

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

C.C., Appellant)	
)	
and)	Docket No. 22-1063
)	Issued: December 18, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
CLEMENT J. ZABLOCKI VA MEDICAL)	
CENTER, Milwaukee, WI, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 5, 2022 appellant filed a timely appeal from a January 20, 2022 nonmerit decision and a May 19, 2022 merit 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.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish disability from work commencing September 12, 2021, causally related to her accepted July 23, 2021

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 19, 2022 decision, appellant submitted additional evidence to OWCP and on appeal. 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 an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On July 23, 2021 appellant, then a 58-year-old safety technician, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 2021 while in the performance of duty, a power lock door mechanism fell and struck the top of her head as she passed through the doorway, causing a bump, cuts, bleeding, and right eye swelling. She stopped work on July 26, 2021. By decision dated September 10, 2021, OWCP accepted the claim for unspecified injury of head.

On September 24, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work for the period September 12 through 25, 2021.³

Appellant submitted a September 3, 2021 report wherein Dr. Felicia D. Robertson, a physician Board-certified in family medicine, held appellant off work through October 22, 2021 "for health-related reasons."

In a development letter dated September 29, 2021, OWCP informed appellant of the deficiencies of her disability claim. It advised her of the type of medical evidence needed and afforded her 30 days to respond.

In a September 29, 2021 duty status report (Form CA-17), Dr. Robertson, noted appellant's complaints of dizziness, lightheadedness, loss of balance and headaches. She held appellant off work through October 22, 2021.

OWCP also received physical therapy treatment notes dated September 2 through 30, 2021.

In a September 3, 2021 report, Dr. Robertson, related that appellant's headaches kept her awake at night and that she had been seeing a concussion specialist. She noted that appellant had a history of Type 2 diabetes mellitus without complication or endocrine concerns.

In an October 12, 2021 report, Dr. Darin A. Maccoux, a physician Board-certified in family and sports medicine, observed the following:

"HEENT extraocular movements were intact and pupils are equal reactive to light. No evidence of nystagmus. Patient has symptoms with diagonal greater than vertical and minimal symptoms with repetitive horizontal eye movements. Cervical range of motion is limited with left rotation. Pain with terminal extension and flexion. Range of motion of upper extremities full symmetrical with no motor weakness. Vestibular symptoms were reproduced with Epley maneuvers right greater than left."

Dr. Maccoux diagnosed closed-head injury, chronic post-traumatic headaches, concussion without loss of consciousness, vertigo, saccadic deficiency, and stuttering. He prescribed

³ Appellant continued to file additional CA-7 forms for continuing disability thereafter.

medication and continued physical and occupational therapy for vestibular and ocular motor dysfunction.

In reports dated October 22, 2021, Dr. Robertson continued to hold appellant off work. She released appellant to full-duty work, effective January 28, 2022.

By decision dated November 18, 2021, OWCP denied appellant's claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish causal relationship between the claimed disability and the accepted employment injury.

On November 30, 2021 OWCP received physical and occupational therapy notes dated October 5 through 28, 2021.

In a December 9, 2021 report, Dr. Robertson returned appellant to "desk duty" for two hours a day commencing December 13, 2021, pending reevaluation with Dr. Maccoux.⁴

On December 27, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a November 23, 2021 report, Dr. Maccoux, noted that appellant had been under treatment since the July 22, 2021 employment injury. He referred her to physical and occupational therapy for ocular motor dysfunction and continuing neck pain. Dr. Maccoux also referred appellant to speech therapy as she developed stuttering following the head injury.

