United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 13-1987**
	)	**Issued: January 16, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 28, 2013 appellant filed a timely appeal from a March 4, 2013 merit decision and a July 2, 2013 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 met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on December 21, 2012; and (2) whether OWCP properly denied appellant's request for review of the written record as untimely filed under 5 U.S.C. § 8124.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence after OWCP rendered its July 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. § 501.2(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).

FACTUAL HISTORY

On December 23, 2012 appellant, then a 62-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 21, 2012 he sustained a left knee strain when he twisted his knee when stepping on a curb. He notified his supervisor, stopped work and first sought medical treatment on December 22, 2012.

A December 22, 2010 emergency room (ER) note and Duty Status Report (Form CA-17) were submitted by Crystal Mumford, a physician's assistant, which provided appellant with work restrictions.

In a December 22, 2012 medical report, Dr. Andrea Allman, a physician of osteopathic medicine, reported that appellant presented to the ER with left knee pain. She noted that his current episode started the previous day and that the problem occurred constantly. Dr. Allman further stated that appellant was on his mail route the day before when he stepped up on a curb and twisted his left knee, causing a sharp pain. Appellant complained of pain in his left knee when bending and weight bearing. Physical examination of the left knee revealed normal range of motion, no swelling, no effusion, no ecchymosis, no deformity, no laceration, no erythema, normal alignment, no lateral collateral ligament (LCL) laxity, normal patellar mobility, no bony tenderness, normal meniscus and no medial collateral ligament (MCL) laxity. Dr. Allman diagnosed left knee pain.

By letter dated January 24, 2013, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical evidence needed and asked that his physician submit a narrative medical report within 30 days.

In support of his claim, appellant submitted a January 28, 2013 Form CA-17 signed by a physician's assistant,[3] January 3 and February 3, 2013 notes diagnosing left knee strain from Judy Kammra, another physician's assistant, and a February 20, 2013 therapy note from Christina Kline, a physical therapist.

By decision dated March 4, 2013, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury because he did not submit any medical evidence containing a medical diagnosis in connection with the accepted December 21, 2012 employment incident.

In an appeal request form received on April 8, 2013, appellant requested review of the written record.

In support of his claim, appellant resubmitted medical evidence already of record as well as CA-17 forms dated January 3 to February 5, 2013 providing work restrictions from Dr. Daniel P. Stewart, Board-certified in emergency medicine. In a February 5, 2013 note, Dr. Stewart diagnosed left knee strain.[4]

[3] The signature is illegible.

[4] The reports of Dr. Stewart were co-signed by PA Kammra.

By decision dated July 2, 2013, the Branch of Hearings and Review denied appellant's request for review of the written record finding that his request was not made within 30 days of the March 4, 2013 OWCP decision.[5] 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 he sustained an injury.

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 are causally related to the employment injury.[6] These are the essential elements of each and 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 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.[9] 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 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.[10]

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[5] The Branch of Hearings and Review noted that appellant's request for review was received on April 8, 2013. The original envelope was scanned into the iFECS record but the postmark was illegible after scanning. It noted that the filing date used in the decision was the date stamped by the Branch of Hearings and Review.

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

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

[8] *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

[10] *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 1

OWCP accepted that the December 21, 2012 incident occurred as alleged. The issue, therefore, is whether appellant submitted sufficient medical evidence to establish that the employment incident caused a left knee injury. The Board finds that he did not submit sufficient medical evidence to support that he sustained an injury causally related to the December 21, 2012 employment incident.[11]

In a December 22, 2012 medical report, Dr. Allman reported that appellant presented to the emergency room with a current episode of left knee pain which had started when appellant was on his mail route the previous day, stepped on a curb and twisted his left knee. She noted that appellant had a history of constant knee pain. Dr. Allman's physical examination revealed no abnormality of the left knee. She diagnosed left knee pain and failed to provide a firm medical diagnosis of appellant's left knee condition. Dr. Allman's diagnosis of left knee pain is a description of a symptom rather than a clear diagnosis of a compensable medical condition.[12] Her report does not constitute probative medical evidence because she fails to provide a clear diagnosis and does not adequately explain the cause of appellant's injury.[13] The Board notes that Dr. Allman's report fails to provide a rationalized medical opinion causally relating a diagnosed condition to factors of employment and is therefore of little probative value.

The remaining medical evidence of record is also insufficient to establish a diagnosed condition causally related to the December 21, 2012 employment incident. The treatment notes and CA-17 forms from Ms. Mumford and Ms. Kammra; as well as Ms. Kline are of no probative value. Registered nurses, licensed practical nurses, physician's assistants, physical and occupational therapists, are not "physicians" as defined under FECA. Their opinions are therefore of no probative value.[14] The Board notes that it is well established that a physician's signature is required on a report in order for it to be considered as medical evidence.[15] In the instant case, the record is without rationalized medical evidence establishing a diagnosed medical condition causally related to the accepted December 21, 2012 employment incident. Thus, appellant has failed to establish his burden of proof.

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.

[11] *See Robert Broome*, 55 ECAB 339 (2004).

[12] The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[13] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[14] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) 'physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.

[15] *B.M.*, Docket No. 11-725 (issued February 17, 2012).

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 claim before a representative of the Secretary.[16] 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.[17] 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.[18] 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's decision.[19] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[20] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[21]

ANALYSIS -- ISSUE 2

In the present case, appellant requested review of the written record and OWCP found that the reconsideration request was received on April 8, 2013.[22] His request was made more than 30 days after the date of issuance of OWCP's prior decision dated March 4, 2013. Therefore, OWCP properly found in its July 2, 2013 decision that appellant was not entitled to an oral hearing or examination of the written record as a matter of right because his request for review of the written record was not made within 30 days of its March 4, 2013 decision.[23]

OWCP, however, has the discretionary authority to grant a hearing if the request was not timely filed. In its July 2, 2013 decision, it considered the issue involved and properly exercised its discretion when it denied appellant's hearing request and determined that he could equally well address the issue of establishing a diagnosed condition causally related to the December 21, 2012 incident by requesting reconsideration and submitting 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.[24] In the

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.615.

[18] *Id.* at § 10.616(a).

[19] *See James Smith*, 53 ECAB 188 (2001).

[20] *Herbert C. Holley*, 33 ECAB 140 (1981).

[21] *Id.*

[22] The Board notes that though the postmark date from appellant's appeal request form was not legible after it was scanned into the iFECS system, the Branch of Hearings and Review documented the April 8, 2013 received date as evidence of the date of appeal. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.4(a) (October 2011) (If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely).

[23] *Id.*

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

present case, OWCP did not abuse its discretion in denying a discretionary hearing and properly denied appellant's request for a hearing under section 8124 of FECA.[25]

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he developed a left knee injury in the performance of duty on December 21, 2012. The Board also finds that OWCP properly denied his request for review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the July 2 and March 4, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 16, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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