

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HOWARD D. FERGUSON and SMITHSONIAN INSTITUTE,  
NATIONAL AIR & SPACE MUSEUM, Washington, DC

*Docket No. 00-343; Submitted on the Record;  
Issued December 12, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established that he sustained a work-related injury on September 18, 1998; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On September 18, 1998 appellant, then a 43-year-old security officer, filed a notice of traumatic injury (Form CA-1) alleging that on that day, the work vehicle he was sitting in was hit by another work vehicle resulting in injuries to his neck and head.<sup>1</sup>

By letter dated October 23, 1998, the Office advised appellant that the information submitted was insufficient to establish that he sustained an injury as alleged. The Office requested that his physician provide an opinion, supported by a medical explanation, as to how the reported work incident caused or aggravated the claimed injury. The Office indicated that it would keep the record open for 30 days from the date of the letter.

In a narrative dated December 3, 1998, appellant stated that he was sitting in his work vehicle when he was hit by another work vehicle which caused him to be thrown forward and then jerked back, causing injuries to his neck and head.

By decision dated January 12, 1999, the Office denied appellant's claim. The Office stated that, although appellant "actually experienced the claimed injury," the evidence of file did not establish that a compensable injury occurred as a result of the incident.

On February 3, 1999 appellant, through counsel, requested reconsideration.

In support of his request, appellant submitted a medical report dated September 21, 1998 from Dr. I. Semra Engin, Board-certified in diagnostic radiology, who stated that a

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<sup>1</sup> The work vehicle was a Cushman cart, similar to a golf cart.

September 22, 1998 x-ray of the cervical spine revealed degenerative disease of C5-6 and C6-7 and an x-ray of the left shoulder was normal.

In a medical report dated September 21, 1998, Drs. Carmen R. Britt<sup>2</sup> and Julianne S. Greenberg, Board-certified in diagnostic radiology, stated that a September 18, 1998 x-ray of the cervical spine revealed degenerative joint disease from C4 through C6, with joint space narrowing at C5-6.

In reports dated September 29 and October 12 and 19, 1998, Dr. Henry Osei, Board-certified in internal medicine, indicated that appellant had a neck and shoulder condition.<sup>3</sup>

By merit decision dated March 4, 1999, the Office denied appellant's request for reconsideration on the grounds that none of the medical reports established a causal relationship between appellant's condition and the September 18, 1998 work-related incident.

By letter dated April 14, 1999, appellant, through counsel, requested reconsideration.

By nonmerit decision dated July 19, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted had been reviewed previously by the Office.

The Board has reviewed the record and finds that appellant has not established that he sustained an injury in the performance of duty on September 18, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>4</sup> has the burden of establishing the essential elements of his claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition, for which compensation is claimed are causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have

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<sup>2</sup> The Board notes that there is no listing for Dr. Britt in the American Medical Association, *Directory of Physicians in the United States* (35<sup>th</sup> ed. 1996).

<sup>3</sup> In his October 19, 1998 report, Dr. Osei stated that appellant had neck and arm pain.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> The Office regulations clarify that a traumatic injury refers to injury caused by a specific event or incident or series of events or incidents occurring within a single workday or work shift, whereas occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or shift; see 20 C.F.R. §§ 10.5(q), (ee).

caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition, for which compensation is claimed; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>7</sup>

In this case, none of the medical reports that appellant submitted established a causal relationship between his condition and the September 18, 1998 employment incident accepted by the Office. In fact, Dr. Engin found degenerative disease of C5-6 and C6-7 while noting that appellant's shoulder was normal. Similarly, Drs. Britt and Greenberg noted appellant's degenerative joint disease from C4 through C6, with joint space narrowing at C5 and C6 but did not establish a causal relationship between his condition and the September 18, 1998 incident. Dr. Osei's reports are likewise of limited probative value in that they do not contain a rationalized medical opinion establishing a causal relationship between appellant's condition and his employment.<sup>8</sup> None of the medical reports provide a history of the September 18, 1998 employment incident, nor do they address causal relationship between a diagnosed condition and the September 18, 1998 employment incident and, therefore, are insufficient to support appellant's claim.

Further, the Board finds that the Office did not abuse its discretion by denying merit review on April 27, 1999.

Section 8128(a) of the Act<sup>9</sup> provides for review of an award for or against payment of compensation. Section 10.606, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.<sup>10</sup> Thus, a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.<sup>11</sup>

Section 10.608(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits.<sup>12</sup> If a claimant fails to submit relevant evidence not previously of record or

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<sup>7</sup> *Elaine Pendleton*, *supra* note 5.

<sup>8</sup> *Linda I. Sprague*, 48 ECAB 386 (1997).

<sup>9</sup> Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.606(b).

<sup>11</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>12</sup> 20 C.F.R. § 10.608(b).

advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.<sup>13</sup>

In this case, the Office properly declined to review the merits of appellant's claim on July 19, 1999. In requesting reconsideration, appellant was required to submit evidence addressing a causal relationship between his condition and his employment. The evidence submitted by appellant in support of his request for reconsideration had been considered previously by the Office. Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether his medical condition was causally related to his employment, the Office acted within its discretion in declining to reopen the claim.

The decisions of the Office of Workers' Compensation Programs dated July 19, March 4 and January 12, 1999 are affirmed.

Dated, Washington, DC  
December 12, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>13</sup> *John E. Watson*, 44 ECAB 612, 614 (1993).