In a December 1, 2021 report, Dr. Maccoux recounted appellant's history of a July 22, 2021 head injury to the right temporal aspect and top of her head. Appellant continued to have post-traumatic headaches with associated vertical saccades, convergence insufficiency documented by ophthalmologic and physical therapy providers, and ongoing balance issues. She had been unable to return to work and had difficulty completing her assigned job functions. Dr. Maccoux opined that appellant demonstrated repetitive vertical eye movements, convergence deficiency at six inches, and dizziness could limit her ability to perform "computer screen work and table desk work." He recommended a trial of work for two hours a day, but noted that she would need to be monitored for disease progression. Dr. Maccoux opined that the stuttering appellant had developed after the accepted injury was consistent with being struck on the temporal aspect of the head with possible injury to her speech pattern. He recommended a cognitive assessment as her daughter reported that her mother had recently forgotten recipes and had difficulty preparing meals. Dr. Maccoux also noted continued deficits with tandem and single leg stance, although appellant's vertigo had resolved.

In a December 22, 2021 report, Dr. Scott F. Kenitz, an optometrist, noted that appellant could return to regular work as of November 12, 2021 based on her response to rehabilitation. He recommended blue-tinted lenses in her prescription glasses for treatment of the visual component of postconcussion syndrome.

In a January 4, 2022 report, Dr. Maccoux indicated that appellant could work four hours a day with limitations. He noted that she had sustained an employment-related head injury, which

⁴ On December 14, 2021 appellant accepted a modified light-duty job offer.

caused visual, speech, and processing impairments, with difficulty visually tracking on a computer screen.⁵

By decision dated January 20, 2022, OWCP denied appellant's request for an oral hearing as untimely filed, finding that her request was not made within 30 days of the November 18, 2021 decision. 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.

On February 18, 2022 appellant requested reconsideration of OWCP's November 18, 2021 decision.

Appellant subsequently submitted a February 23, 2022 report, wherein Dr. Maccoux recounted that on July 22, 2021 a metal beam or bar from a door mechanism, weighing 13 to 15 pounds, fell and struck the right side, right temporal aspect, top of her head and her right eye. Dr. Maccoux opined that because of these injuries, she developed headaches, delayed words, stuttering, vertigo, confusion, memory loss, double vision in both eyes, rapid eye movement, vertical saccades, convergence insufficiency, nystagmus, visual disturbance, blurry vision of her right eye, dizziness with repetitive vertical eye movements, muffled hearing, inability to walk or stand, and balance issues. He added that appellant had "compression muscular headache related to the tension in the areas of the impact conversion neurological disorder." Dr. Maccoux explained that concussions commonly revealed psychological disorders and post-traumatic stress disorder (PTSD). He opined that appellant "now has depression over these conditions." Dr. Maccoux also diagnosed postconcussion syndrome, convergence insufficiency, and neurologic problems. He recommended additional physical, occupational, speech, neurologic and psychological therapy.

In an employing establishment work capacity form report of even date, Dr. Maccoux returned appellant to full-time modified-duty work, with no driving, additional breaks, and limited outdoor work secondary to balance issues.

In a letter dated April 5, 2022, OWCP requested that Dr. Robertson provide a rationalized medical opinion regarding whether the accepted head injury had ceased, and whether appellant could return to full-duty work. It enclosed an updated statement of accepted facts, as to whether the accepted head injury had resolved. OWCP afforded 30 days for Dr. Robertson to respond.

OWCP received additional evidence. In a February 3, 2022 report, Dr. Kate M. Essad, a Board-certified neurologist, recounted appellant's history of injury and treatment. She noted that appellant no longer reported vision changes or blurry vision. On examination, Dr. Essad observed clear language, no memory deficits, no abnormality of the cranial nerves, normal reflexes throughout all extremities, normal coordination, and a stable, steady gait. She diagnosed conversion disorder, other depression, PTSD, functional disease of the central nervous system with neuroendocrine disturbance, concussion without loss of consciousness, and a resolved concussion with conversion disorder. Dr. Essad explained that it was common for a head injury to unearth psychological disorders such as PTSD related to past traumas. She prescribed cognitive behavioral therapy and functional neurological rehabilitation. Dr. Essad recommended a gradual return to

⁵ On January 7, 2022 OWCP received physical and occupational therapy treatment notes dated from November 2 to 23, 2021.

full-time work. She noted that any of appellant's physicians could clear her for work as she no longer had a neurological condition.

