

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

S.A., Appellant

and

**DEPARTMENT OF THE ARMY, PICATINNY
ARSENAL, Picatinny, NJ, Employer**

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**Docket No. 10-1933
Issued: February 17, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 20, 2010 appellant timely appealed the March 8, 2010 nonmerit decision of the Office of Workers' Compensation Programs which denied reconsideration. Because he filed his appeal more than 180 days after the most recent merit decision of December 15, 2009, the Board does not have jurisdiction over the merits of the claim.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denial of reconsideration.²

ISSUE

The issue is whether the Office properly denied appellant's February 24, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

¹ 20 C.F.R. § 501.3(e) (2010). The Office denied the claim based on a finding that appellant was not in the performance of duty at the time of injury.

² The current record includes evidence received after the Office issued its March 8, 2010 decision. The Board's review of a case is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On March 4, 2009 appellant, a 61-year-old mechanical engineer, filed a traumatic injury claim (Form CA-1) for pain in his hands, elbows and right ankle which arose on May 20, 2008. He attributed his injury to excessive force by an employing establishment security guard. Appellant was taken into custody at work on May 20, 2008 pursuant to a March 28, 2008 arrest warrant for nonpayment of child support. The employing establishment police department later relinquished custody to the Morris County, NJ Sheriff's Department. At a court appearance later that day, it was determined that appellant had already paid his court-ordered child support. He had been incarcerated approximately one week earlier and was released when he paid \$250.00. During a court appearance on May 12, 2008, appellant was ordered to commence payment of at least \$75.00 a week, which he did on May 19, 2008. He was arrested on May 20, 2008 based on a prior bench warrant. Because appellant had already complied with the court's May 12, 2008 order, the judge vacated the arrest warrant and released him from custody.

Appellant alleged that an employing establishment security guard came into the building and forced him outside by grabbing his hand. Once outside, the security guard reportedly pushed him against a car, slamming his elbow on the vehicle. He also allegedly hit appellant's ankles with his feet and tightly handcuffed appellant.

The employing establishment acknowledged that appellant was arrested May 20, 2008, but denied that any force was used by either its patrolman or a criminal investigator who executed the arrest warrant at the request of the Morris County Sheriff's Department. According to police procedures, appellant was handcuffed and searched as a safety precaution. The officers involved reported that appellant was cooperative at the time of his arrest.

Appellant submitted an October 8, 2008 referral for physical therapy and various receipts for medical treatment. He also submitted a March 13, 2009 report from Dr. Abraham H. Rosenzweig, a Board-certified orthopedic surgeon, who diagnosed status post contusion, left wrist and right ankle. Appellant was reportedly injured on "May 2, 2008" when he was arrested while at work. He complained of pain in his right ankle from a kick and left wrist pain from being handcuffed. According to Dr. Rosenzweig, appellant did not require further treatment.

In an April 10, 2009 decision, the Office denied appellant's claim because he was not in the performance of duty at the time of the alleged May 20, 2008 injury. It found that there was no evidence to establish that his arrest by the employer's security guards arose out of and in the course of his employment as a mechanical engineer.

Appellant requested an oral hearing, which was held on October 14, 2009. He submitted transcripts from his May 12 and 20, 2008 court appearances and a copy of the March 28, 2008 arrest warrant. Appellant also submitted a copy of the May 20, 2008 military police report filed by the patrolman who arrested him. The Office received an October 8, 2009 report from appellant's podiatrist, Dr. Paul J. Lafergola, who diagnosed right foot sinus tarsi syndrome. Appellant was reportedly kicked in the right ankle in May 2008.

