

² The Board notes that, following the September 8, 2021 decision, appellant submitted additional evidence to OWCP. 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.*

(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 April 7, 2021 appellant, then a 30-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he experienced a left knee strain due to factors of his federal employment, including repetitive walking of 20,000 steps per day, stepping into his van repeatedly, and climbing many flights of stairs daily. He indicated that he first became aware of his condition and first realized its relation to his federal employment on April 4, 2021. Appellant stopped work on April 5, 2021.

In an April 14, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. It did not receive a response.

An activity prescription form dated April 6, 2021 from Katherine Hester, an advanced registered nurse practitioner, noted that appellant was examined following an April 4, 2021 workplace incident. She diagnosed left knee sprain and advised that he could return to work.

By decision dated May 17, 2021, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted factors of his federal employment as it was rendered by Ms. Hester. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On July 2, 2021 appellant was seen by Dr. Marilyn Nayan, a Board-certified family medicine physician, with ongoing complaints of lower back and leg pain relating to his official duties as a mail carrier. She indicated that his current symptoms began on June 27, 2021, but that he had been experiencing pain for six months. Dr. Nayan diagnosed a strain of the muscle and tendon of the lower back, and radiculopathy in the lumbar region. In duty status reports (Form CA-17) dated July 2, 9, 16 and 2021, she provided clinical findings of strain of muscle, fascia and tendon of the lower back and lumbar radiculopathy related to a June 27, 2021 work injury. Dr. Nayan advised that appellant could return to work with restrictions.

In a diagnostic report dated July 2, 2021, Dr. Aamer Farooki, a Board-certified radiologist, performed an x-ray of the lumbar spine, which revealed no acute abnormalities.

On July 9, 2021 appellant presented in follow up to Dr. Nayan and related that his symptoms had improved with medication.

On August 10, 2021 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

In a July 16, 2021 note, Dr. Nayan noted that appellant's condition was exacerbated by prolonged walking or standing while working. She further indicated that he could return to work with limited duties.

An August 6, 2021 follow-up note from Dr. Nayan related appellant's ongoing symptoms and improvement with medication. In a Form CA-17 of even date, she indicated that he could return to work.

On August 20, 2021 appellant was seen by Dr. Nayan in follow up. Dr. Nayan noted that his pain symptoms increased after returning to full-duty work, and further noted that prolonged walking and carrying heavy bags aggravated his condition. She diagnosed a lumbar strain without a herniated disc. In a Form CA-17 of even date, Dr. Nayan indicated that appellant could return to work with restrictions.

By decision dated September 8, 2021, OWCP denied appellant's request for a review of the written record as untimely filed, finding that his request was not made within 30 days of the May 17, 2021 OWCP decision as it was postmarked on August 10, 2021. It further exercised discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

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 establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁷

³ *Supra* note 1.

⁴ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *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 *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also* *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue. A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a diagnosed medical condition causally related to the accepted factors of his federal employment.

In support of his claim, appellant submitted an activity prescription form dated April 6, 2021 from Ms. Hester, an advanced registered nurse practitioner, who diagnosed a left knee sprain following a workplace incident on April 4, 2021. The Board, however, has held that medical reports signed solely by a nurse practitioner are of no probative value as such providers are not considered physicians as defined under FECA.⁹ This evidence, therefore, is insufficient to establish appellant's burden of proof.

As the medical evidence of record is insufficient to establish a diagnosed medical condition causally related to the accepted factors of appellant's federal employment, the Board finds that 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."¹⁰ 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

⁸ *John J. Carlone*, 41 ECAB 354 (1989).

⁹ Section 8101(2) of FECA provides that a 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 *M.C.*, Docket No. 19-1074 (issued June 12, 2020); *S.L.*, Docket No. 19-0607 (issued January 28, 2020) (nurse practitioners are not considered physicians under FECA).

¹⁰ 5 U.S.C. § 8124(b)(1).

representative of the Secretary.¹¹ 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.¹² 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 a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for a hearing or review of the written record must be made within 30 days of the date of the decision for which review is sought.¹³ Because appellant's request was postmarked on August 10, 2021, it post-dated OWCP's May 17, 2021 decision, by more than 30 days and, therefore, is untimely. Appellant was, therefore, not entitled to a review of the written record as a matter of right.¹⁴

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.¹⁵ The Board finds that, in the September 8, 2021 decision, OWCP properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional 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, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁶ In this case, the evidence of record does not indicate 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 pursuant to 5 U.S.C. § 8124(b) as untimely filed.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a diagnosed medical condition causally related to the accepted factors of his federal employment. The Board

¹¹ 20 C.F.R. §§ 10.616, 10.617.

¹² *Id.* at § 10.616(a).

¹³ *Supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020).

¹⁴ *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

¹⁵ *Id.*

¹⁶ *Id.*

further finds that OWCP properly denied his request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the May 17 and September 8, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 21, 2022
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