

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

J.F., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
MEDICAL COMMAND, Redstone Arsenal, AL,
Employer**

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**Docket No. 13-1082
Issued: September 18, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 3, 2013 appellant filed a timely appeal from a November 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and a January 2, 2013 nonmerit decision denying her request for a hearing. 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 met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether OWCP properly denied her request for an oral hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 10, 2012 appellant, then a 50-year-old allergy and immunology technician, filed a traumatic injury claim (Form CA-1) alleging that on March 26, 2012 she sustained an aggravation of a prior January 19, 2011 injury claim File No. xxxxx522. She stated that she had recurrent pain for over 15 months which worsened in the last two weeks, causing her headaches and pain in the right shoulder and neck. Appellant noted that on January 19, 2011, she picked up a heavy metal basket at work which caused nerve impingement of the cervical spine. She also noted that she sustained injury on February 16, 2011 after a patient passed out and knocked her to the floor, causing permanent nerve damage to the lumbar spine, claim File No. xxxxxx043. The record indicates that the 2011 claims were accepted by OWCP.²

In an April 10 and 17, 2012 note, Rhonda Lambert, a registered nurse practitioner, reported that appellant sought follow-up treatment for headaches and neck and shoulder pain.

In an April 18, 2012 report, Dr. Martin G. Bryant, a treating chiropractor, reported that appellant was involved in a work-related accident on January 19, 2011 when she attempted to lift a heavy metal basket and felt pain in her right arm, right shoulder, right side of face and neck. Appellant complained of headaches, neck pain, right shoulder pain and upper back pain which became worse during the prior two weeks. An April 18, 2012 x-ray of the cervical spine was reviewed which showed degenerative disc disease, hypolordosis and subluxation at C1-2. An April 18, 2012 x-ray of the lumbar spine revealed degenerative disc disease and possible scar tissue versus uterine tumors in pelvis.³ Dr. Bryant diagnosed cervical disc displacement with associated brachial neuritis, cervical disc degeneration, cervical somatic dysfunction, trigeminal neuralgia, thoracic somatic dysfunction and lumbar disc displacement with associated sciatic neuralgia. He recommended manipulation to correct the subluxations and to appellant's range of motion.

By letter dated October 1, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised that it was unclear whether she was claiming a traumatic injury or occupational disease claim and asked to clarify the nature of her claim. It further requested additional medical and factual evidence and asked that she and her physician respond to the provided questions within 30 days.

In an October 17, 2012 statement, appellant reported that she had an extremely busy work load during the week of March 19 to 26, 2012. Her tasks involved repetitive arm motions and prolonged standing to administer immunizations. Appellant was required to review and update over 100 word documents at her computer, which required repetitive arm and shoulder motions for extended periods of time. She contended that this aggravated her original injury that occurred at work in January 2011 and February 2012. Appellant noted that she was diagnosed with subluxation of C1 as documented by x-ray, bulging disc at C2 and L4-5 and cervical and lumbar neuropathy which was caused by this work injury.

² The record before the Board contains no other information regarding appellant's prior claims.

³ Copies of the April 18, 2012 diagnostic tests were provided.

Appellant submitted additional medical notes dated January 20 to April 17, 2012 from Ms. Lambert and signed by Dr. Madan A. Maladkar, Board-certified in internal medicine. The January 2011 reports listed a history that appellant was lifting a box at work on January 19, 2011 and experienced sharp pain to the right arm, shoulder and neck. Appellant was diagnosed with right trapezoid muscle strain, right shoulder strain and overexertion/strenuous movement from lifting. The February 2011 reports noted that on February 16, 2011, she was knocked over by a patient causing her to reinjure her shoulder and neck. Appellant was diagnosed with neck pain. In April 2012 Dr. Maladkar reported that her job at an immunization clinic required prolonged standing and repetitive motions by repeatedly administering injections and keyboarding for data entry. He diagnosed right trapezoid muscle strain and tension-type headaches.

Appellant also submitted a September 14, 2012 progress note, Dr. Charles Albert, Board-certified in internal medicine, who noted acute sinusitis, cough, right leg injury from and numbness and tingling in her foot. Also submitted were progress notes dated August 9 and November 10, 2011 and April 24, 2012 from Sullivan Medical, LLC.⁴

By decision dated November 2, 2012, OWCP denied appellant's claim finding that the evidence of record failed to establish that the diagnosed conditions were causally related to the accepted March 26, 2012 employment incident.

