

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

T.S., Appellant)	
)	
and)	Docket No. 24-0605
)	Issued: August 23, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. IMMIGRATION AND CUSTOMS)	
ENFORCEMENT, Long Beach, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2024 appellant filed a timely appeal from a December 13, 2023 merit decision and an April 15, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 has met his burden of proof to establish a medical diagnosis in connection with the accepted August 15, 2023 employment incident; and (2) whether

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.2(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 his oral argument request, appellant asserted that as of April 3, 2024, he was not aware of the scheduled time and date of the hearing. He also asserted that his medical evidence and facts supported the approval of his claim. 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.

² 5 U.S.C. § 8101 *et seq.*

OWCP properly determined that appellant abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

FACTUAL HISTORY

On September 1, 2023 appellant, then a 53-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on August 15, 2023, he sustained whiplash symptoms of neck and lower back pain, as well as a headache, when his government vehicle was struck from behind while stopped at a traffic signal in the performance of duty.

OWCP received a copy of the police report dated August 15, 2023.

In a development letter dated September 11, 2023, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 60 days to submit the necessary evidence.

In progress notes dated September 6, 2023, Mai X. Ha, a nurse practitioner, noted that appellant was seen for bilateral neck pain and lower back pain after his vehicle was rear ended in a motor vehicle accident. She diagnosed cervicalgia and lumbar pain.

In a follow-up letter dated September 26, 2023, OWCP advised appellant that it had conducted an interim review and the evidence remained insufficient to establish his claim. It noted that he had 60 days from the September 1, 2023 letter to submit the requested supporting evidence. OWCP further advised that if the evidence was not received during this time, it would issue a decision based on the evidence contained in the record.

OWCP received a September 6, 2023 x-ray of the cervical spine which revealed no acute displaced fracture; reduced cervical lordosis, positional or due to muscle spasm; and apparent linear calcifications posterior to C2, C3, and C4 vertebral bodies, likely due to posterior longitudinal ligament.

In an October 5, 2023 report, Dr. Diana H. Hess, a Board-certified internist, noted that appellant discussed work accommodations for persistent cervicalgia and low back pain after a motor vehicle collision. She diagnosed cervicalgia and chronic midline low back pain, unspecified whether sciatica present. On October 15, 2023 Dr. Hess completed a duty status report (Form CA-17), diagnosed cervicalgia due to injury, and advised a return to work on September 13, 2023, with restrictions.

OWCP received physical therapy notes dated October 5, 2023, which noted treatment would be performed for cervicalgia and low back pain.

By decision dated December 13, 2023, OWCP denied appellant's claim. It found that he did not submit any medical evidence which contained a diagnosis in connection with the accepted employment incident. OWCP explained that the medical evidence was insufficient to support the claim as it provided diagnoses of cervicalgia (neck pain) and low back pain. It noted that "pain" is a symptom, and not a valid diagnosis. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 5, 2024 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. He submitted additional medical evidence.

In a February 26, 2024 notice, OWCP's hearing representative informed appellant that he had scheduled a telephonic hearing for April 3, 2024 at 12:15 p.m. Eastern Standard Time (EST). The notice included a toll-free number to call and provided the appropriate passcode for access to the hearing. The hearing representative mailed the notice to appellant's last known address of record. Appellant did not appear for the hearing and no request for postponement was received.

By decision dated April 15, 2024, OWCP found that appellant had abandoned his request for an oral hearing, as he had received written notification of the hearing 30 days in advance but failed to appear. It further found that there was no indication in the case record that appellant had contacted the Branch of Hearings and Review either prior to or after the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 an injury.⁷

The medical evidence required to establish a 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 *Id.*

⁴ *See Y.S.*, Docket No. 22-1142 (issued May 11, 2023); *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 diagnosed medical condition in connection with the accepted August 15, 2023 employment incident.

