United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 16-1562**
	)	**Issued: December 22, 2016**
U.S. POSTAL SERVICE, HOWELL MILL STATION, Atlanta, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 26, 2016 appellant filed a timely appeal from a March 3, 2016 merit decision and a July 13, 2016 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.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury on January 10, 2016 in the performance of duty; and (2) whether OWCP properly denied appellant's request for a hearing.

On appeal appellant asserts that the March 3, 2016 decision had three different dates as it was stamped March 8, 2016, and another letter was dated March 17, 2016, all of which arrived together. She advised that she was on vacation beginning in April 2016 and out of the country until May 1, 2016 and that she had a document indicating that her mail was held.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 12, 2016 appellant, then a 59-year-old noncareer sales and service/ distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on Sunday, January 10, 2016 she injured the palm of her right hand, caused by "red plum mailers." She did not stop work. An employing establishment supervisor, M.T., checked a claim form box indicating that this was a "first aid injury." A position description was forwarded with the claim form.

In support of her claim, appellant submitted a January 12, 2016 treatment note in which Dr. Shaun Brownlee, a family physician, noted a complaint of numbness and tingling in the right arm and hand that began on Sunday. Dr. Brownlee noted a past history of a nonemployment-related 2012 cervical fusion in 2012 done for similar complaints.[2] Right upper extremity physical examination was normal. Examination of the cervical spine demonstrated a positive Spurling's maneuver with no tenderness and full range of motion. Dr. Brownlee diagnosed cervical radiculopathy. He prescribed medication and advised that appellant could return to modified duty.

Dr. Wenli Wang, a Board-certified family physician, completed a work activity status form on January 19, 2016. She advised that appellant should continue modified duty.

By letter dated January 25, 2016, sent to appellant's address of record in McDonough, Georgia, OWCP informed appellant of the evidence needed to support her claim. This requested evidence consisted of a statement regarding the claim including a description of red plum mailers, a history of her cervical spine condition, and a report from her physician.

Additional medical reports of record included Dr. Wang's treatment note dated January 19, 2016 in which she described appellant's complaint of right arm and neck pain. Musculoskeletal and cervical spine examinations demonstrated full range of motion and no tenderness or swelling. Dr. Wang diagnosed cervical radiculopathy and right arm pain. She prescribed medication and physical therapy. On January 25, 2016 Dr. Brownlee reiterated his findings and conclusions. He recommended an electrodiagnostic study and advised that appellant could continue modified duty. Appellant was seen by Dr. Olujimi Oluwole, an osteopath, on February 1, 2016. Dr. Oluwole reported that appellant had tingling in fingers and decreased grip strength. Examination of the right wrist, hand, and fingers was normal. Cervical spine examination demonstrated right trapezius tenderness, full range of motion, and a positive Spurling's maneuver. Dr. Oluwole diagnosed cervical radiculopathy and right arm pain and advised that appellant could continue modified duty. Dr. Brownlee next saw appellant on February 8, 2016. He reiterated his findings and conclusions. The record also includes physical therapy notes dated January 1 to February 8, 2016.

[2] The record indicates that appellant had no previous FECA claims. The January 12, 2016 treatment note and forthcoming medical reports were submitted by physicians at Concentra Medical Centers. Each indicated that treatment was authorized by M.T., appellant's supervisor.

By decision dated March 3, 2016, OWCP denied the claim because the evidence of record was insufficient to establish that the events occurred as alleged. It noted that appellant did not provide answers to questions set forth in the January 25, 2016 development letter.

In correspondence postmarked June 15, 2016, appellant maintained that she did not receive the January 25, 2016 letter from OWCP and requested a hearing with OWCP's Branch of Hearings and Review. She answered the questions noted on the March 3, 2016 decision. Appellant asked that the decision be reconsidered so that medical expenses could be paid.

On July 13, 2016 an OWCP hearing representative denied appellant's request for a hearing as untimely filed. OWCP considered the request and determined that her case could equally well be addressed by requesting reconsideration with OWCP and submitting new evidence or, alternatively, by filing an appeal with the Board.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,[3] including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.[4] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[6]

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[7] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and her subsequent course of action. An employee has not met her burden in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain

[3] *J.P.*, 59 ECAB 178 (2007).

