

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

R.C., Appellant)
and) Docket No. 20-1388
DEPARTMENT OF AGRICULTURE, ANIMAL)
& PLANT HEALTH INSPECTION SERVICE,)
Riverdale, MD, Employer)
Issued: May 25, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 16, 2020 appellant filed a timely appeal from a February 13, 2020 merit decision and a February 14, 2020 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.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed; and (2) whether appellant has met her burden of

¹ The Board notes that, following the February 14, 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 additional evidence for the first time on appeal.

² 5 U.S.C. § 8101 *et seq.*

proof to establish a medical condition causally related to the accepted September 19, 2019 employment incident.

FACTUAL HISTORY

On September 20, 2019 appellant, then a 60-year-old management and program analyst, filed a traumatic injury claim (Form CA-1) alleging that on September 19, 2019 she injured her left calf, neck, head, left shoulder, left arm, and left quad when she fell backwards over a dolly while in the performance of duty. She explained that her injury could have been an exacerbation of her existing spondylosis and lumbar spinal stenosis. On the reverse side of the claim form appellant's supervisor checked a box marked "No" to indicate her opinion that appellant was not in the performance of duty and contended that, while she was at work when her injury occurred, she was not performing her typical duties because she was overseeing the activities of a contractor who was moving office equipment. Appellant did not stop work.

In a September 25, 2019 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant submitted an April 4, 2016 diagnostic report in which Dr. Adam Scherr, a Board-certified diagnostic radiologist, performed a magnetic resonance imaging (MRI) scan of her lumbar spine, finding multilevel degenerative disc disease, degenerative spondylosis and disc bulges, central canal stenosis, moderate bilateral neural foraminal stenosis at L3-4, mild left L2-3 neural foraminal stenosis and a left posterior paracentral annular tear at L5-S1.

In a September 11, 2019 medical report, Dr. Christopher Magee, a Board-certified orthopedic surgeon, evaluated appellant for pain in her lower back and lumbar spine. He diagnosed spinal stenosis of the lumbar spine and low back pain.

A September 19, 2019 medical note with an illegible signature indicated that appellant was injured when she tripped over a moving dolly, fell backwards and landed on her left side earlier that day. The provider advised that she should use rest, ice, compression, and elevation to treat the afflicted areas and to follow up with urgent care.

In a September 25, 2019 medical report, Stella Meusch, a physician assistant, evaluated appellant for pain in her lower back and left shoulder after she fell backwards.

In a diagnostic report of even date, Dr. Islamiat Ego-Osuala, a Board-certified radiologist, performed an x-ray of appellant's lumbosacral spine. She found mild lumbar levoscoliosis and moderate degenerative disc disease at L4-5.

In a September 25, 2019 medical note, Ms. Meusch diagnosed dorsalgia, unspecified and pain in the left shoulder. She referred appellant to physical therapy for further treatment.

In a September 27, 2019 statement, appellant described the events of the September 19, 2019 employment incident in which movers were in her office moving equipment. She noted that she stepped back and, when her left foot made contact with a dolly, she lost balance and fell and,

landed on her back. The movers then helped her up. Appellant explained that she did not hit her head, but the way she landed caused her to hyperextend her “left trap” and the surrounding muscles. She indicated that she was in the performance of duty as she was at her duty station and preparing her workstation for work that day.

In an October 7, 2019 medical report, Dr. Rajiv Dua, Board-certified in family medicine, evaluated appellant for back pain as well as paresthesias in her bilateral arms and hands. He also observed her previous conditions, including spinal stenosis of the lumbar region beginning March 15, 2017.

In an October 11, 2019 witness statement, J.T., a contractor, explained that he was helping to move equipment in appellant’s office on September 19, 2019 when she started backing up, hit a cart on one end and fell down. In a separate witness statement, D.F., another contractor, again explained that he was helping to move equipment and, as appellant was backing up, he heard a noise, turned around, and saw that she had fallen.³

In an October 14, 2019 response to OWCP’s development questionnaire, appellant again explained the events of the September 19, 2019 employment incident. She indicated that she fell onto a metal dolly causing her severe back pain and an overextension of her neck and shoulder. Appellant also noted her previous diagnoses of bursitis and spinal stenosis. She included a timeline of relevant events, beginning on September 11, 2019, where she was diagnosed with trochanteric bursitis of the left hip, the September 19, 2019 employment incident, as well as her subsequent medical treatment and physical therapy.

