

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

|                                    |   |                          |
|------------------------------------|---|--------------------------|
| E.M., Appellant                    | ) |                          |
|                                    | ) |                          |
| and                                | ) | Docket No. 20-0837       |
|                                    | ) | Issued: January 27, 2021 |
| DEPARTMENT OF THE AIR FORCE, SCOTT | ) |                          |
| AIR FORCE BASE, IL, Employer       | ) |                          |
|                                    | ) |                          |

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 5, 2020 appellant filed a timely appeal from October 23 and November 25, 2019 merit decisions, and a January 27, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because he had followed his physician's advice regarding treatment and return to work after his employment injury. Appellant also asserted that he did not participate in the scheduled hearing before OWCP's Branch of Hearings and Review because he was working on a project with his supervisor. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish entitlement to continuation of pay (COP); (2) whether he has met his burden of proof to establish a right humerus fracture causally related to the accepted August 28, 2019 employment incident; and (3) OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

## **FACTUAL HISTORY**

On October 16, 2019 appellant, then a 58-year-old purchasing agent, filed a traumatic injury claim (Form CA-1) alleging that on August 28, 2019 he fractured his right arm when he tripped over a box and landed on his right elbow while in the performance of duty. He stopped work on August 28, 2019 and returned to work on September 16, 2019.<sup>3</sup>

In a statement dated August 28, 2018, a coworker related that he was walking in the warehouse with appellant when appellant tripped over a box and landed on his left side and arm.

In a letter dated October 22, 2019, the employing establishment controverted appellant's claim for COP because the injury had not been reported within 30 days of the date of the claimed injury.

In a development letter dated October 23, 2019, OWCP advised appellant of the deficiencies of his claim and advised him of the type of factual and medical evidence necessary to establish entitlement to FECA benefits. It noted that no medical evidence had been submitted with his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

On October 23, 2019 the employing establishment forwarded an October 22, 2019 e-mail from appellant explaining why he did not file his claim within 30 days of the August 28, 2019 incident. Appellant explained that the injury occurred during fiscal year closeout, the busiest time of year for procurement. He also related that his physician had instructed him to wear a sling for six weeks and had restricted his ability to move his right arm for two weeks.

By decision dated October 23, 2019, OWCP denied COP for the period August 29 to September 22, 2019. It explained that appellant had not reported his injury on an OWCP-approved form within 30 days following the August 28, 2019 employment incident. OWCP added that the denial of COP did not preclude him from filing a claim for disability due to the effects of the claimed August 28, 2019 employment injury.

On October 27, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

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<sup>3</sup> The Board notes there is discrepancy in the evidence as to when appellant returned to work. The Form CA-1 notes September 16, 2019 as the return to work date. However, a report of work status form noted September 23, 2019 as the date appellant returned to work during the COP eligibility period. In an October 27, 2019 letter, appellant noted that he was off work from August 28 to September 13, 2019. In a claim for compensation (Form CA-7) dated October 21, 2019, appellant requested leave buy back from September 1 through 14, 2019.

OWCP subsequently received a September 3, 2019 disability note from Dr. Charles L. Lehmann, a Board-certified orthopedic surgeon, who diagnosed right humerus fracture and placed appellant off work until further notice.

By decision dated November 25, 2019, OWCP accepted that the August 28, 2019 employment incident occurred as alleged, but denied appellant's traumatic injury claim, finding that the evidence of record did not include medical evidence demonstrating that the diagnosed right humerus fracture was causally related to accepted employment incident.

In a December 10, 2019 letter, OWCP informed appellant that an oral hearing would take place on January 14, 2020 at 11:00 a.m., Eastern Standard Time (EST). It provided a toll free number and a pass code to access the hearing by telephone. OWCP mailed the letter to appellant's last known address of record.

By decision dated January 27, 2020, OWCP found that appellant had abandoned his request for an oral hearing in connection with the denial of COP. It indicated that he had failed to appear at the telephonic hearing scheduled for January 14, 2020 and failed to contact OWCP prior to or subsequent to the scheduled hearing to his failure to appear.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8118(a) of FECA authorizes COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.<sup>4</sup> This latter section provides that written notice of injury shall be given within 30 days.<sup>5</sup> The context of section 8122 makes clear that this means within 30 days of the injury.<sup>6</sup>

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.<sup>7</sup>

The Board has held that section 8122(d)(3) of FECA,<sup>8</sup> which allows OWCP to excuse failure to comply with the time limitation provision for filing a claim for compensation because of exceptional circumstances, is not applicable to section 8118(a), which sets forth the filing

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<sup>4</sup> *Supra* note 2 at § 8118(a).

