

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

_____)	
J.R., Appellant)	
)	
and)	Docket No. 21-0830
)	Issued: February 3, 2022
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, FEDERAL CORRECTIONAL)	
INSTITUTION, Big Springs, TX, 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 May 8, 2021 appellant filed a timely appeal from a February 24, 2021 merit decision and an April 26, 2021 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 the case.²

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of disability commencing October 29, 2020 causally related to his accepted January 11, 2004

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 26, 2021 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.*

employment injury; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On February 4, 2004 appellant, then a 28-year-old correctional officer, filed a traumatic claim injury (Form CA-1) alleging that on January 11, 2004 he chipped a bone in his right knee when assisting in the subduing of an inmate while in the performance of duty. OWCP accepted the claim for right knee medical meniscus tear. Appellant underwent OWCP-authorized repair of the posterior horn of the medial meniscus on March 1, 2004 and on September 20, 2004 he underwent a partial right medial meniscectomy.³ He underwent a subsequent OWCP-authorized medial and lateral meniscectomy on June 29, 2009.⁴ OWCP continued to receive evidence regarding appellant's right knee condition through December 14, 2009.

In a letter received on October 29, 2020, appellant requested authorization to be examined by Dr. Gregory Gardner, a family medicine specialist, for knee pain. On December 1, 2020 he filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability from work due to his accepted January 11, 2004 employment injury. Appellant noted that he had worked limited light duty since his injury and had been in constant pain since his first surgery. He also noted that he had sustained a recurrence of disability in 2009 which resulted from walking and normal day-to-day activities.

In a development letter dated January 19, 2021, OWCP informed appellant that additional evidence was necessary to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a February 20, 2021 response to OWCP's questionnaire, appellant attested that his recurrence occurred following his last surgery in 2009. He described continuous knee pain due to walking and normal day-to-day activities. Appellant stated that all three of his accepted knee surgeries had caused pain afterwards.

Appellant resubmitted an operative report dated June 29, 2009 from Dr. Hayes, which related that he had undergone a right knee medial and lateral meniscectomy, and removal of osteophytes.

By decision dated February 24, 2021, OWCP denied appellant's recurrence claim. It found that the medical evidence of record was insufficient to establish that his current condition was disabling and was related to his original injury, without an intervening cause.

On April 4, 2021 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

³ On June 24, 2005 OWCP granted appellant a schedule award for eight percent permanent impairment of the right lower extremity. The period of the award ran from January 18 through June 28, 2005.

⁴ Appellant submitted an operative report dated June 29, 2009 from Dr. Robert Hayes, an orthopedic surgeon, which related that he had undergone a right knee medial and lateral meniscectomy, and removal of osteophytes.

Appellant submitted medical reports dated February 9 and March 9, 2021 from Dr. Kraig Pepper, an osteopath and Board-certified orthopedic surgeon. Dr. Pepper related that appellant was seen for pain in his right knee and decreased range of motion. He noted that appellant previously underwent knee surgeries in 2004 and 2009.

OWCP also received a report dated March 19, 2021 from Robert Martin, a physician assistant, which stated that appellant was seen for a follow up on his right knee pain.

By decision dated April 26, 2021, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record as untimely filed, finding that it was made more than 30 days after the February 24, 2021 merit decision as it was submitted on April 4, 2021. It further exercised its discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration before OWCP, along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁵ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁶

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁷

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

⁵ 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

injury, and supports that conclusion with medical reasoning.⁸ Where no such rationale is present, the medical evidence is of diminished probative value.⁹

A recurrence of a medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.¹⁰ An employee has the burden of proof to establish that he or she sustained a recurrence of a medical condition that is causally related to his or her accepted employment injury without intervening cause.¹¹

If a claim for recurrence of medical condition is made more than 90 days after release from medical care, a claimant is responsible for submitting a medical report supporting a causal relationship between the employee's current condition and the original injury in order to meet his or her burden.¹² To meet this burden, the employee must submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, supports that the condition is causally related and supports his or her conclusion with sound medical rationale.¹³ Where no such rationale is present, medical evidence is of diminished probative value.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing October 29, 2020 causally related to his accepted January 11, 2004 employment injury.

In support of his recurrence claim, appellant resubmitted an operative report dated June 29, 2009 from Dr. Hayes which related that appellant had undergone a right knee medial and lateral meniscectomy and removal of osteophytes. This report did not address appellant's disability status commencing October 2020. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability or medical condition is due to an accepted employment-related injury is of no probative value.¹⁵ Therefore, this evidence is insufficient to meet appellant's burden of proof.

⁸ *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

⁹ *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

¹⁰ 20 C.F.R. § 10.5(y).

¹¹ *M.P.*, Docket No. 19-0161 (issued August 16, 2019); *E.R.*, Docket No. 18-0202 (issued June 5, 2018).

¹² Federal (FECA) Procedural Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.4b (June 2013); *see also J.M.*, Docket No. 09-2041 (issued May 6, 2010).

¹³ *A.C.*, Docket No. 17-0521 (issued April 24, 2018); *O.H.*, Docket No. 15-0778 (issued June 25, 2015).

¹⁴ *S.P.*, Docket No. 19-0573 (issued May 6, 2021); *Michael Stockert*, 39 ECAB 1186 (1988).

¹⁵ *See S.P., id.*; *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

As appellant has not submitted rationalized medical evidence in support of a finding that he sustained a recurrence of disability commencing October 29, 2020 causally related to his accepted January 11, 2004 employment injury, 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: “Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [his] claim before a representative of the Secretary.”¹⁶

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.”¹⁷ The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date of marking) of the date of the decision for which a hearing is sought.¹⁸ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁹ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP’s regulations provide that a request for review of the written record must be made within 30 days of the date of the decision for which a review is sought. Appellant’s request for a review of the written record was submitted on April 4, 2021, more than 30 days after the issuance of OWCP’s February 24, 2021 merit decision. Because his request was submitted more than 30

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ 20 C.F.R. § 10.615.

¹⁸ *Id.* at § 10.616.

¹⁹ *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

²⁰ *Id.*

days after the date of OWCP's February 24, 2021 decision, the Board finds that the request was untimely filed and he was not entitled to a review of the written record as a matter of right.²¹

Although appellant was not entitled to a hearing as a matter of right, OWCP's Branch of Hearings and Review has the discretionary authority 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.²² In this instance, the Branch of Hearings and Review denied a discretionary review of the written record because appellant could instead submit new evidence and request reconsideration before OWCP. The Board finds that OWCP properly exercised its discretionary authority in denying appellant's request for an oral hearing.²³

The Board has held that the only limitation on OWCP's authority is reasonableness.²⁴ 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.²⁵ In this case, the evidence of record indicates that OWCP acted reasonably in denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP did not abuse its discretion.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing October 29, 2020 causally related to his accepted January 11, 2004

²¹ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. *See J.W.*, Docket No. 18-1611 (issued February 27, 2019); *Donna A. Christley*, 41 ECAB 90 (1989).

²² *W.N.*, Docket No. 20-1315 (issued July 6, 2021).

²³ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts. *R.S.*, Docket No. 17-0063 (issued March 7, 2017); *André Thyratron*, 54 ECAB 257, 261 (2002).

²⁴ *R.M.*, Docket No. 19-1088 (issued November 17, 2020). *See also E.S.*, Docket No. 18-1750 (issued March 11, 2019).

²⁵ *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *R.S.*, *supra* note 23.

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

ORDER

IT IS HEREBY ORDERED THAT the February 24 and April 26, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 3, 2022
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