In an October 5, 2023 report, Dr. Hess diagnosed cervicalgia and chronic midline low back pain, and noted that it was unspecified whether sciatica was present. On October 15, 2023 she completed a Form CA-17 and diagnosed cervicalgia due to injury. The Board has held that pain is a symptom, not a diagnosis of a medical condition.¹⁰ Medical reports lacking a firm diagnosis and a rationalized medical opinion regarding causal relationship are of no probative value.¹¹ Therefore, this evidence is insufficient to meet appellant's burden of proof.¹²

OWCP also received a September 6, 2023 x-ray of the cervical spine. The Board has held that diagnostic reports, standing alone, lack probative value on the issue of causal relationship as they do not provide an opinion as to whether the accepted employment incident caused a diagnosed condition.¹³ Consequently, this evidence is insufficient to establish appellant's claim.

OWCP received progress notes dated September 6, 2023, from Mai X. Ha, a nurse practitioner, and physical therapy notes dated October 5, 2023. Certain healthcare providers such as physician assistants, nurse practitioners, and physical therapists are not considered physicians as defined under FECA.¹⁴ Consequently, their notes will not suffice for purposes of establishing entitlement to FECA benefits.

As the medical evidence of record is insufficient to establish a diagnosed medical condition in connection with the accepted August 15, 2023 employment incident, the Board finds that appellant has not met his burden of proof.

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 *R.D.*, Docket No. 24-002 (issued January 24, 2024); *K.S.*, Docket No. 19-1433 (issued April 26, 2021); *S.L.*, Docket No. 19-1536 (issued June 26, 2020); *D.Y.*, Docket No. 20-0112 (issued June 25, 2020).

¹¹ *See A.C.*, Docket No. 20-1510 (issued April 23, 2021); *J.P.*, Docket No. 20-0381 (issued July 28, 2020); *R.L.*, Docket No. 20-0284 (issued June 30, 2020).

¹² *See J.P.*, Docket No. 18-0349 (issued December 30, 2019); *D.D.*, 57 ECAB 734 (2006).

¹³ *K.A.*, Docket No. 23-613 (issued April 22, 2024); *W.L.*, Docket No. 20-1589 (issued August 26, 2021); *A.P.*, Docket No. 18-1690 (issued December 12, 2019).

¹⁴ 5 U.S.C. § 8101(2) 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. 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); *A.M.*, Docket No. 20-1575 (issued May 24, 2021) (physical therapists are not physicians as defined by FECA); *M.F.*, Docket No. 19-1573 (issued March 16, 2020) (medical reports signed solely by a physician assistant or a nurse practitioner are of no probative value as these care providers are not considered physicians as defined under FECA); *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).

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

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive 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.¹⁵ 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.¹⁶ OWCP has the burden of proving that it properly mailed notice of the scheduled hearing to a claimant and any representative of record.¹⁷

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.¹⁸ 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. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.¹⁹ Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision, finding that the claimant abandoned the request for a hearing.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following OWCP's December 13, 2023 decision, appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a February 26, 2024 letter, OWCP's hearing representative notified appellant that a telephonic hearing was scheduled for April 3, 2024 at 12:15 p.m. EST. He mailed the notice to appellant's last known address of record. The Board has held that, absent evidence to the contrary, a letter properly

¹⁵ 20 C.F.R. § 10.616(a).

¹⁶ *Id.* at § 10.617(b).

¹⁷ *See J.T.*, Docket No. 24-0299 (issued April 26, 2024); *W.R.*, Docket No. 22-1016 (issued September 30, 2022); *M.S.*, Docket No. 22-0362 (issued July 29, 2022); *L.L.*, Docket No. 21-1194 (issued March 18, 2022); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹⁸ 20 C.F.R. § 10.622(f).

¹⁹ *Id.*

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (February 2022); *K.H.*, Docket No. 20-1198 (issued February 8, 2021); *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule.²¹

Appellant failed to appear for the scheduled hearing at the prescribed time and did not request a postponement or provide an explanation for the failure to appear within 10 days of the scheduled hearing. As such, the Board finds that OWCP properly determined that he abandoned his request for an oral hearing.²²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a diagnosed medical condition in connection with the accepted August 15, 2023 employment incident. The Board further finds that OWCP properly determined that appellant abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2023 and April 15, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 23, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²¹ *L.L.*, *supra* note 17; *V.C.*, Docket No. 20-0798 (issued November 16, 2020); *L.T.*, Docket No. 20-1539 (issued August 2, 2021).

²² *Id.*