<sup>5</sup> *Id.*

<sup>6</sup> *C.C.*, Docket No. 18-0912 (issued July 11, 2019); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

<sup>7</sup> *J.S.*, *id.*; *Robert M. Kimzey*, 40 ECAB 762 (1989); *Myra Lenburg*, *id.*

<sup>8</sup> *Supra* note 2 at § 8122(d)(3).

requirements for COP.<sup>9</sup> Thus, there is no provision in the law for excusing an employee's failure to file a claim within 30 days of the employment injury.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish entitlement to COP.

Appellant filed written notice of his traumatic injury (Form CA-1) on October 16, 2019. By decision dated October 23, 2019, OWCP denied his request for COP, as his claim was not filed within 30 days following the August 28, 2019 employment injury. Appellant explained that the delay in filing his claim occurred because he was injured during a very busy period at the end of the fiscal year. He also explained that his arm was immobile for the first two weeks, following the injury, and in a sling for six weeks.

The Board notes that there is no provision in FECA for excusing a late filing regarding COP.<sup>11</sup> Because appellant filed written notice of his traumatic injury claim (Form CA-1) on October 16, 2019, the Board finds that it was not filed within 30 days of the claimed August 28, 2019 employment injury, as specified in sections 8118(a) and 8122(a)(2) of FECA. Therefore appellant is not entitled to COP.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under FECA<sup>12</sup> 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,<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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<sup>9</sup> *C.C.*, and *J.S.*, *supra* note 6; *William E. Ostertag*, 33 ECAB 1925 (1982).

<sup>10</sup> *Id.*; *Dodge Osborne*, 44 ECAB 849 (1993).

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 2.

<sup>13</sup> *T.L.*, Docket No. 19-1467 (issued July 24, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>14</sup> *T.L.*, *id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>15</sup> *T.L.*, *supra* note 13; *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).

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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.<sup>16</sup> The second component is whether the employment incident caused a personal injury.<sup>17</sup>

Rationalized medical opinion evidence is required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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 incident.<sup>18</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not met his burden of proof to establish a right humerus fracture causally related to the accepted August 28, 2019 employment incident.

The only medical evidence appellant submitted in support of his claim was a September 3, 2019 disability note from Dr. Lehmann diagnosing right humerus fracture and placing appellant off work. Dr. Lehmann, however, offered no opinion regarding the cause of this condition. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>20</sup> Thus, this evidence is insufficient to support his claim.

As appellant has not submitted rationalized medical evidence to establish that his diagnosed right humerus fracture was causally related to the accepted employment incident of August 28, 2019, the Board finds that he has not met his burden of proof.

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.

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<sup>16</sup> *K.M., id.; L.M., id.; Delores C. Ellyett, id.*

<sup>17</sup> *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>18</sup> *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>19</sup> *J.L.*, Docket No. 18-1804 (issued April 12, 2019); *L.D., id.; see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>20</sup> *M.C.*, Docket No. 20-0125 (issued July 15, 2020); *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see also L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

### **LEGAL PRECEDENT -- ISSUE 3**

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.<sup>21</sup> Unless otherwise directed in writing by the claimant, OWCP's 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.<sup>22</sup> OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.<sup>23</sup>

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.<sup>24</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

Following OWCP's October 23, 2019 decision concerning the denial of COP, appellant filed a timely request for a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. In a December 10, 2019 letter, OWCP's hearing representative notified appellant that his telephonic hearing was scheduled for January 14, 2020 at 11:00 a.m., EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record<sup>25</sup> and provided him with a toll free number and a pass code to use at the time of the scheduled hearing. There is no evidence of nondelivery of the hearing notice. Appellant, however, failed to appear for the scheduled hearing and he did not request a postponement or provide an explanation to OWCP for his failure to attend the hearing within 10 days of the scheduled

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<sup>21</sup> 20 C.F.R. § 10.616(a).

<sup>22</sup> *Id.* at § 10.617(b).

<sup>23</sup> *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *T.P.*, Docket No. 15-0806 (issued September 11, 2015); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>24</sup> 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, *supra* note 20.

<sup>25</sup> *R.J.*, Docket No. 18-1701 (issued May 18, 2020); *E.S.*, Docket No. 19-0567 (issued August 5, 2019).

hearing.<sup>26</sup> The Board thus finds that OWCP properly determined that appellant abandoned his request for a telephonic oral hearing.<sup>27</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he was entitled to receive COP. The Board further finds that appellant has not met his burden of proof to establish a right humerus fracture causally related to the accepted August 28, 2019 employment incident. The Board also finds OWCP properly determined that appellant abandoned his request for a telephonic hearing before an OWCP hearing representative.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 23 and November 25, 2019, and January 27, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 27, 2021  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>26</sup> *R.J., id.; A.J.*, Docket No. 18-0830 (issued January 10, 2019).

<sup>27</sup> *Supra* note 25.