

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

P.O., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
New York, NY, Employer**

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**Docket No. 08-1303
Issued: November 7, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 27, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated January 14, 2008 which denied his reconsideration request. He also filed a timely appeal of the May 10, 2007 merit decision of the Office which denied his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden to establish that he sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On March 27, 2007 appellant, then a 51-year-old police officer, filed a traumatic injury claim alleging that on October 23, 2005 he responded to a call, saw that a patient was about to hit

a doctor with a chair, apprehended the patient and wrestled him to the floor resulting in a shoulder and right knee condition.

In an April 4, 2007 letter, the Office requested additional factual and medical information from appellant as to why the incident was not reported to his supervisor within 30 days.

Additional information was received. In an October 23, 2005 radiology report, Dr. Emily Ann Lichtman, a radiologist, diagnosed osteoarthritis of the acromioclavicular joint of the left shoulder. An October 23, 2005 radiology report of the right knee revealed no radiographic evidence of bone or joint abnormality. In an October 23, 2005 emergency department note, Dr. Lichtman reported that appellant complained of pain to the right knee and left shoulder sustained while apprehending a psychiatric patient. In a February 26, 2006 emergency department note, Dr. Vladislav I. Shick, Board-certified in internal medicine, stated that appellant presented with right knee pain after a twisting injury in April 2005 and noted right knee tenderness. In a March 10, 2006 orthopedic surgery consultation note, Dr. Ralph Lusskin, an orthopedic surgeon, noted that appellant presented with left knee pain, that there were mild osteoarthritis changes on the x-ray, and that there was left knee quad/patella tendinitis, possible medial meniscus tear versus medial compartment degenerative joint disease. In an April 14, 2006 report, Dr. Paul Ort, an orthopedic surgeon, noted that appellant had a history of multiple traumas to both knees over the past year, that mild osteoarthritic changes were on the x-ray and there was a possible medial meniscus tear vs. medial compartment degenerative joint disease. In an April 17, 2006 MRI scan, the left lower extremity revealed a normal MRI scan of the left knee. In a June 9, 2006 note, Dr. Sami O Khan, Board-certified in internal medicine, reviewed the MRI scan which revealed no meniscal tear. A May 3, 2007 duty status report provided restrictions for appellant and described the injury as shoulder and right/left knee. In a May 3, 2007 physician's report, Dr. John T. Hughes, a neurologist, stated that appellant responded to a code 2000 and hurt both knees, both shoulders and his lumbar spine.

In a May 10, 2007 decision, the Office denied appellant's claim for a traumatic injury finding that he had not established fact of injury.

On December 7, 2007 appellant requested reconsideration.¹ In an undated letter received December 10, 2007, he requested an extension of time in order to be reevaluated by his physician. No other information was received.

In a January 14, 2008 nonmerit decision, the Office denied appellant's request for reconsideration on the grounds that no evidence was submitted to warrant a merit review.

¹ The form was dated June 6, 2007 but the fax line was dated December 7, 2007 and it was received in by the Office on December 10, 2007. There was no evidence that it was sent earlier than December 7, 2007. Appellant checked the lines for both reconsideration and review of the written record however the Office only issued a decision addressing the reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing 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 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.³ 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.⁴

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.⁵ The second component is whether the employment incident caused a personal injury.⁶ Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁷

ANALYSIS -- ISSUE 1

Appellant claims that on October 23, 2005 he apprehended a psychiatric patient and wrestled him to the floor in the process sustaining an injury to his shoulder and knee. The Office did not accept that the incident occurred as alleged. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁸ Appellant sought medical attention on the date of the injury and the contemporaneous reports reflect the same incident history. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive

² 5 U.S.C. §§ 8101-8193

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Elaine Pendleton*, *supra* note 3.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, *supra* note 4. Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the claimant's specific employment factors. *Id.*

⁸ *M.H.*, 59 ECAB ____ (Docket No. 08-120, issued April 17, 2008); *George W. Glavis*, 5 ECAB 363, 365 (1953).

evidence.⁹ Although appellant did not file his claim until almost two years later, there is no contradictory evidence, and he has given a consistent history of injury. Therefore the Board accepts that the incident occurred.

The issue in the case is, therefore, whether appellant has established that he sustained an injury as a result of the accepted employment incident. Appellant was diagnosed with osteoarthritis of the acromioclavicular joint of the left shoulder and left knee quad/patella tendinitis. There is no medical opinion as to the cause of such conditions. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁰ There is no evidence of a medical opinion addressing the cause of appellant's conditions consequentially there is no medical opinion that finds that appellant's conditions are causally related to the accepted incident. To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination, state whether the employment injury caused or aggravated the diagnosed conditions and present medical rationale in support of his or her opinion.¹¹ No such report was submitted.

The evidence of record is not sufficient to meet appellant's burden of proof to establish that his osteoarthritis of the acromioclavicular joint of the left shoulder and left knee quad/patella tendinitis are causally related to his federal employment.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608(b) provides that when an application for review of the merits of a claim 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.¹³ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁴

⁹ *S.P.*, 59 ECAB ____ (Docket No. 07-1584, issued November 15, 2007); *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

¹⁰ *Michael E. Smith*, 50 ECAB 313 (1999).

¹¹ *D.D.*, 57 ECAB 734 (2006), *Calvin E. King*, 51 ECAB 394 (2000).

¹² 20 C.F.R. § 10.606(b)(2) (2003).

¹³ *Id.* at § 10.608(b) (2003).

¹⁴ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

The Office is required to reopen a case for merit review if appellant demonstrates that the Office erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not argue that the Office erroneously applied a point of law nor did he present a new relevant legal argument. He did not submit any evidence after the Office issued its January 10, 2007 merit decision therefore relevant and pertinent new evidence was not submitted. Appellant is not entitled to review of the merits of his claim based on any of the requirements under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim, the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration. The Board finds that appellant had not established that he sustained a traumatic injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2008 and May 10, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: November 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board