United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
	)	
and	)	**Docket No. 21-0189**
	)	**Issued: November 16, 2021**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, UNITED STATES PENITENTIARY ATWATER, Atwater, CA, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 17, 2020 appellant filed a timely appeal from a May 28, 2020 merit decision and a November 9, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 appellant has met his burden of proof to establish a diagnosed medical condition causally related to the accepted December 28, 2017 employment incident; and (2) whether OWCP properly determined that appellant had abandoned his request for a telephonic hearing before an OWCP hearing representative.

---

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On March 2, 2018 appellant, then a 46-year-old communications technician, filed a traumatic injury claim (Form CA-1) asserting that on December 28, 2017 he sustained right shoulder and head injuries when he was subduing an inmate by placing him on the ground while in the performance of duty. He did not stop work. Appellant subsequently requested that a left knee injury be included in his claim as sustained during the same December 28, 2017 claimed employment incident.

In a development letter dated March 13, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him regarding the type of medical and factual evidence required. OWCP afforded appellant 30 days to provide the requested evidence.

In response to OWCP's request, appellant submitted medical evidence.

A form report dated December 28, 2017 from Dondon Edeza, a family nurse practitioner, noted appellant's history of injury and his complaints of right shoulder and left knee pain.

In a March 30, 2018 work restriction form, Mr. Edeza, indicated that ongoing medical care was required and that appellant could perform his regular work duties. Progress notes of even date from Mr. Edeza indicated that appellant was seen for left knee and right shoulder pain, and right shoulder pain radiating to fingers following an altercation with an inmate. She diagnosed right shoulder and left knee pain.

March 30, 2018 x-ray interpretations of appellant's right shoulder and left knee were negative.

In work restriction forms dated April 2, June 11, and August 1, 2018, Dr. Rodrigo DeZubiria, a Board-certified family medicine physician, noted a December 28, 2017 injury date, that ongoing medical care was required, and that appellant could return to his regular work duties. Progress notes dated April 2 and August 1, 2018 from Dr. DeZubiria noted that appellant was seen for a follow-up visit for right shoulder and left knee injuries due to a December 28, 2017 injury. Right shoulder and left knee pain were diagnosed.

Dr. DeZubiria, on an April 23, 2018 work restriction form, noted an injury date of April 2018 indicated appellant required ongoing medical care, and noted that he would be able to return to work in one day.[2] Progress notes dated April 30, 2018 from Dr. DeZubiria noted that appellant was seen in follow up on April 18, 2018 for an infection since April 18, 2018.

A May 9, 2018 work restriction form from Dr. DeZubiria released appellant to modified work, noted a December 28, 2017 injury date, and checked a box indicating that ongoing medical care was required. Progress notes of even date from Dr. DeZubiria noted a December 28, 2017 injury and diagnoses of right shoulder and left knee pain.

---

[2] The dated note on the form is April 30, 2018 while the date in the signature block is April 23, 2018.

By decision dated May 28, 2020, OWCP accepted that the December 28, 2017 employment incident occurred as alleged, but denied appellant's traumatic injury claim because the evidence of record did not include medical evidence containing a firm diagnosis in connection with the accepted employment incident. As such, it found that the requirements had not been met to establish that he sustained an injury as defined by FECA.

Progress notes dated June 11, 2018 from Dr. DeZubiria noted a December 28, 2017 date of injury and diagnosed right shoulder and left knee pain.

On June 5, 2020 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 25, 2020 notice, OWCP's hearing representative informed appellant that an oral hearing was scheduled for October 28, 2020 at 1:30 p.m. Eastern Standard Time (EST). The notice included the toll-free number and required passcode to participate in the telephonic hearing. The hearing representative instructed appellant to "call the toll free number listed below and when prompted, enter the pass code also listed below." The notice was mailed to his last known address of record. Appellant did not appear for or request postponement of the hearing.

By decision dated November 9, 2020, OWCP's hearing representative found that appellant failed to appear at the oral hearing and, as such, had abandoned his request. The hearing representative indicated that appellant received a 30-day advance notice of the hearing scheduled for November 15, 2019, and found that there was no evidence that he had contacted OWCP either prior to or subsequent to the scheduled hearing to request a postponement or explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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,[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, it first must be determined whether fact of injury has been established. There

[3] 5 U.S.C. § 8101 *et seq*.

[4] *J.G.*, Docket No. 20-1125 (issued March 8, 2021); *D.D.*, Docket No. 20-0626 (issued September 14, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[6] *J.G.*, *id.*; *D.D.*, *id.*; *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

are two components involved in establishing fact of injury. 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. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted December 28, 2017 employment incident.

