United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 22-0454**
	)	**Issued: December 7, 2023**
DEPARTMENT OF VETERANS AFFAIRS, CONROE VA CLINIC, Conroe, 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
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 3, 2022 appellant filed a timely appeal from a September 8, 2021 merit decision and a January 26, 2022 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.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that her left thumb condition is causally related to the accepted March 23, 2021 employment incident; and

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the September 8, 2021 merit 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*.

(2) whether OWCP properly determined that appellant abandoned her request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

FACTUAL HISTORY

On March 25, 2021 appellant, then a 46-year-old diagnostic radiology technician, filed a traumatic injury claim (Form CA-1) alleging that on March 23, 2021 she experienced pain at the base of her left thumb at approximately the carpometacarpal joint when pushing a button to move an x-ray tube while in the performance of duty. She did not stop work.

On March 25, 2021 appellant was initially seen at an urgent care facility. A physician assistant noted that appellant alleged a left thumb injury while operating radiology equipment on March 23, 2021 with associated symptoms of pain and swelling for two days. He noted her physical examination and left-hand x-ray findings and provided an impression of left de Quervain's tendonitis. Appellant was provided with a left thumb spica splint and released to work with left hand restrictions from March 25 through April 6, 2021. In a state workers' compensation work status report, also dated March 25, 2021, the physician assistant diagnosed left de Quervain's tendonitis and advised that appellant could return to work that day with restrictions.

On March 31, 2021 the employing establishment issued an authorization for examination and/or treatment (Form CA-16).

OWCP received a May 26, 2021 magnetic resonance imaging (MRI) scan report of the left wrist and notes dated April 2, 8, and 22, May 6, and June 3, 2021 from Eric R. Naifeh, a chiropractor and certified nurse practitioner. In his reports, Mr. Naifeh described appellant's daily radiology duties and the procedures she used to operate the radiological equipment. He noted that on March 23, 2021 she had a lot of clients and that she left work early. Mr. Naifeh diagnosed de Quervain's or tenosynovitis of left thumb, which he opined was due to overuse from work. He noted that appellant averaged 30 examinations in a day which required her to squeeze with her left thumb 90 times a day and sustain force and move the tube in the correct position. Mr. Naifeh also explained how such overuse led to the diagnosis.

In a July 6, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and requested a narrative medical report from her treating physician containing a detailed description of findings and a diagnosis, explaining how her work incident caused or aggravated a medical condition. OWCP also provided a questionnaire for appellant's completion, which included a request that she clarify whether she was claiming a traumatic injury or occupational disease, provided definitions of the respective claims. It afforded her 30 days to submit the necessary evidence.

On July 19, 2021 appellant signed the form, but did not respond to the questions contained in the questionnaire provided by OWCP. She later provided a narrative statement in which she described the March 23, 2021 events, and noted that she was previously scheduled to leave early that day.

On August 3, 2021 Dr. Jelani Ingram, a Board-certified family practitioner, cosigned a letter authored by Mr. Naifeh. The letter described appellant's daily duties, including operating radiologic equipment which included using her left hand and thumb to push a button and move a radiographic tube with both hands. It noted that, on March 23, 2021, while she was setting up for the next radiographic examination, she had to push a button with the left hand and move the radiographic tube with both hands. When appellant did so she experienced the onset of pain in her left thumb. Dr. Ingram further related that she continued to work, pushing through the pain until she left work. He noted that the x-rays from an urgent care facility showed mild osteoarthritis at the thumb. Dr. Ingram diagnosed de Quervain's or tenosynovitis as a result of overuse at work. He further explained that appellant averaged 30 examinations in a day, which required her to have to squeeze with the left thumb 90 times a day and sustain force to move the tube in the correct position. Dr. Ingram explained that this led to thickening of the tendons of the first dorsal compartment and subsequent restricted gilding of the tendons in the fibro-osseous canal. Based on the initial history of injury provided by appellant, advanced testing and examination findings, he opined that her left thumb tenosynovitis was causally related to the March 23, 2021 incident.

An additional July 22, 2022 report from Mr. Naifeh was also received.

By decision dated September 8, 2021, OWCP denied appellant's traumatic injury claim. It found that the facts surrounding the March 23, 2021 work incident did not comport with the description provided by Dr. Ingram. OWCP noted that appellant had not indicated how many examinations she performed on the day of injury and that the average number of examinations performed in a single workday could not be used to reasonably justify how her left thumb tenosynovitis could have developed on March 23, 2021 when she did not work the entire day.

On September 29, 2021 appellant timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review and submitted additional medical evidence.

In a letter dated November 10, 2021, OWCP's hearing representative advised appellant that a telephonic hearing would be held on January 12, 2022 at 1:30 p.m. Eastern Standard Time (EST). The hearing representative also provided appellant with the toll-free telephone number and passcode to access the hearing. OWCP's hearing representative mailed the notice to appellant's last known address of record. Appellant, however, failed to appear for the hearing at the appointed time. By decision dated January 26, 2022, OWCP found that she failed to appear at the oral hearing and abandoned her request. It noted that an oral hearing was scheduled to be conducted by telephone on January 12, 2022 and that appellant received written notification of the hearing 30 days in advance of the hearing. OWCP also indicated that she failed to appear for the hearing and there was no indication in the file that she contacted it either prior to or subsequent to the scheduled hearing to request a postponement or explain her 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 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

[3] *Supra* note 1.

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 are two components involved in establishing fact of injury. The first component is that 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[7]

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[8] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident identified by the claimant.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that her left thumb condition is causally related to the accepted March 23, 2021 employment incident.

