

FACTUAL HISTORY

OWCP accepted that on November 22, 1996 appellant, then a 48-year-old laborer, sustained right elbow, wrist, and forearm superficial foreign body without major open wound with infection and right shoulder region other affections when his bobcat vehicle flipped over after he backed up onto a dirt pile, while in the performance of duty.² It authorized right shoulder arthroscopic and subacromioplasty surgery, which was performed on September 24, 1997.³

On February 28, 2022 appellant filed a claim for a recurrence of medical treatment beginning May 22, 2021. He noted that following his accepted injury he returned to work in private industry without problems and in January 2021 started part-time work at a travel center. Appellant alleged that he developed right shoulder pain after lifting heavy pots in the kitchen at his part-time job.

In a development letter dated March 15, 2022, OWCP acknowledged receipt of appellant's claim for a recurrence of medical treatment. It informed him that the form he submitted expired on November 30, 2020 and requested that he complete the new Form CA-2a, which was attached. OWCP advised that no additional action would be taken until appellant completed the attached form.

On March 22, 2022 appellant completed a Form CA-2a claim for recurrence of medical treatment and time loss from work. He noted May 22, 2021 as the date of recurrence and reported that he had not returned to work. Appellant related that following his original injury he returned to work with no limitations and had no problems until he returned to work after retirement. He indicated that he had undergone rotator cuff replacement surgery due to arthritis and injury at his part-time job. Appellant explained that he felt pain in his shoulder while lifting a heavy pot over his head while working at his part-time job on January 19, 2021.

In a letter dated March 25, 2022, OWCP informed appellant of the definition of a recurrence for disability and additional medical treatment. It advised him regarding the type of medical evidence required to establish his claim and attached a questionnaire for him to complete. OWCP afforded appellant 30 days to provide the requested evidence.

OWCP subsequently received a January 24, 2022 report from Dr. Andrew Pike, a Board-certified orthopedic surgeon. Dr. Pike reported that appellant was seen for a postoperative evaluation of right reverse total shoulder arthroplasty surgery, which occurred on December 28, 2021.

In response to OWCP's development letter, appellant completed the questionnaire and again noted that he felt pain in his shoulder on May 22, 2021 while lifting heavy pots over his head. He noted that he did not return to work and had undergone bone/joint replacement surgery

² Appellant was terminated/removed from the employing establishment effective February 26, 2000.

³ On May 7, 2014 appellant filed a notice of recurrence for medical treatment only (Form CA-2a) for the period November 22 to December 31, 1996. By decision dated October 7, 2014, OWCP denied his claim for a recurrence of disability finding that he had failed to establish a material change or worsening in his accepted work injury.

on December 28, 2021. Appellant stated that he reinjured his shoulder because the shelves at work were too high to reach without struggling.

By decision dated May 16, 2022, OWCP denied his claim for a recurrence of a disability and additional medical treatment finding that he alleged a new work injury on May 22, 2021. It further found the evidence of recurrence insufficient to establish that his claim for wage-loss compensation was causally related to the conditions accepted for his November 22, 1996 employment injury. OWCP also found that he had not established that he required additional medical treatment due to a worsening of his accepted work-related conditions without intervening cause. Thus, his claim remained closed for medical treatment.

On August 15, 2022 appellant requested review of the written record by an OWCP hearing representative.

Appellant submitted a work status report dated July 22, 2022 and an August 3, 2002 report from Dr. Pike. In the July 22, 2002 work status report, Dr. Pike advised that appellant has been disabled from work since his surgery on December 28, 2021. Dr. Pike, in his August 3, 2022 report, noted that he had treated appellant for right shoulder osteoarthritis since November 2020 and that appellant had a history of prior right rotator cuff repair approximately 20 years ago. He explained that the mechanism of injury for appellant's symptoms included repetitive overhead lifting with his right upper extremity.

By decision dated September 12, 2022, OWCP 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 May 16, 2022 merit decision as it was dated August 12, 2022 and received on August 17, 2022. 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.⁴ 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.⁵

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

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

⁵ *Id.*

condition that results from a new injury, even if it involves the same part of the body previously injured.⁶

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 injury, and supports that conclusion with medical reasoning.⁷ Where no such rationale is present, the medical evidence is of diminished probative value.⁸

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.⁹ 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.¹⁰

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 of proof.¹¹ To meet this burden the claimant 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.¹² Where no such rationale is present, medical evidence is of diminished probative value.¹³

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *K.B.*, Docket No. 21-0830 (issued February 3, 2022); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

⁷ *K.B.*, *id.*; *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

⁸ *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

⁹ 20 C.F.R. § 10.5(y).