On December 4, 2012 appellant requested an oral hearing before the Branch of Hearings and Review. The appeal was postmarked December 12, 2012.

By decision dated January 2, 2013, the Branch of Hearings and Review denied appellant's request for a hearing finding that her request was not made within 30 days of the November 2, 2012 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which establishes that she sustained an injury causally related to factors of her federal employment.⁵

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the

⁴ The Board notes that there was no legible signature on these reports.

⁵ The Board notes that appellant submitted additional evidence after OWCP rendered its January 2, 2013 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. §510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

employment injury.⁶ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.⁷

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁸ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee 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 employment factors identified by the employee.⁹

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.¹⁰ The opinion of the physician 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 factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹¹

ANALYSIS -- ISSUE 1

Appellant filed a notice of traumatic injury claim alleging injury on March 26, 2012 which aggravated a prior January 19, 2011 nerve impingement of the cervical spine. On October 1, 2012 OWCP requested that she clarify whether she was claiming an occupational or traumatic injury. In an October 17, 2012 narrative statement, appellant stated that she had a busy week from March 19 to 26, 2012 and her tasks involved repetitive arm and shoulder motions which were required to administer immunizations and input computer data. She stated that this

⁶Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁷Michael E. Smith, 50 ECAB 313 (1999).

⁸Elaine Pendleton, *supra* note 6.

⁹See Roy L. Humphrey, 57 ECAB 238, 241 (2005); Ruby I. Fish, 46 ECAB 276, 279 (1994).

¹⁰See 20 C.F.R. § 10.110(a); John M. Tornello, 35 ECAB 234 (1983).

¹¹James Mack, 43 ECAB 321 (1991).

caused her to aggravate the January and February 2011 injuries. The Board notes that appellant first claimed a traumatic injury by filing a Form CA-1 but described an occupational disease. Under the circumstances of the case, the Board will treat the matter as an occupational disease claim as she alleged an injury resulting from her work environment over a period longer than a single workday or shift.¹²

The Board finds that appellant failed to establish that she developed an injury causally related to factors of her federal employment as an allergy and immunology technician.¹³

Appellant submitted medical reports from Dr. Maladkar regarding treatment for injuries sustained as a result of her prior claims, File No. xxxxx522 and File No. xxxxxx043. As her prior claims are not before the Board, this medical evidence is of no probative value in establishing her present occupational disease commencing on March 19, 2012. Dr. Maladkar's reports of April 10 and 17, 2012 noted generally that appellant's job at an immunization clinic required prolonged standing and repetitive motion by repeatedly administering injections and keyboarding for data entry. He diagnosed right trapezoid muscle strain and tension-type headaches.

The Board finds that the opinion of Dr. Maladkar is not well rationalized on causal relation. While Dr. Maladkar provided a diagnosis of appellant's condition, he failed to provide any opinion on the cause of her injury. He failed to provide a detailed medical history and gave no opinion regarding whether her prior injuries were aggravated by her current employment duties. Dr. Maladkar briefly described appellant's employment duties, noting that her job entailed repetitive motions from repeatedly administering injections and keyboarding data entry. He failed to adequately describe the nature of her work duties, how long she worked as an allergy and immunization technician, how many hours a day she administered injections or entered data and the frequency of other physical movements and tasks. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁴ The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.¹⁵ Dr. Maladkar's reports do not meet that standard and are insufficient to meet appellant's burden of proof.

In an April 18, 2012 medical report, Dr. Bryant, a treating chiropractor, reported that appellant was involved in a work-related accident on January 19, 2011 when she attempted to lift a heavy metal basket and felt pain in her right arm, right shoulder, right side of face and neck. Appellant sought treatment after her headaches, neck pain, right shoulder pain and upper back

¹² A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

¹³ See *Robert Broome*, 55 ECAB 339 (2004).

