

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

A.S., Appellant)	
)	
and)	Docket No. 22-1227
)	Issued: April 6, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
BRUCE W. CARTER VA MEDICAL CENTER,)	
Miami, FL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 17, 2022 appellant filed a timely appeal from a May 3, 2022 merit decision and a June 23, 2022 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a medical condition causally related to the accepted March 9, 2022 employment incident; and (2) whether OWCP properly denied appellant's request for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On March 22, 2022 appellant, then a 44-year-old supply clerical and technician, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 2022 she injured her lower back,

¹ 5 U.S.C. § 8101 *et seq.*

neck, head, left leg, chest, and spine when her vehicle was rear-ended in a motor vehicle accident (MVA) while in the performance of duty. A MVA report dated March 15, 2022 was submitted to the record.

OWCP received a March 9, 2022 employing establishment report indicating that appellant should not return to work until March 14, 2022, and work restrictions dated March 11, 14, 16, and 23, 2022 signed by a chiropractor.

Magnetic resonance imaging (MRI) scans dated March 14, 2022 of appellant's cervical and lumbar spines, as well as her left knee were received. The cervical spine MRI scan noted an impression of straightening and reversal of the cervical lordosis, consistent with torticollis/cervical strain. Cervical disc herniations were also noted from C3-7. The lumbar MRI scan noted an impression of ventral epidural defect at T11-12 with compression on the thecal sac, L4-5 broad based bulging annulus with compression on the thecal sac and disc desiccation, L5-S1 broad-based disc herniation with compression on the thecal sac, with left-sided neural foraminal narrowing and diffuse disc desiccation. The MRI scan of appellant's left knee related findings of tiny inner edge tear of the lateral meniscus, small popliteal cyst, small amount of joint fluid indicative of mild joint synovitis, and heterogeneous marrow signal in the distal femur.

In a development letter dated March 29, 2022, OWCP advised appellant of the deficiencies of her claim and requested that she submit a comprehensive medical summary from a licensed physician which contained a diagnosis of a condition caused by the reported incident. It afforded her 30 days to submit the requested information.

In response to the development letter, OWCP received daily examination and treatment reports dated from March 11 to April 8, 2022, from Dr. Felipe Contro, a chiropractor. These reports indicated that appellant's spinal, knee, and ankle conditions were improving.

OWCP also received appellant's response to the development questionnaire and copies of the March 14, 2022 MRI scans of the cervical and lumbar spine and the left knee.

In a progress report dated March 29, 2022, Dr. Ankeet Amrich Choxi, Board-certified in anesthesiology and pain medicine, reviewed appellant's MRI scans and listed assessments of cervicalgia, cervical spine ligament sprain, cervicothoracic radiculopathy, other cervical displacement unspecified, lumbar radiculopathy, lumbar ligament sprain, lumbar intervertebral disc displacement, and left knee pain.

In a progress report dated April 9, 2022, Dr. Paul Rothenberg, a Board-certified orthopedic surgeon, related that appellant was seen for bilateral shoulder pain, left knee pain, and right ankle pain. He noted that she was involved in a MVA on March 9, 2022. Dr. Rothenberg opined that appellant had a small tear of the lateral left knee meniscus and a history of right shoulder arthroscopy. Regarding her left shoulder and right ankle, he indicated that her pain in those areas had resolved and did not require further management.

In a report dated April 12, 2022, Dr. Choxi reiterated appellant's diagnoses and indicated that he had provided her with lumbar and cervical epidurals due to failure of conservative treatment.

By decision dated May 3, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a medical condition causally related to the March 9, 2022 employment incident.

On June 3, 2022 appellant filed an undated request for a review of the written record before a representative of OWCP's Branch of Hearings and Review.

OWCP continued to receive medical evidence.

By decision dated June 23, 2022, OWCP denied appellant's request for review of the written record, finding that her request was not made within 30 days of its May 3, 2022 decision. It further exercised its 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 FECA² 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,³ 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.⁴ 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.⁵

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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 at the time, place, and in the manner alleged.⁶ The second component is whether the employment incident caused a personal injury.⁷

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 employment incident must be based on a complete factual

² *Id.*

³ See *S.P.*, Docket No. 22-0766 (issued August 17, 2022); *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).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *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).