¹⁰ *K.B.*, *supra* note 6; *M.P.*, Docket No. 19-0161 (issued August 16, 2019); *E.R.*, Docket No. 18-0202 (issued June 5, 2018).

¹¹ *Supra* note 6 at Chapter 2.1500.4(b) (June 2013); *see also K.B.*, *id.*; *J.M.*, Docket No. 09-2041 (issued May 6, 2010).

¹² *K.B.*, *id.*; *A.C.*, Docket No. 17-0521 (issued April 24, 2018); *O.H.*, Docket No. 15-0778 (issued June 25, 2015).

¹³ *K.B.*, *id.*; *O.H.*, *id.*; *Michael Stockert*, 39 ECAB 1186 (1988); *see Ronald C. Hand*, 49 ECAB 113 (1997).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability and need for medical treatment commencing May 22, 2021, causally related to his accepted November 22, 1996 employment injury.

OWCP accepted that appellant sustained right elbow, wrist, and forearm superficial foreign body without major open wound with infection, and right shoulder region other affections due to his November 22, 1996 employment injury. Appellant underwent authorized right shoulder arthroscopic and subacromioplasty surgery on September 24, 1997. On March 21, 2022 he filed a claim for a recurrence of disability and need for medical treatment commencing May 22, 2021 following an injury which occurred when he lifted heavy pots over his head at his private part-time job. Appellant indicated that following his original injury that he returned to work with no restrictions.

In support of his recurrence claim, appellant submitted an encounter note dated January 24, 2022 from Dr. Pike which related that appellant had undergone right reverse total shoulder arthroplasty on December 28, 2021. This report did not address appellant's disability status commencing May 22, 2021. Dr. Pike also made no mention of appellant's November 22, 1996 work injury or need for medical treatment due to accepted employment conditions. 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.¹⁴ Therefore, this evidence is insufficient to meet appellant's burden of proof.

As appellant has not submitted rationalized medical evidence in support of his claim that he sustained a recurrence of disability commencing May 22, 2021 causally related to his accepted November 22, 1996 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, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides that a claimant is entitled to a hearing before an OWCP representative when a request is made 30 days after the date of the issuance of an OWCP final decision.¹⁵

A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between either an oral hearing or a review of the written record. In

¹⁴ See *J.R.*, Docket No. 21-0830 (issued February 3, 2022); *S.P.*, Docket No. 19-0573 (issued May 6, 2021); *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).

¹⁵ 5 U.S.C. § 8124(b)(1).

addition to the evidence of record, the claimant may submit new evidence to the hearing representative.¹⁶ A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.¹⁷ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.¹⁸

OWCP has discretion to grant or deny a request that is made after the 30 -day period for requesting an oral hearing or review of the written record and must properly exercise such discretion.¹⁹

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 dated August 15, 2022, more than 30 days after the issuance of OWCP's May 16, 2022 merit decision. Because his request was submitted more than 30 days after the date of OWCP's May 16, 2022 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.²⁰

Although appellant was not entitled to a hearing as a matter of right, OWCP 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.²¹ In this instance, OWCP 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.²²

¹⁶ 20 C.F.R. § 10.615.

¹⁷ *Id.* at § 10.616(a); *K.B.*, *supra* note 6; *B.H.*, Docket No. 18-0874 (issued October 10, 2018); *James Smith*, 53 ECAB 188 (2001).

¹⁸ *K.B.*, *id.*; *B.H.*, *id.*

¹⁹ 20 C.F.R. § 10.616(b); *id.*

²⁰ 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.R.*, *supra* note 14; *J.W.*, Docket No. 18-1611 (issued February 27, 2019); *Donna A. Christley*, 41 ECAB 90 (1989).

²¹ *J.R.*, *id.*; *W.N.*, Docket No. 20-1315 (issued July 6, 2021).

²² 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. *J.R.*, *id.*; *R.S.*, Docket No. 17-0063 (issued March 7, 2017); *André Thyratron*, 54 ECAB 257, 261 (2002).

The Board has held that the only limitation on OWCP's authority is reasonableness.²³ 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.²⁴ 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 and the need for medical treatment commencing May 22, 2021, causally related to his accepted November 22, 1996 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 May 16 and September 12, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 12, 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

²³ *J.R., id.; R.M.*, Docket No. 19-1088 (issued November 17, 2020). *See also E.S.*, Docket No. 18-1750 (issued March 11, 2019).

²⁴ *J.R., id.; P.C.*, Docket No. 19-1003 (issued December 4, 2019).