

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

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E.F., Appellant))	
and))	Docket No. 19-1008
DEPARTMENT OF THE INTERIOR, BUREAU))	Issued: October 21, 2019
OF LAND MANAGEMENT, Medford, OR,))	
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 April 2, 2019 appellant filed a timely appeal from an October 4, 2018 merit decision and a December 11, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 4, 2018, the date of OWCP's last decision, was Tuesday, April 2, 2019. Because using April 8, 2019, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. *See* 20 C.F.R. § 501.3(f)(1). The date of the U.S. Postal Service postmark is April 2, 2019, rendering the appeal timely filed. *Id.*

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after OWCP issued its January 18, 2019 decision. 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury in the performance of duty on May 23, 2018, as alleged; 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).

FACTUAL HISTORY

On May 29, 2018 appellant, then a 65-year-old wildlife bio science tech, filed a traumatic injury claim (Form CA-1) alleging that on May 23, 2018 he slipped on slick rocks in a stream he was fording and fell while in the performance of duty. He alleged that he sustained bruises to his right shoulder, knee, and elbow and developed pain in his right shoulder. Appellant also explained that he filed his claim as a precaution in case his injuries were more severe. On the reverse side of the claim form, appellant's supervisor concurred that appellant was injured in the performance of duty and responded, "yes" when asked if he agreed with appellant's statements surrounding the incident.

A June 19, 2018 referral note signed by Dr. Howard Morningstar, Board-certified in family medicine, indicated that he referred appellant to physical therapy for a right shoulder injury.

On June 26, 2018 appellant was seen by Michael Siegl, a physical therapist. Mr. Siegl noted pain and impingement in appellant's right shoulder as a result of his May 23, 2018 fall. He noted that Disabilities of the Arm, Shoulder, and Hand (DASH) functional shoulder questionnaire completed by appellant indicated a 17 percent reduction in his right shoulder function.

By development letter dated August 22, 2018, OWCP informed appellant that his claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that continuation was not controverted by the employing establishment, and thus limited expenses had been authorized. However, a formal decision was now required. OWCP advised appellant that the evidence of record was insufficient to establish his claim. It further advised him of the factual and medical evidence necessary to establish his claim and provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the information.

Appellant provided medical reports dated from June 19 to August 24, 2018, signed by Dr. Morningstar. Dr. Morningstar's June 19, 2018 medical report recounted that appellant injured his right shoulder on May 23, 2018 when he slipped and fell on some rocks while at work. He examined appellant and diagnosed sprain of the anterior right shoulder and also noted that appellant may have also injured his rotator cuff. The remaining medical reports provided updates on appellant's recovery.

In appellant's August 30, 2018 response to OWCP's questionnaire, he again explained that his leg slipped on mossy creek rocks and that he hit his right hip, elbow and shoulder when he fell. His right shoulder hurt the most after the fall and did not improve over time.

By decision dated October 4, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish the medical component of fact of injury. It accepted that the May 23, 2018 incident occurred as alleged, but denied his claim because the medical evidence of record failed to provide a medical diagnosis causally related to the accepted

employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 17, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 11, 2018, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative, finding that he was not entitled to a hearing as a matter of right because his request was not made within 30 days of the issuance of its October 4, 2018 decision. It exercised its discretion and determined that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that he sustained an injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ 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 of FECA,⁵ 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.⁶ 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.⁷

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.⁸ Generally, 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.⁹ The second component is whether the employee has submitted evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.¹⁰

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

⁴ *Supra* note 2.

⁵ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *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).

⁸ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *M.D.*, Docket No. 18-0709 (issued September 4, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

opinion evidence supporting such causal relationship.¹¹ Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹² 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.¹³ 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 causal relationship.¹⁴

ANALYSIS -- ISSUE 1

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

OWCP denied appellant's traumatic injury claim, finding that the evidence of record did not contain a medical diagnosis from a qualified physician in connection with the accepted May 23, 2018 employment incident.

However, in his June 19, 2018 medical report, Dr. Morningstar diagnosed a sprain of the anterior right shoulder and also noted that appellant may have also injured his rotator cuff as a result of his fall. He noted that appellant injured his right shoulder on May 23, 2018 when he slipped and fell on rocks while at work.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁵ OWCP has an obligation to see that justice is done.¹⁶ The case shall, therefore, be remanded for OWCP to consider whether the medical evidence of record is sufficient to establish causal relationship between appellant's anterior right shoulder sprain and the accepted May 23, 2018 employment incident. After this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁷

CONCLUSION

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

¹¹ *J.L.*, Docket No. 18-0698 (issued November 5, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹² *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹³ *L.D.*, *id.*; *see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁴ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁵ *D.H.*, Docket No. 18-1410 (issued March 21, 2019).

¹⁶ *M.F.*, Docket No. 18-0602 (issued October 11, 2018).

¹⁷ In light of the Board's disposition with regard to Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 11 and October 4, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 21, 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
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