⁶ *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *D.M.*, Docket No. 20-0386 (issued August 10, 2020); *John J. Carlone*, 41 ECAB 354 (1989).

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 accepted employment incident.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted March 9, 2022 employment incident.

In support of her claim, appellant submitted numerous reports from Dr. Contro, a chiropractor, dating from March 11, 2022. The Board notes that section 8101(2) of FECA⁹ provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary.¹⁰ OWCP's implementing federal regulations at 20 C.F.R. § 10.5(bb) defines subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. The Board has reviewed the reports from Dr. Contro and finds that the reports do not diagnose a subluxation as demonstrated by x-ray. As these reports did not diagnose subluxation as demonstrated by x-ray, these reports do not constitute competent medical evidence.¹¹

In support of appellant's claim, OWCP also received reports from Dr. Choxi dated March 29 and April 12, 2022, as well as a report from Dr. Rothenberg dated April 9, 2022. In these reports the physicians listed her diagnoses, but offered no opinion regarding the cause of the diagnosed conditions. The Board has held that a medical report lacking a rationalized medical opinion regarding causal relationship is of no probative value.¹² These reports are therefore insufficient to establish causal relationship.¹³

Appellant also submitted March 14, 2022 MRI scans of her cervical and lumbar spine and left knee. The Board has held that diagnostic tests standing alone lack probative value on the issue of causal relationship as they do not address the relationship between the accepted employment factors and a diagnosed condition.¹⁴ For this reason, the diagnostic reports submitted by appellant are insufficient to meet her burden of proof.

⁸ *Id.*

⁹ 5 U.S.C. § 8101(2).

¹⁰ *Id.*; 20 C.F.R. § 10.311.

¹¹ *M.J.*, Docket No. 20-1263 (issued September 14, 2021); *C.S.*, Docket No. 19-1279 (issued December 30, 2019); *Robert H. St. Onge*, Docket No. 43 ECAB 1169 (1992).

¹² *See J.P.*, Docket No. 20-0381 (issued July 28, 2020); *P.C.*, Docket No. 18-0167 (issued May 7, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹³ *Y.C.*, Docket No. 17-1938 (issued January 7, 2019).

¹⁴ *See J.L.*, Docket No. 20-1662 (issued October 7, 2022); *see W.M.*, Docket No. 19-1853 (issued May 13, 2020); *L.F.*, Docket No. 19-1905 (issued April 10, 2020).

As the medical evidence of record is insufficient to establish a medical condition causally related to the accepted March 9, 2022 employment incident, the Board finds that appellant has not met her 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 -- ISSUE2

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.”¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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(b).

OWCP’s regulations provide that the request for a review of the written record must be made within 30 days of the date of the decision for which a review is sought.¹⁹ On June 3, 2022 OWCP’s Branch of Hearings and Review received appellant’s undated request for review of the written record regarding OWCP’s May 3, 2022 merit decision. The 30th day after May 3, 2022 was June 2, 2022. As the request for review of the written record was received more than 30 days after the issuance of the May 3, 2022 decision, the Board finds that appellant’s request was untimely filed. Therefore, OWCP properly found in its June 3, 2022 decision that she was not entitled to a review of the written record as a matter of right.²⁰

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. §§ 10.616, 10.617.

¹⁷ *Id.* at § 10.616(a).

¹⁸ *Id.* at § 10.616(b).

¹⁹ *Id.*

²⁰ *B.H.*, Docket No. 20-0777 (issued October 21, 2020); *R.W.*, Docket No. 13-0044 (issued February 22, 2013); *A.L.*, Docket No. 09-1851 (issued March 9, 2010); *F.W.*, Docket No. 08-0722 (issued August 7, 2008).

Although appellant's request for review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.²¹ 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, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.²² The Board finds that OWCP properly exercised its discretion in its June 23, 2022 decision by determining that the issue in the case could be equally well addressed by a request for reconsideration before OWCP along with the submission of new evidence relevant to the issue at hand and, thus, it properly denied appellant's request for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).²³

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted March 9, 2022 employment incident. The Board further finds that OWCP properly denied her request for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

²¹ *R.H.*, Docket No. 19-1488 (issued February 20, 2020).

²² *Id.*

²³ *See J.O.*, Docket No. 17-0789 (issued May 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the June 23 and May 3, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 6, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board