N. Ciardulli, a Board-certified emergency medicine physician, diagnosed strain of abdominal wall with left upper quadrant pain. He indicated that a computerized tomography (CT) scan of the abdomen showed no acute injuries. Appellant had a hernia and her laboratory work was normal.

A return to work excuse note dated September 10, 2018 from Dr. Titus Duncan, a Board-certified general surgeon, held appellant off work until September 17, 2018.

On September 13, 2018 Dr. Duncan advised that appellant was able to return to work after surgery.

In a September 28, 2018 return to work excuse note, Dr. Duncan indicated that appellant had a postoperative visit and would be unable to return to work until after her October 15, 2018 visit.

In a letter dated October 5, 2018, the employing establishment controverted appellant's claim, arguing that she had previously undergone gastric bypass surgery and the medical evidence was insufficient to support that her injury was causally related to her federal employment.

In an October 10, 2018 development letter, OWCP requested that appellant provide additional factual and medical information in support of her claim, including a detailed factual statement and a report from her attending physician addressing the causal relationship between any diagnosed condition(s) and the claimed September 6, 2018 work incident. It afforded her 30 days to respond to its request for additional evidence.

In response, appellant submitted an accident report dated September 13, 2018 indicating that at 3:30 p.m. on September 6, 2018 she bent straight down to pick up a tray of mail causing her alleged injury. She stated that she pulled the tray up and felt a rip.

On September 10, 2018 Dr. Duncan noted that appellant presented with left-sided abdominal pain that had started on September 6, 2018. Appellant recalled bending over to pick something up at work and then felt a sharp/ripping pain in her abdomen. Dr. Duncan reported that she was seen in the emergency department and a CT was obtained, but it was negative. He

diagnosed left upper quadrant (LUQ) pain and discussed with appellant that her pain was likely muscular in origin due to the mechanism and negative CT.

In a September 21, 2018 report, Dr. Yaa Manu, a Board-certified emergency medicine physician, diagnosed LUQ pain and abdominal wall strain. She reported that appellant had been in pain for about two weeks after bending over and feeling a sharp pain in the area. The report noted that appellant had a past medical history of hernia of abdominal wall, hernia repair, gastric bypass, and laparoscopic gastric banding.

On September 26, 2018 Dr. Duncan performed a diagnostic laparoscopy and the accompanying report noted his findings relating to her medical diagnoses.

In a duty status report (Form CA-17) dated October 15, 2018, Dr. Duncan diagnosed left abdominal muscle strain due to bending down to pick up a tray of letters and advised that appellant was capable of returning to work on October 22, 2018.

On October 15, 2018 Dr. Duncan indicated that appellant was seen for abdominal pain after a reported work injury and she had a negative CT in the emergency department a few days prior, but was worried about a possible internal hernia. He reported that appellant underwent a diagnostic laparoscopy to further investigate her persistent abdominal pain and during the laparoscopy her adhesions were removed. Dr. Duncan noted that her intra-abdominal organs and bowel were normal.

In an October 25, 2018 progress report, Dr. Duncan continued to diagnose left lower quadrant pain and indicated that appellant believed that it was from an injury on her job. He noted that she had undergone a gastric bypass surgery in 2014 and a cholecystectomy in 2014 and 2016.

In an attending physician's report (Form CA-20) dated October 29, 2018, Dr. Duncan indicated that appellant was scheduled for surgery. In an accompanying duty status report (Form CA-17) he opined that he did not believe that her diagnosed condition had been caused or aggravated by an employment activity.

By decision dated November 15, 2018, OWCP found that appellant had met her burden of proof to establish the occurrence of the September 6, 2018 employment incident. It denied the claim, however, as the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted work incident.

On an appeal request form postmarked January 30, 2019, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She also resubmitted a September 6, 2018 report from Dr. Ciardulli and an October 25, 2018 report from Dr. Duncan that had been previously reviewed by OWCP.

By decision dated February 11, 2019, OWCP denied appellant's request for a review of the written record finding that her request was untimely because it was not made within 30 days of its November 15, 2018 decision. It further indicated that it had exercised its discretion and denied the request because the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

## 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,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

Causal relationship is a medical issue, and rationalized medical opinion evidence is generally required to establish causal relationship.<sup>9</sup> 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.<sup>10</sup>

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>11</sup>

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<sup>3</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>5</sup> *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).

<sup>6</sup> *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).

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

<sup>8</sup> *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).

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

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

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

## **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish an abdominal condition causally related to the accepted September 6, 2018 employment incident.

In his September 6, 2018 medical report, Dr. Duncan diagnosed left upper quadrant pain and in his October 15 and 25, 2018 reports, he diagnosed left abdominal muscle strain as a result of bending down to pick up trays of letters. In September 10, 13, and 28, 2018 notes, he identified the specific employment incident alleged by appellant and restricted appellant from work, however, he did not provide an opinion on whether the accepted incident had caused or contributed to her diagnosed conditions. 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 on the issue of causal relationship.<sup>12</sup> These reports, therefore, are insufficient to establish appellant's claim. While Dr. Duncan issued an opinion on causal relationship in his October 29, 2018 Form CA-17, his opinion was that the employment incident was not sufficient to have caused or aggravated the diagnosed conditions and it therefore does not support appellant's claim.<sup>13</sup>

In her September 21, 2018 report, Dr. Manu diagnosed abdominal wall strain and identified the specific employment incident alleged by appellant. However, the Board has held that neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.<sup>14</sup> Dr. Manu's opinion does not include an opinion on the issue of causal relationship and is therefore insufficient to establish appellant's claim.<sup>15</sup>

In his September 6, 2018 emergency department report Dr. Ciardulli diagnosed strain of abdominal wall. However, as Dr. Ciardulli failed to address causal relationship, his report is insufficient to meet appellant's burden of proof.<sup>16</sup>

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

## **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

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

<sup>13</sup> *C.M.*, Docket No. 18-0997 (issued November 1, 2018).

<sup>14</sup> *See J.L.*, Docket No. 18-1804 (issued April 12, 2019).

<sup>15</sup> *Supra* note 12.

<sup>16</sup> *Id.*

of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”<sup>17</sup> Under OWCP’s procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant’s January 30, 2019 request for review of the written record by an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

OWCP’s procedures 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.<sup>22</sup> Because appellant’s request was postmarked on January 30, 2019, more than 30 days after OWCP’s November 15, 2018 decision, it was untimely and she was not entitled to a review of the written record as a matter of right.

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.<sup>23</sup> In its February 11, 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 the diagnosed abdominal condition was causally related to the accepted September 6, 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.<sup>24</sup>

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<sup>17</sup> 5 U.S.C. § 8124(b)(1).

<sup>18</sup> 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).

<sup>19</sup> 20 C.F.R. §§ 10.617, 10.618.

<sup>20</sup> *Id.* at § 10.616(a).

<sup>21</sup> *J.T.*, Docket No. 18-0664 (issued August 12, 2019).

<sup>22</sup> *Supra* note 18; *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; *see also Mary B. Moss*, 40 ECAB 640 (1989).

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.<sup>25</sup> The Board finds that 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 appellant's request for review of the written record by an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish an abdominal condition causally related to the accepted September 6, 2018 employment incident. The Board further finds that OWCP properly denied appellant's request for review of the written record by an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 11, 2019 and November 15, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 20, 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

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<sup>25</sup> *Id.*; see also *Samuel R. Johnson*, 51 ECAB 612 (2000).