

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

L.L., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
Chattanooga, TN, Employer**

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**Docket No. 13-253
Issued: May 16, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 13, 2012 appellant filed a timely appeal from a September 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and an October 18, 2012 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (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 met his burden of proof to establish that he sustained a left shoulder injury in the performance of duty on February 19, 2010; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 17, 2012 appellant, then a 59-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging left shoulder pain on February 19, 2010 when he was removing “a bus ground with 14’ insulated hot stick.”

By letter dated July 25, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence necessary to establish his claim, including a medical report from a qualified physician which provided a diagnosis of his condition and an opinion explaining the causal relationship between the diagnosed condition and the employment incident.

In response to OWCP’s request, appellant submitted physical therapy records dated from February 22 to March 3, 2010. He also submitted progress notes from physician’s assistants dated February 24, 26 and March 3, 2010.

In a decision dated September 4, 2012, OWCP denied appellant’s claim on the grounds that the medical evidence was insufficient to establish that he sustained an injury in connection with the February 19, 2010 employment incident.²

On October 1, 2012 appellant requested reconsideration of the September 4, 2012 decision. He related that he was submitting a doctor’s report dated September 21, 2012. No further medical evidence was received.

By decision dated October 18, 2012, OWCP denied appellant’s request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence establishing fact of injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability 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 on a traumatic injury or an occupational disease.⁴

² On August 7, 2012 OWCP received a notice of recurrence of disability dated August 3, 2012. Appellant alleged that on June 2, 2012 he sustained a recurrence of his February 19, 2010 injury, requiring medical treatment. By letter dated August 20, 2012, OWCP informed him that before a recurrence claim could be accepted, the initial claim for work-related injury would have to be accepted.

³ Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁴ Michael E. Smith, 50 ECAB 313 (1999).

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁵ The opinion of the physician must be based on one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶

Section 8101(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. As nurses, physician's assistants, physical and occupational therapists are not physicians as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that the alleged incident occurred on February 19, 2010. The Board finds that appellant has submitted insufficient medical evidence to establish that he had sustained a left shoulder injury due to the accepted work incident.

On July 25, 2012 OWCP informed appellant of the medical evidence necessary to establish his claim. Specifically it requested that he submit a medical report from a physician that included history of injury, diagnosis of his medical condition and medical rationale explaining the relationship of that condition to his employment.

Appellant submitted several treatment and progress notes; but the documents were signed by physical therapists and physician's assistants. As noted, physical therapists and physician's assistants are not physicians and their opinions regarding diagnosis and causal relationship are of no probative medical value. The Board finds that appellant has not submitted any probative medical report which addresses how the accepted incident caused or contributed to his left shoulder condition.

As the only medical documents pertaining to appellant's medical condition are of no probative medical value, appellant had failed to meet his burden of proof to establish that his left shoulder condition was caused by his federal employment duties.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

⁵ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁶ *James Mack*, 43 ECAB 321 (1991).

⁷ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, its regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁸ Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his October 1, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant alleged in his request for reconsideration that he was submitting a medical report from a physician. The Board finds that appellant did not submit additional evidence with his request for reconsideration.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a left shoulder injury on February 19, 2010 in the performance of duty. OWCP properly denied his request for reconsideration without a merit review.

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *K.H.*, 59 ECAB 495 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 18 and September 4, 2012 are affirmed.

Issued: May 16, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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