Following OWCP's request for clarification of the type of claim, appellant continued to allege that her left thumb injury occurred on March 23, 2021. She did not specify that the injury occurred over a series of workdays or indicate that she was claiming an occupational disease claim.

[4] *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[9] *A.C.*, Docket No. 21-1307 (issued March 22, 2022); *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

The Board notes that there is no evidence that appellant worked the entire day on March 23, 2021. Rather, appellant had worked on March 23, 2021 performing radiographical examinations before stopping work at noon.

In the August 4, 2021 report, Dr. Ingram noted appellant's history of injury, including that she worked until noon to attend to a personal matter. He reported objective findings of a positive Finklestein's test to support the diagnosis of de Quervain's or tenosynovitis of the left thumb. Dr. Ingram opined that appellant's left thumb tenosynovitis was causally related to the March 23, 2021 events and explained with medical rationale how and why an overuse injury could occur as a result of her constant squeezing with the left thumb, and having to sustain force and move the tube in the correct position while performing radiographical examinations, leading to the diagnosed pathology. However, his opinion was premised on the average number of radiological examinations she performed in a single workday, but on March 23, 2021 she did not engage in a full workday. As Dr. Ingram's opinion is not based on a complete and accurate factual history, his opinion is of diminished probative value.[10] As noted, appellant claimed that her injury occurred when she pushed a button on one x-ray tube on March 23, 2021. She did not describe additional work factors occurring that day or provide a history of events over the course of more than one day. Thus, Dr. Ingram's opinion is insufficient to establish appellant's traumatic injury claim.

Appellant also submitted records from Mr. Naifeh, dual certified as a chiropractor and certified nurse practitioner. Mr. Naifeh diagnosed de Quervain's or tenosynovitis of left thumb, which he opined that was due to overuse from work. However, his records are of no probative value. To the extent Mr. Naifeh's records are viewed as that from a chiropractor, the records have no probative medical value as he did not diagnose spinal subluxation as demonstrated by x-ray to exist.[11] To the extent his records are viewed as being from a nurse practitioner, he is not considered a physician and as nurse practitioners are not considered physicians as defined under FECA.[12] Consequently, Mr. Naifeh's medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.

[10] *M.G.*, Docket No. 21-0427 (issued January 6, 2022); *S.P.*, Docket No. 19-0573 (issued May 6, 2021); *A.C.*, Docket No. 17-0521 (issued April 24, 2018); *O.H.*, Docket No. 15-0778 (issued June 25, 2015).

[11] Section 8101(2) provides that under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable 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). Chiropractors are considered physicians under FECA 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. *See* 5 U.S.C. § 8101(2); *M.B.*, Docket No. 22-0422 (issued April 3, 2023); *P.T.*, Docket No. 21-0110 (issued December 8, 2021); *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *S.D.*, Docket No. 19-1245 (issued January 3, 2020); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[12] *Id.*; *J.D.*, Docket No. 21-0164 (issued June 15, 2021) (nurse practitioners are not physicians as defined under FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners and physical therapists are not considered physicians under FECA).

The record also contains records from a physician assistant. These reports, however, do not constitute competent medical evidence because physician assistants are not considered physicians as defined under FECA.[13] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to compensation benefits.[14]

The case record also contains an MRI scan dated May 26, 2021. However, the Board has held that diagnostic tests, standing alone, lack probative value as they do not provide a physician's opinion on whether there is a causal relationship between appellant's claimed disability and a diagnosed condition.[15]

As the medical record is insufficient to establish that appellant's left thumb condition is causally related to the accepted March 23, 2021 employment incident, the Board finds that she 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 -- ISSUE 2

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[16] Unless otherwise directed in writing by the claimant, OWCP's 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.[17] OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.[18]

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. 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

[13] *Supra* note 12. *See also S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians under FECA and are not competent to provide medical opinions).

[14] *Id*.

[15] *See P.A.*, Docket No. 18-0559 (issued January 29, 2020); *A.P.*, Docket No. 18-1690 (issued December 12, 2019); *R.M.*, Docket No. 18-0976 (issued January 3, 2019).

[16] 20 C.F.R. § 10.616(a).

[17] *Id*. at § 10.617(b).

[18] *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *T.P.*, Docket No. 15-0806 (issued September 11, 2015); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant abandoned her request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following OWCP's September 8, 2021 decision denying her traumatic injury claim, appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a November 10, 2021 letter, OWCP's hearing representative notified her that a telephonic hearing was scheduled for January 12, 2022 at 1:30 p.m. EST. The hearing representative mailed the hearing notice to appellant's last known address of record and provided instructions on how to participate. However, appellant failed to call in for the scheduled hearing and did not request a postponement or provide an explanation to OWCP for her failure to attend the hearing within 10 days of the scheduled hearing.[20] The Board thus finds that OWCP properly determined that she abandoned her request for an oral hearing.[21]

On appeal, appellant contends that she got mixed up with another appointment for the same date and did not wish to abandon her hearing request. However, as discussed, she failed to provide an explanation to OWCP for her failure to attend the hearing within 10 days of the scheduled hearing.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her left thumb condition is causally related to the accepted March 23, 2021 employment incident.[22] The Board further finds that OWCP properly determined that she abandoned her request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

[19] 20 C.F.R. § 10.622(f); *supra* note 11 at Chapter 2.1601.6g (October 2011); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[20] *J.C.*, Docket No. 23-0090 (issued June 27, 2023); *E.S.*, Docket No. 19-0567 (issued August 5, 2019).

[21] *Id*.

[22] The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *S.P.*, Docket No. 19-1904 (issued September 2, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2022 and September 8, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 7, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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