In an October 21, 2019 diagnostic report, Dr. David Porter, a Board-certified radiologist, performed an MRI scan of appellant’s lumbar spine, finding multilevel degenerative disc disease.

By decision dated November 12, 2019, OWCP denied appellant’s traumatic injury claim, finding that the medical evidence of record was insufficient to establish a diagnosis in connection with her claimed injury. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On November 15, 2019 appellant requested reconsideration of OWCP’s November 12, 2019 decision. She explained that Dr. Magee reviewed her MRI scans and diagnosed an exacerbation of her stenosis with symptoms that were not associated with her preexisting conditions.

In a November 15, 2019 medical report, appellant informed Dr. Magee that she fell backwards over a dolly at work and injured her back. Dr. Magee diagnosed spinal stenosis of the lumbar region, a low back strain, and a contusion of the lumbar nerve root. He noted that the onset of her spinal stenosis was September 11, 2019 and the onset of her low back strain was November 15, 2019. Dr. Magee referred appellant to physical therapy for treatment of her conditions.

³ Appellant also attached comments to the two witness statements in which she clarified that she did not make contact with the wall when she fell, she made a loud noise and did not catch herself when she fell.

By request form dated November 20, 2019 and received by OWCP on December 30, 2019, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received a September 30, 2019 medical report, wherein Dr. Hugh House, a Board-certified orthopedic surgeon, evaluated appellant for left shoulder, left hip, and low back pain. Dr. House noted that appellant had low back pain for a while and that she exacerbated her symptoms when she fell on her left side a couple of weeks prior. On review of her x-ray scans, he diagnosed other spondylosis, lumbar region, low back pain, and trochanteric bursitis of the left and right hips.

In a November 21, 2019 attending physician's report (Form CA-20), Dr. Magee diagnosed lumbar spinal stenosis and checked a box marked "Yes" to indicate his opinion that appellant's condition was caused by the September 19, 2019 employment incident. He noted that she fell backwards over a dolly, hitting her left shoulder, left calf, neck, and back.

By decision dated February 13, 2020, OWCP affirmed the November 12, 2019 decision, as modified, to find that the new evidence was sufficient to establish the medical component of fact of injury. The claim remained denied, however, because appellant failed to submit a rationalized opinion from her treating physician explaining how her diagnosed conditions were causally related to the accepted September 19, 2019 employment incident.

By decision dated February 14, 2020, OWCP's Branch of Hearings and Review denied appellant's hearing request. It found that the request was untimely filed, as it was not received until "December 31, 2019,"⁴ more than 30 days after its November 12, 2019 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

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."⁵ 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.⁶ 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.⁷ Although there is no right to a review of the written record or an oral hearing, if not requested

⁴ OWCP's decision noted that appellant's request for an oral hearing was received on December 31, 2019; however, this appears to be a typographical error as the Integrated Federal Employees' Compensation System (iFECS) indicates that OWCP received appellant's request on December 30, 2019.

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. §§ 10.616, 10.617.

⁷ *Id.* at § 10.616(a).

within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.

OWCP's procedures provide that the request is timely if it was mailed (as determined by the postmark or other carrier's date marking) within 30 days of the date of the district office's decision. If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery in the record reflecting that the request is untimely.⁸

ANALYSIS -- ISSUE 1

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

While OWCP noted in its February 14, 2020 decision that the appeal form was not received until December 30, 2019, the envelope or other evidence of the carrier's mark was not retained in the record. As the record lacks evidence of the postmark or other evidence from which the date of the mailing could be established, the hearing request is deemed timely.⁹ Upon return of the case record, OWCP shall schedule an appropriate hearing before a representative of OWCP's Branch of Hearings and Review.¹⁰

CONCLUSION

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011).

⁹ *Id.*; see also R.C., Docket No. 19-0949 (issued June 24, 2020).

¹⁰ In light of the Board's disposition of Issue 1, Issue 2 is in an interlocutory posture.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2020 decision of OWCP is reversed and the February 13, 2020 decision of the Office of Workers' Compensation Programs is set aside as moot. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 25, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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