United States Department of Labor
Employees' Compensation Appeals Board

C.F., Appellant	)	
and	)	**Docket No. 18-0791**
	)	**Issued: February 26, 2019**
DEPARTMENT OF VETERANS AFFAIRS, ST. ALBANS HARBOR HEALTHCARE SYSTEM, Jamaica, NY, Employer	)	

Appearances:
Ena Thompson, for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 1, 2018 appellant, through her representative, filed a timely appeal from an October 26, 2017 merit decision and a January 29, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a traumatic injury causally related to her accepted September 4, 2017 employment incident; and (2) whether OWCP abused its discretion when it denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On September 13, 2017 appellant, then a 51-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 4, 2017 she sprained her back when she slipped and fell on a wet floor while in the performance of duty.

On September 4, 2017 appellant was treated in the employing establishment's emergency department for complaints of lower back and buttock pain due to a fall. Dr. Aleksander Gleyzer, Board-certified in emergency medicine, noted an unspecified contusion.

In a September 5, 2017 occupational health note, Dr. Renee Venzen, an internist, indicated that she treated appellant for follow-up of lower right back/buttock pain. She related that appellant slipped and fell on a wet floor in the B3 unit and landed on her right side. Appellant had a history of low back surgery in 2016, secondary to a herniated disc. Dr. Venzen reported that physical examination showed no vertebral tenderness. She noted an unspecified muscle strain.

On September 5, 2017 a health care provider, who signed with initials that appear to be R.Y., completed a duty status report (Form CA-17), which noted a September 4, 2017 date of injury and also noted an unspecified muscle strain. R.Y. authorized appellant to work modified duty with specific restrictions.

In a September 20, 2017 development letter, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It provided a factual questionnaire for her completion and requested additional medical evidence. OWCP afforded appellant 30 days to submit the requested information. By separate letter of even date, it requested additional information from the employing establishment regarding the circumstances of the September 4, 2017 injury.

OWCP subsequently received a September 19, 2017 duty status report (Form CA-17) in which a health care provider with initials that appear to be R.Y. noted an unspecified muscle sprain and advised that appellant could return to full-duty work.

By decision dated October 26, 2017, OWCP denied appellant's traumatic injury claim. It accepted that the September 4, 2017 employment incident occurred as alleged, but denied her claim because the medical evidence submitted did not contain a diagnosis in connection with the accepted incident. Although the evidence included diagnoses of "contusion" and "muscle sprain," it was unclear as to the specific location(s) of the diagnosed condition(s). Consequently, OWCP found that appellant had not established the medical component of fact of injury.

In an undated appeal request form, postmarked December 14, 2017, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 29, 2018, the Branch of Hearings and Review denied appellant's request for a hearing, finding that it was untimely filed as the request was not postmarked within 30 days of OWCP's October 26, 2017 merit decision. The hearing representative also considered whether to grant a discretionary hearing, but determined that the issue in the case could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish 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 timely filed within the applicable time limitation period of FECA,[3] and that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[6] Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[7] The second component is whether the employment incident caused a personal injury.[8]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[9] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment incident must be based on a complete factual and medical background.[10] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical

[3] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *T.H.*, 59 ECAB 388, 393-94 (2008).

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

[8] *John J. Carlone*, 41 ECAB 354 (1989).

[9] *T.H.*, *supra* note 6; *Robert G. Morris*, 48 ECAB 238 (1996).

[10] *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

rationale, explaining the nature of the relationship between the diagnosed condition, and appellant's specific employment incident.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish an injury causally related to the accepted September 4, 2017 employment incident.

The record contains hospital discharge instructions dated September 4, 2017. While Dr. Gleyzer noted an unspecified contusion, the report does not contain a firm medical diagnosis and does not adequately explain the cause of any medical condition.[12]

In support of her claim appellant also submitted a September 5, 2017 occupational health note by Dr. Venzen. Dr. Venzen described that appellant slipped and fell at work and experienced lower back and buttock pain. She reported that physical examination showed no vertebral tenderness and noted an unspecified muscle strain. This report, however, fails to establish a firm medical diagnosis and provides no support for an injury. Dr. Venzen did not specify where the muscle sprain was located nor did she report any unremarkable examination findings.[13] Accordingly, the Board finds that her report is insufficient to establish a firm medical diagnosis in connection with the accepted employment incident.

The Form CA-17 duty status reports completed by an unspecified health care provider dated September 5 and 19, 2017 have no probative value, as it is not established that the author is a physician.[14]

Accordingly, the Board finds that appellant has not established that she sustained an injury causally related to the accepted September 4, 2017 employment incident.

On appeal, appellant asserts that she was injured at work and indicates that she has supporting documents. As explained above, the medical evidence of record is insufficient to establish an injury causally related to the accepted employment incident.

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 provides that "a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the

[11] *Id.*

[12] *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); *Michael E. Smith*, 50 ECAB 313 (1999).

[13] *J.P.*, Docket No. 14-0087 (issued March 14, 2014).

[14] *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary."[15] Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[16] A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[17] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[18]

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not abused its discretion when it denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124. OWCP's regulations provide that the request for a hearing or a review of the written record must be mailed within 30 days of the date of the decision for which a review is sought. Because appellant's request was postmarked on December 14, 2017, more than 30 days after OWCP's October 26, 2017 decision, it was untimely filed and she was not entitled to a hearing as a matter of right.

Although appellant's request for a hearing was untimely filed, OWCP has the discretionary authority to grant the request and it must exercise such discretion.[19] In its January 29, 2018 decision, OWCP's hearing representative properly exercised her discretion by notifying appellant that she had considered the matter and determined that the issue involved could be equally well addressed by requesting reconsideration before OWCP and submitting appropriate evidence. The Board finds that the hearing representative properly exercised her discretionary authority in denying appellant's request for a hearing.[20] 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.[21] In this case, the evidence of record does not indicate that OWCP abused its discretion. Accordingly, the Board finds that OWCP properly denied appellant's hearing request.

CONCLUSION

Appellant has not met her burden of proof to establish a traumatic injury causally related to her accepted September 4, 2017 employment incident. The Board further finds that OWCP did

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. §§ 10.616, 10.617.

[17] *Id.* at § 10.616(a).

[18] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[19] *Id.*

[20] *Mary B. Moss*, 40 ECAB 640, 647 (1989).

[21] *Samuel R. Johnson*, 51 ECAB 612 (2000).

not abuse its discretion in denying her request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2018 and October 26, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 26, 2019
Washington, DC

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

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

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