United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 20-0294**
	)	**Issued: October 21, 2020**
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTION PETERSBURG, Petersburg, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 18, 2019 appellant filed a timely appeal from a May 21, 2019 merit decision and a July 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] A claimant has 180 days from the date of OWCP's decision to timely file an appeal. 20 C.F.R. § 501.3(e). In this case, the 180-day period for the May 21, 2019 decision expired on Sunday, November 17, 2019. If the last day to file an appeal falls on a Saturday, Sunday, or Federal holiday, the 180-day period runs until the close of the next business day. 20 C.F.R. § 501.3(f)(2). The appeal in this case, received by the Board on Monday, November 18, 2019, was therefore timely filed.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the July 17, 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that his diagnosed conditions were causally related to the accepted December 5, 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 under 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On December 5, 2018 appellant, then a 46-year-old cook supervisor, filed a traumatic injury claim (Form CA-1) alleging that on that date he strained his back when he felt a pull in the upper back as he lifted a 50-pound bag of oatmeal while in the performance of duty. On the reverse side of the claim form, the employing establishment acknowledged that he was injured in the performance of duty. Appellant did not stop work.

On December 14, 2018 appellant submitted x-rays of his thoracic and lumbar spine which revealed mild chronic endplate irregularities at multiple levels, chronic inferior anterior endplate deformity at the L1 level with a mild convex left scoliotic deformity, and severe chronic degenerative disc disease at the L5-S1 level.

In a December 14, 2018 report, Dr. Ricky Placide, a Board-certified orthopedic surgeon, noted that appellant had been experiencing upper thoracic and left posterior arm pain. He reported that, two weeks prior, appellant had lifted an object and felt pain in his upper thoracic area radiating into the left posterior arm. Dr. Placide indicated that appellant had a significant past history with anterior cervical discectomy and fusion surgery. He reviewed radiographs of appellant's thoracic spine and diagnosed upper thoracic and left arm pain, which he indicated may represent a lower cervical radiculopathy. Dr. Placide reported that appellant had previously undergone a fusion of C5-6 and C6-7. In a physical therapy prescription note of even date, he diagnosed cervicothoracic radiculopathy.

Appellant submitted physical therapy treatment notes dated December 19, 2018 through March 20, 2019.

In an April 18, 2019 development letter, OWCP indicated that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or otherwise challenge the case, payment of a limited amount of medical expenses was administratively approved. It explained that it had reopened the claim for consideration because his medical expenses had exceeded $1,500.00. OWCP requested additional factual and medical evidence in support of appellant's claim and provided a questionnaire for his completion. It afforded him 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated May 21, 2019, OWCP denied appellant's traumatic injury claim finding that, although he had established that the December 5, 2018 employment incident occurred as alleged, the medical evidence of record was insufficient to establish that a diagnosed medical condition was causally related to the accepted employment incident.

In an appeal request form dated June 17, 2019, appellant requested a review of the written record before an OWCP hearing representative. The request was postmarked June 21, 2019 and received by OWCP on June 26, 2019.

In support of his claim, appellant submitted a March 1, 2019 magnetic resonance imaging scan of the cervical spine, an additional report dated March 29, 2019 from Dr. Placide, physical therapy treatment notes dated March 1 through June 4, 2019, and a June 14, 2019 report from physician assistant Jeffrey D. Grant.

By decision dated July 17, 2019, OWCP's hearing representative denied appellant's request for a review of the written record finding that it was untimely as it was not postmarked within 30 days of the May 21, 2019 decision. After exercising its discretion, the hearing representative found that the merits of the claim could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] 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,[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 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. The second component is whether the employment incident caused a personal injury.[8]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[9] 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

[4] *Supra* note 2.

[5] *Y.W.*, Docket No. 19-1877 (issued April 30, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *C.B.*, Docket No. 20-0250 (issued April 28, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] 20 C.F.R. § 10.115; *H.A.*, Docket No. 18-1253 (issued April 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *T.H.*, Docket No. 19-1891 (issued April 3, 2020); *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *L.P.*, Docket No. 19-1812 (issued April 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident identified by the claimant.[10]

In a case in which 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.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that his diagnosed conditions were causally related to the accepted December 5, 2018 employment incident.

In a December 14, 2018 report, Dr. Placide diagnosed upper thoracic and left arm pain and noted that it may represent lower cervical radiculopathy. In an accompanying physical therapy prescription note, he listed a diagnosis of cervicothoracic radiculopathy. The Board has held that pain is not a compensable medical diagnosis, but merely a symptom of an underlying condition.[12] The Board has also 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.[13] As Dr. Placide has not offered an opinion as to whether appellant's cervicothoracic condition was causally related to the accepted December 5, 2018 employment incident, the Board finds that his reports were insufficient to meet appellant's burden of proof.[14]

Appellant submitted December 14, 2018 x-rays of the thoracic and lumbar spine which revealed mild chronic endplate irregularities at multiple levels, chronic inferior anterior endplate deformity at the L1 level with a mild convex left scoliotic deformity, and severe chronic degenerative disc disease at the L5-S1 level. However, the Board has held that diagnostic studies standing alone lack probative value on the issue of causal relationship as they do not address whether the employment incident caused any of the diagnosed conditions.[15]

The remaining medical evidence consists of physical therapy treatment notes dated December 19, 2018 through March 20, 2019. The Board has held that medical notes signed solely by physical therapists are of no probative value as such healthcare providers are not considered

[10] *C.B.*, *supra* note 6; *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *V.W.*, Docket No. 19-1537 (issued May 13, 2020).

[12] *L.P.*, *supra* note 9.

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

[14] *C.C.*, Docket No. 19-1071 (issued August 26, 2020).

[15] *Id.*

physicians as defined under FECA.[16] Accordingly, these notes are insufficient to establish appellant's claim.

As appellant has not submitted rationalized, probative medical evidence sufficient to establish a diagnosed medical condition causally related to the accepted December 5, 2018 employment incident, he has not met his 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 of the decision, to a hearing on his [or her] claim before a representative of the Secretary."[17]

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.[18] 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.[19] 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.[20]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed under 5 U.S.C. § 8124(b).

OWCP's regulations provide that a request for a review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant's June 17, 2019 request for a review of the written record was postmarked June 21, 2019, it postdated

[16] Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2). *See also 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); *S.K.*, Docket No. 18-1414 (issued April 29, 2020) (physical therapists are not considered physicians under FECA).

[17] *Id*. at § 8124(b)(1).

[18] 20 C.F.R. §§ 10.616, 10.617.

[19] *Id.* at § 10.616(a).

[20] *D.R.*, Docket No. 19-1899 (issued April 15, 2020); *D.S.*, Docket No. 19-1764 (issued March 13, 2020); *Eddie Franklin*, 51 ECAB 223 (1999).

OWCP's May 21, 2019 decision by more than 30 days and was therefore untimely. As such, he was not entitled to a review of the written record as a matter of right.[21]

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and must exercise such discretion.[22] The Board finds that, in the July 17, 2019 decision, OWCP's hearing representative properly exercised discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP along with submitting additional medical evidence.

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 show 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 his request for a review of the written record.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his diagnosed conditions were causally related to the accepted December 5, 2018 employment incident. The Board further finds that OWCP properly denied his request for a review of the written record as untimely filed under 5 U.S.C. § 8124(b).

[21] *See D.S., id.*

[22] *Id.*

[23] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 17 and May 21, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 21, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board