

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

_____)
A.G., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Philadelphia, PA,)
Employer**)
_____)

**Docket No. 20-1319
Issued: May 19, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 23, 2020 appellant filed a timely appeal from a March 12, 2020 merit decision and a June 11, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 his burden of proof to establish a condition causally related to the accepted January 13, 2020 employment incident; and (2) whether OWCP

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 11, 2020 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 evidence for the first time on appeal. *Id.*

properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

FACTUAL HISTORY

On January 15, 2020 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2020 he injured the left side of his neck when pushing an all-purpose container (APC) while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that he stopped work on January 14, 2020.

In a January 14, 2020 note, Dr. Natuarbhal Patel, a family medicine specialist, indicated that appellant was seen that day, and that he was released to return to work on January 21, 2020 without restrictions.

In a development letter dated January 30, 2020, OWCP advised appellant of the deficiencies of his claim and requested additional factual and medical evidence and provided him with a questionnaire to complete. It afforded him 30 days to submit the requested evidence.

In a January 21, 2020 note, Dr. Patel advised that appellant should not return to work until he was reevaluated in two weeks. On that same date he referred appellant for physical therapy and noted his diagnoses of neck and left shoulder pain.

January 23, 2020 x-rays of appellant's cervical spine and left shoulder interpreted by Dr. Steve Whitmoyer, a Board-certified radiologist, revealed cervical spine mild discogenic disease and bony spondylosis, and mild left shoulder osteoarthritis.

OWCP received January 27, 2020 physical therapy treatment notes signed by Allison Clark, a physical therapist.

February 24, 2020 progress notes by Dr. Michael Messina, a Board-certified orthopedic surgeon, indicated that appellant presented with left-sided neck pain and stiffness. Dr. Messina related that appellant's symptoms were aggravated by lifting, working, pushing, pulling, overhead activities, and sleeping. He indicated that appellant injured his neck on January 13, 2020 at work when he felt a pop in his neck while he was moving a container. Appellant tried to continue working, but his neck pain increased and radiated down into his shoulder. Dr. Messina indicated that appellant had no pertinent medical history, and a physical examination revealed spasm and tenderness to palpation along the paraspinal musculature of the cervical spine, reduced range of motion in the cervical spine, and a positive Spurling test on the left side. He indicated that review of appellant's cervical x-rays revealed mild degenerative changes. Dr. Messina stated that appellant's history and physical examination findings were "most concerning" for disc herniation with cervical radiculopathy, and that his examination findings "would be potentially consistent with" C5 radiculopathy, and he diagnosed cervical radiculopathy. In a February 24, 2020 note, he advised that appellant should not return to work until further notice.

A February 28, 2020 magnetic resonance imaging (MRI) scan of appellant's cervical spine interpreted by Dr. Messina demonstrated multilevel cervical spondylosis most significant from C3-4 through C6-7. Dr. Messina indicated that these changes were superimposed upon a congenitally narrowed canal.

March 2, 2020 progress notes by Dr. Messina indicated that appellant continued to complain of neck pain radiating into his shoulder. Dr. Messina conducted a physical examination and related that appellant's complaints were more related to a strain or sprain of the surrounding musculature. He additionally diagnosed cervicalgia and opined that appellant's MRI scan demonstrated spondylosis and mild degenerative changes in the cervical spine. In a March 2, 2020 note, Dr. Messina advised that appellant should not return to work until he was reevaluated on March 30, 2020.

Appellant responded to OWCP's development questionnaire and related in a March 4, 2020 letter that on January 13, 2020 he was changing equipment on his machine when he felt a pop on the left side of his neck. He continued to work and started to experience pain. Appellant went home and was unable to sleep due to the pain. He related that the next day his doctor informed him that he should not return to work until further notice.

By decision dated March 12, 2020, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish causal relationship between his cervical and left shoulder conditions and his accepted January 13, 2020 employment injury.

On April 21, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He continued to submit medical evidence.

By decision dated June 11, 2020, OWCP denied appellant's hearing request. It found that the request was untimely filed, as it was dated April 21, 2020, more than 30 days after its March 12, 2020 merit decision. After exercising its discretion, OWCP 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 FECA³ 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,⁴ 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.⁵ 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.

³ *Supra* note 1.