¹⁴ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁵ See *Lee R. Haywood*, 48 ECAB 145 (1996).

pain had worsened. Dr. Bryant reviewed x-rays of the cervical and lumbar spine dated April 18, 2012 which showed degenerative disc disease, hypolordosis, sUBLUXATION at C1-2 and possible scar tissue. He recommended manipulation to correct the sUBLUXATIONS and diagnosed cervical disc displacement with associated brachial neuritis, cervical disc degeneration, cervical somatic dysfunction, trigeminal neuralgia, thoracic somatic dysfunction and lumbar disc displacement with associated sciatic neuralgia. As Dr. Bryant diagnosed sUBLUXATION at C1-2 as demonstrated by an April 18, 2012 x-ray, he is a physician as defined under FECA.¹⁶

The Board finds, however, that Dr. Bryant's report is insufficient to establish that appellant sustained an injury as a result of her employment duties. Dr. Bryant failed to state any opinion on causal relationship or provide an explanation on how appellant's work duties would cause or aggravate the diagnosed sUBLUXATION. While he referenced appellant's January 19, 2011 employment injury, he provided no opinion regarding the cause of her current condition and how it related to her prior injuries. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁷ Dr. Bryant's report is insufficient to meet appellant's burden of proof.¹⁸

The remaining medical evidence of record is also insufficient to establish causal relationship between appellant's injury and factors of her federal employment as the progress notes submitted merely noted her complaints and treatment, failing to provide any opinion on causal relationship. Moreover, it is unclear if the progress notes were signed by a physician as they contain an illegible signature.¹⁹ These notes lack probative medical value as the author(s) cannot be identified as a physician.²⁰

In the instant case, the record lacks rationalized medical evidence establishing a causal relationship between appellant's diagnosed conditions and factors of her federal employment as an allergy and immunology technician. Thus, appellant has failed to meet her burden of proof.

The Board notes that appellant submitted additional evidence following the November 2, 2012 merit decision. The Board, however, may not consider new evidence for the first time on appeal which was not before OWCP at the time it issued its final decision.²¹ As the medical

¹⁶A chiropractor may interpret his x-rays to the same extent as any other physician. 20 C.F.R. § 10.311(c). See *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁷*Supra* note 14.

¹⁸ While Dr. Bryant made other diagnoses along with the sUBLUXATION at C1-2, as a chiropractor, he is limited to the diagnosis and treatment of a spinal sUBLUXATION. He is not considered a physician for diagnosis and treatment of the other diagnosed conditions. *E.T.*, Docket No. 13-185 (issued April 4, 2013). See also *K.L.*, Docket No. 11-955 (issued October 18, 2011).

¹⁹ Nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value. 5 U.S.C. § 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. See also *Roy L. Humphrey*, *supra* note 9.

²⁰See *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

²¹20 C.F.R. § 501.2(c).

reports were not part of the record considered by OWCP in its November 2, 2012 decision, the Board may not consider this evidence for the first time on appeal.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

A claimant for compensation not satisfied with a decision by OWCP 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.²² According to 20 C.F.R. § 10.615, a claimant shall be afforded a choice of an oral hearing or a review of the written record.²³ The regulations provide that a request for a hearing or review of the written record must be made within 30 days as determined by the postmark or other carrier's date marking, of the date of the decision.²⁴ A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of OWCP decision.²⁵ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.²⁶ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.²⁷

ANALYSIS -- ISSUE 2

In the present case, appellant requested review of the written record on December 4, 2012 and OWCP found that the reconsideration request was postmarked on December 12, 2012. Her request was made more than 30 days after the date of issuance of OWCP's prior decision dated November 2, 2012. Therefore, OWCP properly found in its January 2, 2013 decision that appellant was not entitled to an oral hearing or examination of the written record as a matter of right because her request for an oral hearing was not made within 30 days of its November 2, 2012 decision.²⁸

OWCP, however, has the discretionary authority to grant a hearing if the request was not timely filed. In its January 2, 2013 decision, it considered the issue involved and properly exercised its discretion when it denied appellant's hearing request and determined that she could equally well address the issue of causal relationship by requesting reconsideration and submitting

²²5 U.S.C. § 8124(b)(1).

²³ 20 C.F.R. § 10.615.

²⁴*Id.* at § 10.616(a).

²⁵*See James Smith*, 53 ECAB 188 (2001).

²⁶*Herbert C. Holley*, 33 ECAB 140 (1981).

²⁷*Id.*

²⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

new evidence. The Board has held that the only limitation on OWCP's authority is reasonableness. 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 deduction from established facts.²⁹ In the present case, OWCP did not abuse its discretion in denying a discretionary hearing and properly denied appellant's request for an oral hearing under section 8124 of FECA.³⁰

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she developed an occupational injury as a result of factors of her federal employment. The Board also finds that OWCP properly denied appellant's request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2013 and November 2, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 18, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁹*Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

³⁰*See D.F.*, Docket No. 11-42 (issued August 1, 2011); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).