By decision dated November 24, 2009, the Office hearing representative reversed the April 10, 2009 decision and accepted appellant's claim for left wrist contusion, right ankle

contusion and right foot sinus tarsi syndrome. As to whether appellant was in the performance of duty when injured, the hearing representative found that, while the reason for his arrest was not directly related to a work duty or assignment, the arrest was carried out by employing establishment personnel and in the course of the arrest he sustained injuries from being handled by the patrolman, including the use of handcuffs. The Office hearing representative found that appellant was required by his employment to comply with lawful instructions from base security personnel, which he did on May 20, 2008. The hearing representative concluded that, while the arrest warrant itself was not an employment factor, appellant's injury occurred because of employing establishment personnel while on the employer's premises and in connection with a "general employment requirement."

Subsequently the Chief of the Branch of Hearings & Review reopened appellant's claim pursuant to 5 U.S.C. § 8128(a) and determined that the November 24, 2009 decision was incorrect and was vacated. In a decision issued December 15, 2009, the chief hearing representative affirmed the Office's April 10, 2009 decision. He found that appellant had been restrained and handcuffed due to matters unrelated to his employment duties, namely a State arrest warrant concerning arrears in child support and alimony. The chief hearing representative found this had no relation to the fulfillment of appellant's employment duties and that his claimed injuries did not occur in the performance of duty.

On February 24, 2010 appellant requested reconsideration. He argued that the December 15, 2009 decision was against the medical evidence. Appellant contended that he experienced constant pain and was being treated by a foot specialist. He also chronicled various medical appointments and the days he missed work during January and February 2010.

In a February 16, 2010 report, Dr. Lafergola explained that he had treated appellant since April 16, 2009 for complaints of bilateral ankle pain. Appellant claimed he had been kicked in the ankles in May 2008. Dr. Lafergola noted that in April 2009, appellant's pain was consistent with bursitis of the right ankle. When appellant returned in October 2009, he diagnosed right foot sinus tarsi syndrome. Dr. Lafergola indicated that appellant was still under his care for this condition. He expected appellant to fully recover.

Appellant's request for reconsideration was also accompanied by an article on tarsal tunnel syndrome, various prescriptions and payment receipts and a map outlining the route he reportedly traveled to attend a February 2, 2010 physician's appointment.

In a March 8, 2010 decision, the Office denied appellant's February 24, 2010 request for reconsideration. It noted that the claim had been denied on the basis that his injury did not occur in the performance of his duties as a federal employee. The Office did not dispute that the incident occurred; but it was not a result of appellant's federal employment and did not occur in the performance of duty. It noted that he did not submit any evidence to support that the injury arose out of his employment nor did he raise any substantive legal questions. Consequently, the Office found that appellant's request for reconsideration was insufficient to warrant further review of the prior decision.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.³ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

Appellant's February 24, 2010 request for reconsideration did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office.

The Board notes that the underlying issue in this case was whether the injuries sustained on May 20, 2008 arose in the performance of duty. The claim was not denied based on the adequacy of medical evidence. In the February 24, 2010 request for reconsideration, appellant did not specifically argue that the performance of duty issue was incorrectly decided. He claimed that the December 15, 2009 decision was against the medical evidence and identified various dates when he sought medical treatment and/or missed work due to his claimed condition. Appellant also submitted a report from his podiatrist. Because the issue on reconsideration was not of a medical nature, his February 24, 2010 arguments did not support further merit review. They were not relevant to the question of whether appellant was in the performance of duty at the time of his May 20, 2008 injury. Therefore, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).⁶

The evidence that accompanied appellant's February 24, 2010 request for reconsideration is similarly irrelevant to the issue on reconsideration. Consequently, he also failed to satisfy the third requirement under section 10.606(b)(2). Dr. Lafergola's February 16, 2010 report, the tarsal tunnel article, the map and various prescriptions and payment receipts do not concern the relevant issue of performance of duty. As such, appellant did not submit any relevant and pertinent new evidence with his February 24, 2010 request for reconsideration. Accordingly, he

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

⁶ *Id.* at § 10.606(b)(2)(1) and (2).

is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).⁷

CONCLUSION

The Office properly denied appellant's February 24, 2010 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁷ *Id.* at § 10.606(b)(2)(3).