[4] *R.C.*, 59 ECAB 427 (2008).

[5] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *T.H.*, 59 ECAB 388 (2008).

[7] *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

medical treatment may, if otherwise unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.[8]

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record does not establish that the claimed January 10, 2016 incident occurred as alleged. On the claim form appellant merely indicated that she injured the right palm of hand, caused by "red plum mailers." No further description of the claimed injury was received by OWCP prior to its March 3, 2016 decision on the merits of her claim.[9]

While appellant alleged on appeal that she did not receive OWCP's January 25, 2016 letter informing her of the evidence needed to perfect her claim, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[10] The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule to claimants under FECA and to OWCP when it is established that the mailing was in the ordinary course of the sender's business practices. It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. It is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.[11] In the present case, OWCP's January 25, 2016 letter was mailed to appellant's address of record, and there is no evidence of record that the mailing was undeliverable. As such, the Board finds that the January 25, 2016 correspondence was received by appellant.

Thus, appellant has not met her burden of proof to establish fact of injury. As she did not establish that a January 10, 2016 incident occurred as alleged, the Board need not discuss the probative value of the medical evidence submitted.[12]

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.

[8] *Betty J. Smith*, 54 ECAB 174 (2002).

[9] *See* 20 C.F.R. § 501.2(c)(1).

[10] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[11] *M.U.*, Docket No. 09-526 (issued September 14, 2009).

[12] *Paul Foster*, 56 ECAB 208 (2004).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.[13] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days, or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[14] The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[15] Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[16]

ANALYSIS -- ISSUE 2

As noted above, a request for a hearing must be made within 30 days after the date of the issuance of OWCP's final decision.[17] In this case, appellant requested a hearing with OWCP's Branch of Hearings and Review on a form postmarked June 15, 2016. Thirty days following the issuance of the March 3, 2016 decision was April 2, 2016. Although appellant asserted on appeal that she was on vacation in April 2016 and out of the country until May 1, 2016 and alleged that she had a document proving that her mail was being held, no such document is found in the case record. Moreover, section 8124(b)(1) of FECA provides that a claimant for compensation who is not satisfied with a decision is entitled to a hearing on his or her claim if a request is made within 30 days after the date of issuance of the decision.[18] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[19] Appellant's hearing request was not postmarked until June 15, 2016. The Board finds that the request was therefore untimely.

OWCP also has the discretionary power to grant a request for a hearing or review of the written record when a claimant is not entitled to such as a matter of right. In the July 13, 2016 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request as the issue could be addressed

[13] 5 U.S.C. § 8124(b)(1).

[14] *Claudio Vazquez*, 52 ECAB 496 (2001).

[15] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[16] 20 C.F.R. § 10.617(b); *see R.E.*, Docket No. 13-553 (issued July 25, 2013).

[17] *Supra* note 14.

[18] 5 U.S.C. § 8124(b)(1).

[19] *Id.*; *supra* note 14.

through a reconsideration application. The Board has held that, as 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.[20] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion. The Board finds that OWCP properly denied appellant's request for a hearing.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury on January 10, 2016 in the performance of duty, and that OWCP properly denied her request for a hearing.[21]

[20] *See Mary Poller*, 55 ECAB 483 (2004).

[21] The Board notes that OWCP's implementing regulations allow for authorization of medical treatment in emergency circumstances. While 20 C.F.R. § 10.300 explains that authorization of emergency medical treatment is usually provided by issuance of a Form CA-16, section 10.304 allows for authorization of emergency treatment, in the absence of a Form CA-16, in cases involving emergencies or unusual circumstances. Upon return of the case record, OWCP should consider whether appellant's treatment at Concentra, which was authorized by her supervisor, should be authorized by OWCP. *See N.B.*, Docket No. 15-0708 (issued July 15, 2015); *K.J.*, Docket No. 13-271 (issued May 23, 2013).

ORDER

IT IS HEREBY ORDERED THAT the July 13 and March 3, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 22, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board