⁴ *M.O.*, Docket No. 19-1398 (issued August 13, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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.⁷ 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 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

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a condition causally related to the accepted January 13, 2020 employment incident.

Appellant was initially treated by Dr. Patel. In his reports dated January 14 and 21, 2020, Dr. Patel related appellant's return to work status, but offered no history of injury, diagnosis or opinion regarding causal relationship. These reports were therefore insufficient to establish appellant's claim.¹¹ OWCP also received a January 21, 2020 physical therapy referral from Dr. Patel wherein he listed appellant's diagnoses as neck pain and left shoulder pain. The Board has held, however, that pain is a symptom and not a compensable medical diagnosis.¹² This report was therefore also insufficient to establish appellant's claim.¹³

In February 24, 2020 progress notes, Dr. Messina indicated that appellant presented with left-sided neck pain and stiffness. He reviewed appellant's history of injury, medical history, and x-rays, and he conducted a physical examination. Dr. Messina stated that appellant's history and physical examination findings were "most concerning" for disc herniation with cervical radiculopathy, and that his examination findings "would be potentially consistent with" C5 radiculopathy. His diagnoses, however, are speculative in nature, and the Board has held that medical opinions that are speculative or equivocal have little probative value.¹⁴ While Dr. Messina diagnosed cervical radiculopathy, he did not offer an opinion regarding the issue of causal relationship. The Board has held that medical evidence that does not offer an opinion regarding

⁷ *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *D.M.*, Docket No. 20-0386 (issued August 10, 2020); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *A.R.*, Docket No. 19-0465 (issued August 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *W.L.*, Docket No. 19-1581 (issued August 5, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹¹ *Id.*

¹² *T.S.*, Docket No. 20-0343 (issued July 15, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron, Sr.*, *supra* note 4.

¹³ *Supra* note 10.

¹⁴ *See R.W.*, Docket No. 19-0844 (issued May 29, 2020).

the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁵ This report, therefore, is insufficient to establish appellant's claim.

In March 2, 2020 progress notes, Dr. Messina indicated that appellant continued to complain of neck pain radiating into his shoulder, which he characterized as cervicalgia. He contended that appellant's MRI scan demonstrated spondylosis and mild degenerative changes. Dr. Messina also related that appellant's complaints were more related to a strain or sprain of the surrounding musculature. However, he did not address causal relationship, and as stated above, 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.¹⁶ This report, therefore, is insufficient to establish appellant's claim.

OWCP also received January 27, 2020 physical therapy notes signed by Ms. Clark, a physical therapist. However, certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers' are not considered "physician[s]" as defined under FECA.¹⁷ Consequently, these notes do not constitute competent medical evidence.¹⁸

As the medical evidence of record does not contain rationalized medical evidence establishing causal relationship between appellant's diagnosed neck and left shoulder conditions and the accepted January 13, 2020 employment incident, the Board finds that appellant 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."¹⁹ 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

¹⁵ V.S., Docket No. 19-1370 (issued November 30, 2020).

¹⁶ *Id.*

¹⁷ 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); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (physical therapists are not considered physicians under FECA).

¹⁸ *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

¹⁹ 5 U.S.C. § 8124(b)(1).

representative of the Secretary.²⁰ 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.²¹ 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.

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought.²² Appellant's hearing request was dated April 21, 2020, which was more than 30 days after March 12, 2020. As such, the Board finds that his hearing request was untimely filed, and he was therefore not entitled to an oral hearing as a matter of right.²³

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP properly exercised its discretion in its June 11, 2020 decision, as it noted that it had determined that the issue could be equally well addressed through a reconsideration application. The Board has held that the only limitation on OWCP's discretionary 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 logic and probable deduction from established facts.²⁴ In this case, the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for a hearing. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing.²⁵

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a condition causally related to the accepted January 13, 2020 employment incident. The Board further finds that OWCP properly denied his request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

²⁰ 20 C.F.R. §§ 10.616, 10.617.

²¹ *Id.* at § 10.616(a).

²² *Id.*

²³ *B.H.*, Docket No. 20-0777 (issued October 21, 2020).

²⁴ *W.H.*, Docket No. 20-0562 (issued August 6, 2020).

²⁵ *Supra* note 24.

ORDER

IT IS HEREBY ORDERED THAT the June 11 and March 12, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 19, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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