United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 15-0743**
	)	**Issued: July 24, 2015**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Staten Island, NY, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 12, 2015 appellant timely appealed the January 23, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for a hearing. He also timely appealed OWCP's October 24, 2014 merit decision denying his claim. 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 the claim.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on or after September 11, 2001; and (2) whether the Branch of Hearings and Review properly denied appellant's request for a hearing.

[1] 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

Appellant, a 68-year-old supply management specialist with the U.S. Park Police, filed a claim for various injuries he attributed to exposure to airborne toxins, smoke, fire, and other hazardous/adverse conditions while working at the World Trade Center (WTC) rescue and recovery site (Ground Zero) during the period September 11 through November 18, 2001. He filed his claim (Form CA-1) on April 25, 2014. Appellant's reported injuries included cancer, gastroesophageal reflux disease (GERD), upper respiratory disease, obstructive airway disease, obstructive sleep apnea, and a right knee condition.[2]

Appellant did not submit any medical evidence with his April 25, 2014 Form CA-1. The claim was accompanied by an April 11, 2014 letter from the 9/11 WTC Health Program advising him that as of March 11, 2014 he was certified for treatment benefits for cancer (other and unspecified malignant neoplasm of skin of lip). The letter also noted that appellant had previously been certified (as of July 1, 2011) for treatment for GERD, upper respiratory disease, obstructive airway disease, and obstructive sleep apnea.[3]

On April 29, 2014 OWCP wrote to appellant advising him that the record thus far was insufficient to establish entitlement to FECA benefits. It explained that the record was deficient from both a factual and a medical standpoint.[4] The April 29, 2014 development letter outlined the five basic elements to establishing entitlement under FECA, and OWCP afforded appellant 30 days to submit the requested factual and medical information.

Appellant replied on May 3, 2014. He noted, *inter alia*, that he worked at the WTC site from September 11 through November 18, 2001. Appellant also noted that his claimed medical conditions were already certified by the WTC Health Program, which should suffice for purposes of establishing causal relationship under FECA. He, however, did not submit any medical evidence in response to OWCP's April 29, 2014 claim development letter.

In a decision dated October 24, 2014, OWCP denied appellant's claim. It noted that he had not provided any medical evidence. Although the claim was timely and the evidence supported appellant's reported occupational exposure, there was no medical evidence containing a diagnosis in connection with the accepted employment exposure. OWCP explained that exposure alone was insufficient to establish a work-related medical condition.

On January 10, 2015 appellant requested both an oral hearing and a review of the written record. The appeal request form he submitted was postmarked January 12, 2015, and the Branch

[2] A September 16, 2001 National Park Service (NPS) incident report indicated that appellant injured his right leg/knee while working at Ground Zero on September 15, 2001. Appellant was running when he was knocked over by a steel beam lying on the street. He reportedly fell on his right knee and leg and sustained cuts and abrasions. The NPS report further noted that appellant was treated on the scene by a New York City Fire Department Bureau of Emergency Medical Services unit.

[3] The above-noted benefits were provided under the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), 42 C.F.R. §§ 88.1 - 88.17.

[4] OWCP also questioned the timeliness of appellant's claim for FECA benefits.

of Hearings and Review received it on January 16, 2015. Appellant's hearing request was accompanied by October 14 and December 15, 2014 correspondence from the September 11th Victim Compensation Fund (VCF) regarding his eligibility for $50,000.00 under the Zadroga Act. Appellant also submitted a November 14, 2014 letter from the 9/11 WTC Health Program advising that he was recently certified for treatment of an unspecified mental health condition.

In a January 23, 2015 nonmerit decision, the Branch of Hearings and Review denied appellant's request as untimely. The hearing representative also denied a discretionary hearing, noting that appellant could instead file a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA has the burden of establishing the essential elements of his claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[5]

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[6]

ANALYSIS - ISSUE 1

When appellant initially filed for FECA benefits, he did not provide any medical evidence to substantiate his claim. At the time, the record included an April 11, 2014 certification letter from the 9/11 WTC Health Program. The letter indicated that appellant was recently authorized to receive medical treatment for skin cancer, as well as four other previously authorized health conditions. On April 29, 2014 OWCP advised appellant, *inter alia*, that he needed to submit medical evidence in support of his claim for FECA benefits. However, appellant did not did not comply with OWCP's request for relevant medical evidence.

Appellant believes that the same medical conditions accepted by the 9/11 WTC Health Program (Zadroga Act) should have been accepted by OWCP. The determination of an employee's rights and/or remedies under other statutory authority does not establish entitlement

[5] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[6] *Victor J. Woodhams*, *id*.

to benefits under FECA.[7] Moreover, the current record is devoid of any medical evidence to support the list of medical conditions certified by the 9/11 WTC Health Program.[8] Notification of appellant's coverage under the Zadroga Act is insufficient, by itself, to justify acceptance of his current FECA claim.[9] In light of appellant's failure to submit the requisite medical evidence, the Board finds that OWCP properly denied his claim on the basis that he did not establish he was injured in the performance of duty.

LEGAL PRECEDENT - ISSUE 2

A claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP, may obtain a hearing by writing to the address specified in the decision.[10] The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[11] The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[12] If the request is not made within 30 days, a claimant is not entitled to a hearing as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.[13]

ANALYSIS - ISSUE 2

OWCP issued its merit decision on October 24, 2014. Appellant had 30 days to request a hearing, but he waited more than 2½ months before making his request. The hearing request was postmarked January 12, 2015. The regulations clearly specify that "[t]he hearing request must be sent within 30 days ... of the date of the decision for which a hearing is sought."[14] As appellant's request was untimely, he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review also denied appellant's request on the basis that the relevant issue could be equally well addressed by requesting reconsideration before OWCP. The Board finds that the

[7] *G.W.*, Docket No. 14-1793 (issued January 16, 2015); *see also J.F.*, 59 ECAB 331, 339 (2008); *H.S.*, 58 ECAB 554, 560 n. 22 (2007); *Dianna L. Smith*, 56 ECAB 524, 527 (2005).

[8] The April 11, 2014 correspondence referenced medical information provided by the State University of New York (SUNY); however, the underlying medical documentation from SUNY was not included.

[9] *See G.W.*, *supra* note 7.

[10] 20 C.F.R. § 10.616(a).

[11] *Id.*

[12] *Id.*

[13] 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

[14] 20 C.F.R. § 10.616(a).

hearing representative properly exercised her discretionary authority in denying appellant's request.[15]

CONCLUSION

Appellant failed to establish that he sustained an injury in the performance of duty on or about September 11, 2001. The Board also finds that the Branch of Hearings and Review properly denied appellant's hearing request.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2015 and October 24, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 24, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *Mary B. Moss*, 40 ECAB 640, 647 (1989). 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. *See André Thyratron*, 54 ECAB 257, 261 (2002).