By decision dated May 19, 2022, OWCP denied modification of the November 18, 2022 decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶ Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.¹⁰

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

⁶ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁷ 20 C.F.R. § 10.5(f).

⁸ *See H.B.*, Docket No. 20-0587 (issued June 28, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁹ *See H.B., id.*; *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

¹⁰ *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

¹¹ *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

¹² *F.S.*, Docket No. 23-0112 (issued April 26, 2023); *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish disability from work commencing September 12, 2021, causally related to her accepted July 23, 2021 employment injury.

Dr. Robertson, in reports dated September 3 through October 22, 2021, noted the accepted employment injury and recounted appellant's symptoms. She held appellant off work through December 9, 2021, when she returned appellant to "desk duty" for two hours a day, and to full-duty work effective January 28, 2022. Dr. Maccoux, in a December 1, 2021 report, recommended a trial of work for two hours a day. In a January 4, 2022 report, he increased appellant's work schedule to four hours a day, and in a February 23, 2022 report returned her to full-time modified duty. These physicians, however, did not explain how the July 23, 2021 employment injury caused appellant's disability during the period claimed. The Board has held that a report that does not provide an opinion explaining how a given medical condition/period of disability has an employment-related cause is of limited probative value.¹³ Thus, Dr. Robertson's reports dated September 3 through October 22, 2021, and Dr. Maccoux's reports dated December 1, 2021 through February 23, 2022, are insufficient to establish appellant's disability claim.

OWCP also received October 12 and November 23, 2021 reports by Dr. Maccoux, a December 22, 2021 report by Dr. Kenitz, and a February 3, 2022 report by Dr. Essad, which did not offer an opinion as to whether appellant was disabled from work during the claimed period due to the accepted employment-related injury. As stated above, the Board has held that, evidence that does not offer an opinion explaining how a given medical condition/period of disability has an employment-related cause is of no probative value and is insufficient to establish appellant's claim for compensation.¹⁴

OWCP also received physical and occupational therapy treatment notes. Certain healthcare providers such as physical therapists, nurses, physician assistants, and social workers are not considered physicians as defined under FECA. Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁵

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work during the claimed period as a result of the accepted

¹³ *M.H.*, Docket No. 22-1178 (issued April 25, 2023); *see T.S.*, Docket No. 20-1229 (issued August 6, 2021); *J.M.*, Docket No. 19-1169 (issued February 7, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ *F.S.*, *supra* note 12; *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁵ Section 8101(2) of FECA provides that the term 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.H.*, Docket No. 22-1178 (issued April 25, 2023) (physical therapists are not considered physicians as defined under FECA).

employment injury.¹⁶ Because appellant has not submitted rationalized medical opinion evidence sufficient to establish employment-related total disability during the claimed period due to her accepted employment injury, the Board finds that she has not met her burden of proof.

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.”¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for an oral hearing before an OWCP hearing representative 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 a review is sought. Because appellant’s request for a review of the written record was dated December 27, 2021, which was more than 30 days after OWCP’s November 18, 2021 decision, it was untimely filed. Appellant was, therefore, not entitled to a hearing as a matter of right.²¹

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.²² The Board finds that, in the January 20, 2022 decision, OWCP properly

¹⁶ *M.H.*, *id.*; *see L.F.*, Docket No. 19-0324 (issued January 2, 2020); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹⁷ *Supra* note 1 at § 8124(b)(1).

¹⁸ 20 C.F.R. §§ 10.616, 10.617.

¹⁹ *Id.* at § 10.616(a).

²⁰ *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

²¹ *See D.R.*, Docket No. 22-0361 (issued July 8, 2022); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, *id.*

²² *Id.*

exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration, 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.²³ In this case, OWCP did not abuse its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for a review of the written record, as untimely filed, pursuant to 5 U.S.C. § 8124(b)(1).

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish disability from work commencing September 12, 2021, causally related to her accepted employment injury. The Board further finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 20 and May 19, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 18, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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