United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 21-0870**
	)	**Issued: January 5, 2022**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Los Angeles, CA, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 20, 2021 appellant filed a timely appeal from a March 16, 2021 merit decision and a May 11, 2021 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 has met his burden of proof to establish a medical condition causally related to the accepted February 4, 2021 employment incident; and (2) whether

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the May 11, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On February 4, 2021 appellant, then a 40-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on February 4, 2021 he sustained an injury to his lower back when performing an inspection of an aircraft while in the performance of duty. He explained that, while slightly bent at the waist, he turned left and up to inspect an open compartment and felt a pain in the lower right area of his back. Appellant stopped work on February 4, 2021.

In a February 9, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On February 7, 2021 appellant was treated in the emergency room by Dr. Angelique Campen, a Board-certified emergency room physician for back pain, which began on February 4, 2021 while he was inspecting a plane at work. Findings on examination revealed tenderness to palpation with spasm of the right lumbar area. Dr. Campen advised that appellant's symptoms were compatible with muscular skeletal back pain and there was no indication for imaging. She diagnosed low back pain and discharged appellant in stable condition with work restrictions. In a note dated February 7, 2021, Dr. Campen returned him to modified-duty work on February 8, 2021. In an after visit summary of even date, she diagnosed lumbar sprain/strain initial encounter and provided information on back sprain/strain.

In a report dated February 8, 2021, Dr. James Kwok, a Board-certified physiatrist, treated appellant for lower back pain, which began on February 4, 2021. Findings on physical examination revealed tenderness to palpation in the left paralumbar area. On a state workers' compensation form, Dr. Kwok diagnosed lumbar strain, initial encounter and checked a box marked "Yes" that his findings and diagnosis were consistent with appellant's account of injury. He recommended hot and cold compresses and a back and hip wrap. Dr. Kwok returned appellant to modified-duty work on February 8, 2021.

Appellant was treated by Gabriel Chang, a physician assistant, on February 8, 2021 for low back pain. He reported working as a customs officer and on February 4, 2021 he was performing an inspection of the underbelly of an aircraft when he bent over and turned to look up toward the left and suddenly felt back pain. Examination of the lumbar spine revealed tenderness to palpation in the left paralumbar area. Mr. Chang diagnosed lumbar strain, initial encounter and recommended oral analgesics, cold/heat wrap, and hot/cold compress. He returned appellant to modified-duty work. In work activity status reports dated February 8, 2021, Mr. Chang diagnosed lumbar strain, initial encounter. He released appellant to modified work duty.

On February 12, 2021 Mr. Chang treated appellant in follow up and reported that his back pain had resolved. He diagnosed lumbar strain and indicated that appellant reached maximum medical improvement (MMI) and could return to full duty. In a work activity status report dated February 12, 2012, Mr. Chang diagnosed lumbar strain, initial encounter and returned appellant to full duty. He noted MMI was reached on February 12, 2021 and released him from his care.

By decision dated March 16, 2021, OWCP denied appellant's traumatic injury claim, finding that the medical evidence submitted was insufficient to establish causal relationship between his diagnosed condition and the accepted February 4, 2021 employment incident.

In an appeal request form dated April 26, 2021, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 11, 2021, OWCP denied appellant's April 26, 2021 request for an oral hearing as untimely filed, finding that his request was not made within 30 days of the March 16, 2021 OWCP decision. It further exercised discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,[4] 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.[5] 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.[6]

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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[7]

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.[8] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported

[3] *Supra* note 1.

[4] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment incident identified by the employee.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted February 4, 2021 employment incident.

On February 7, 2021 Dr. Campen treated appellant for back pain that began on February 4, 2021 while he was inspecting a plane at work. She diagnosed low back pain. The Board has held that pain is a symptom and not a compensable medical diagnosis.[10] Accordingly, this report is insufficient to meet appellant's burden of proof.

Dr. Campen submitted another note dated February 7, 2021 returning appellant to modified-duty work on February 8, 2021. She completed an after visit summary and diagnosed lumbar sprain/strain initial encounter. Similarly, in a report dated February 8, 2021, Dr. Kwok treated appellant for lower back pain that began on February 4, 2021. He diagnosed lumbar strain, initial encounter and checked a box marked "Yes" that his findings and diagnosis was consistent with appellant's account of injury. However, Drs. Campen and Kwok did not offer an opinion on causal relationship. As the Board has held, medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[11] Thus, the Board finds that these reports are insufficient to meet appellant's burden of proof.

Appellant submitted reports from a physician assistant. However, certain healthcare providers such as physician assistants[12] are not considered "physician[s]" as defined under FECA.[13] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[14]

[9] *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[10] *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, *supra* note 4.

[11] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[12] *C.P.*, Docket No. 19-1716 (issued March 11, 2020) (a physician assistant is not a physician as defined under FECA).

[13] Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R.§ 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

[14] *Id*.

As the record lacks rationalized medical evidence establishing causal relationship between a medical condition and the accepted February 4, 2021 employment incident, the Board finds that appellant 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.

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 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.

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought. Because appellant's hearing request was dated April 26, 2021, it post-dated OWCP's March 16, 2021 decision by more than 30 days and, therefore, is untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.[18]

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.[19] The Board finds that, in the May 11, 2021 decision, OWCP's Branch of Hearings and Review properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional evidence.

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. §§ 10.616, 10.617.

[17] *Id*. at § 10.616(a).

[18] *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

[19] *Id*.

The Board has held that the only limitation on OWCP's authority is reasonableness. 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.[20] In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted February 4, 2021 employment incident. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the March 16 and May 11, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 5, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[20] *Id*.