Appellant submitted work restriction forms and progress reports dated April 2 and August 1, 2018 from Dr. DeZubiria who noted that appellant was seen for December 28, 2017 left knee and right shoulder injuries and diagnosed right shoulder and left knee pain. The Board has held that pain is a description of a symptom, not a clear diagnosis of a medical condition.[8] A medical report lacking a firm diagnosis is of no probative value.[9] These reports are, therefore, insufficient to establish a diagnosed medical condition causally related to the accepted employment incident.

While Dr. DeZubiria, in April 30, 2018 progress notes, diagnosed an infection, he offered no opinion as to the cause of the infection. 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.[10] As such, this report is insufficient to establish causal relationship.

The record also contains a series of reports dated December 28, 2017 through March 30, 2018 from Mr. Edeza, a nurse practitioner. However, certain healthcare providers such as nurse practitioners are not considered physicians as defined under FECA.[11] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA

[7] *J.G.*, *id.*; *D.D.*, *id.*; *K.L.,* Docket No. 18-1029 (issued January 9, 2019); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q).

[8] *C.S.*, Docket No. 20-1354 (issued January 29, 2021); *D.R.,* Docket No. 18-1408 (issued March 1, 2019); *D.A.*, Docket No. 18-0783 (issued November 8, 2018).

[9] *C.S.*, *id.*; *J.P.*, Docket No. 20-0381 (issued July 28, 2020); *R.L.*, Docket No. 20-0284 (issued June 30, 2020).

[10] *See S.J.*, Docket No. 20-0310 (issued April 21, 2021); *E.B.*, Docket No. 19-1548 (issued July 14, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[11] 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* 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). *See also W.K.*, Docket No. 20-0765 (issued February 26, 2021) (nurse practitioners are not considered physicians under FECA).

benefits.[12] As such, this evidence is of no probative value and is insufficient to establish appellant's claim.

OWCP also received x-ray interpretations of the right shoulder and left knee dated March 30, 2018. The Board has held, however, that diagnostic studies, standing alone, lack probative value on the issue of causal relationship, as they do not provide an opinion as to whether the employment incident caused any of the diagnosed conditions.[13] This evidence is, therefore, also insufficient to establish appellant's claim.

The Board finds that the evidence of record is insufficient to establish that the December 28, 2017 employment incident caused a medical condition and, therefore, fails to establish entitlement to compensation under FECA.[14] Accordingly, 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

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought. Unless otherwise directed in writing by the claims examiner, an OWCP hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[15] OWCP has the burden of proving that it mailed notice of the scheduled hearing to a claimant.[16] Section 10.622(f) of OWCP's regulations provides that a claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled.[17] Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review

---

[12] *See W.K.*, *id.*; *N.D.*, Docket No. 20-0699 (issued November 16, 2020).

[13] *See G.W.*, *id.*; *C.B.*, Docket No. 20-0464 (issued July 21, 2020).

[14] *See J.L.*, Docket No. 18-1804 (issued April 12, 2019); *D.H.*, Docket No. 17-1913 (issued December 13, 2018); *see Linda I. Sprague,* 48 ECAB 386 (1997).

[15] 20 C.F.R. § 10.617(b).

[16] *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *A.R.*, Docket No. 19-1691 (issued February 24, 2020)

[17] *Supra* note 15 at 10.622(f).

of the matter will proceed as a review of the written record.[18] Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision finding that the claimant abandoned the request for a hearing.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant abandoned his request for a telephonic hearing before an OWCP hearing representative.

The record establishes that appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review following its May 28, 2020 decision. In a September 25, 2020 letter, a hearing representative notified appellant that she had scheduled a telephonic hearing to be held on October 28, 2020, at 1:30 p.m., EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record and provided instructions on how to participate. The notice was not returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.[20] The presumption is commonly referred to as the "mailbox rule." It arises when the record reflects that the notice was properly addressed and duly mailed. The current record is devoid of evidence to rebut the presumption that appellant received OWCP's September 25, 2020 notice of hearing. Appellant did not appear as instructed for the October 28, 2020 scheduled telephonic hearing and there is no indication that he requested postponement of the telephonic hearing. Moreover, he did not submit a written request within the 10 days after the date set for the telephonic hearing and request that another telephonic hearing be scheduled. Under the circumstances, the Board finds that appellant abandoned his telephonic hearing request.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a diagnosed medical condition causally related to accepted December 28, 2017 employment incident. The Board further finds that OWCP properly determined that appellant abandoned his request for a telephonic hearing before an OWCP hearing representative.

---

[18] *Id.*

[19] *T.R.*, *supra* note 16 ; *A.J.*, Docket No. 18-0830 (issued January 10, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

[20] *E.G.*, Docket No. 20-1184 (issued March 1, 2021); *R.L.*, Docket No. 20-0186 (issued September 14, 2020); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Claudia J. Whitten*, 52 ECAB 483 (2001).

ORDER

IT IS HEREBY ORDERED THAT the May 28 and November 9, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 16, 2021
Washington, DC

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

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

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