

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

G.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Portland, OR, Employer)

**Docket No. 14-1732
Issued: December 15, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 6, 2014 appellant filed a timely appeal from an April 28, 2014 nonmerit decision and a March 20, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 in this case are: (1) whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on December 20, 2013; and (2) whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a) in its April 28, 2014 decision.

On appeal, appellant argues that, because FECA authorizes treatment of injured employees by nonphysicians, the reports of nonphysicians should suffice to establish his claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 20, 2013 appellant, then a 56-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging an injury to the lower back with tingling and spasms. He stated that, on the same date, he was injured when he was moving a bag and lost balance on his left side, wobbled to a table, and balanced himself on the table and the bag. Appellant submitted a witness statement, in which a coworker stated that he saw appellant hurt his lower back when he put down a bag on a workstation table and made a face of pain. The coworker asked appellant what happened, to which appellant responded that his lower back “went out.” A supervisor checked a box indicating that appellant was injured within the performance of duty.

Appellant submitted a work capacity evaluation dated December 20, 2013 and signed by a physician’s assistant. He requested authorization for a physical therapy evaluation, therapeutic exercises, ultrasound therapy, and manual therapy on January 3, 2014. Appellant submitted numerous statements from witnesses supporting that the injury occurred as alleged.

Appellant submitted reports from a physician’s assistant dated December 20, 2013 and January 6, 2014.

In an initial evaluation for physical therapy dated December 30, 2013, countersigned by Dr. Valerie Smith, an osteopath, a physical therapist stated that appellant had lower back pain following a work-related injury that occurred on December 20, 2013.² He noted that appellant was lifting and carrying bags on that date when he felt a strain across the left side of his lower back. The physical therapist stated that, since that date, appellant felt pain, spasm, and tightness across the lumbosacral area bilaterally with the left worse than the right. The evaluation also contained measurements of appellant’s objective symptoms and range of motion. The physical therapist’s progress notes dating from December 30, 2013 through January 27, 2014, which were not countersigned, were submitted attached to the initial evaluation.

By letter dated February 6, 2014, OWCP advised appellant that his claim had been reopened for consideration because medical bills had exceeded \$1,500.00. The letter stated that the evidence of record was insufficient to support his claim, noting that the only medical evidence of record had been signed by a physician’s assistant who did not qualify as a physician under FECA. OWCP afforded appellant 30 days to submit additional medical evidence in support of his claim.

Appellant submitted additional progress notes from a physical therapist dating from February 3 through 24, 2014. These notes were not countersigned by a physician. Appellant also submitted reports signed by both a physical therapist and a physician’s assistant dated February 4 and March 5, 2014.

By decision dated March 20, 2014, OWCP denied appellant’s claim. It found that he did not submit medical evidence containing a diagnosis from a physician in support of his claim.

² Dr. Smith’s certification as an osteopath could not be confirmed with the American Osteopathic Association.

OWCP accepted that appellant was a federal civilian employee who filed a timely claim and that the evidence supported that the injury occurred as described.

On April 18, 2014 appellant requested reconsideration of OWCP's March 20, 2014 decision. With his request, he submitted a letter arguing that because FECA stated that any state licensed person may provide medical treatment to federal employees seeking medical care for injuries, his claim should be established.

By decision dated April 28, 2014, OWCP denied appellant's request for reconsideration without reviewing the merits of his claim. It noted that his letter had neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 timely filed within the applicable time limitation period of FECA, that an injury⁴ 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

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁶

Under FECA, the reports of nonphysicians, including physical therapists and physicians' assistants, do not constitute probative medical evidence unless countersigned by a physician.⁷

³ *Supra* note 1.

⁴ OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁷ *See* 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000) (regarding physical therapists); *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998) (regarding physicians' assistants).

The Board has held that the general diagnoses of pain or spasm do not constitute a firm medical diagnoses, but rather descriptions of symptoms.⁸

ANALYSIS -- ISSUE 1

Appellant alleged that on December 20, 2013 he sustained injuries to his lower back in the performance of duty. OWCP denied his claim on March 20, 2014, finding that he had not submitted medical evidence containing a diagnosis from a physician related to the alleged traumatic incident. The Board finds that appellant submitted medical evidence from a physician, but that this evidence did not contain a firm diagnosis of a condition related to the incident of December 20, 2013.

In an initial evaluation for physical therapy dated December 30, 2013, countersigned by Dr. Smith, a physical therapist stated that appellant had lower back pain following a work-related injury that occurred on December 20, 2013. He noted that appellant was lifting and carrying bags on that date when he felt a strain across the left side of his lower back. The physical therapist stated that since that date, appellant felt pain, spasm, and tightness across the lumbosacral area bilaterally with the left worse than the right. As noted above, the reports of physical therapists do not constitute probative medical evidence unless countersigned by a physician.⁹ As the December 30, 2013 report was countersigned by Dr. Smith, it constitutes medical evidence from a physician.

However, the December 30, 2013 evaluation report does not contain a firm diagnosis of any condition. Instead, it merely describes appellant's objective symptoms and reports the history of his injury as communicated by appellant to the physical therapist. The report notes that appellant "felt a strain" on the date of injury across the left side of his lower back, but this is the self-reported description of a symptom and not a firm medical diagnosis. Similarly, it notes that, since that date, appellant felt pain, spasm, and tightness across the lumbosacral area bilaterally with the left worse than the right. As noted above, pain and spasm are descriptions of symptoms and do not constitute firm medical diagnoses supportive of a claim for compensation.¹⁰ "Tightness" is a description of a symptom as well. Hence, the December 30, 2013 initial evaluation does not contain a firm diagnosis of a condition related to the incident of December 20, 2013.

Appellant submitted several reports from a physician's assistant, which were not countersigned by a physician. As noted above, physicians' assistants do not qualify as physicians under FECA, and their reports do not constitute probative medical evidence unless countersigned by a physician.¹¹ As such, these reports do not support appellant's claim for compensation. Appellant did not submit any other medical evidence in support of his claim.

⁸ See *J.S.*, Docket No. 07-881 (issued August 1, 2007); *Robert Broome*, 55 ECAB 339 (2004).

⁹ *Supra* note 7.

¹⁰ *Supra* note 8.

¹¹ *Supra* note 7.

Therefore, the Board finds that appellant did not submit sufficient medical evidence providing a firm diagnosis from a qualified physician. Appellant failed to establish that he had any diagnosed condition resulting from the December 20, 2013 employment incident.

The Board notes that appellant submitted evidence after the issuance of the March 20, 2014 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.¹²

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

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's 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.¹³ Section 10.608(b) of OWCP's 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.¹⁴

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.¹⁵ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁷

ANALYSIS -- ISSUE 2

OWCP issued a March 20, 2014 merit decision denying appellant's claim for compensation. On April 18, 2014 appellant requested reconsideration of this decision.

The issue presented on appeal of the April 28, 2014 decision is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review

¹² 20 C.F.R. § 501.2(c).

¹³ *Id.* at § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

¹⁴ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495, 499 (2008).

¹⁵ *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

¹⁶ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

¹⁷ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

of the merits of the claim. With his April 18, 2014 request for reconsideration, appellant did not submit any new evidence in support of his claim. Thus, he is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).

With his request for reconsideration, appellant submitted a letter arguing that because FECA stated that any state licensed person may provide medical treatment to federal employees seeking medical care for injuries, his claim should be established. Appellant sought review of the March 20, 2014 merit decision based upon the first and second above-noted requirements of section 10.606(b)(2). However, the Board finds that his legal contention whatever its intellectual merit is contrary to statute and Board precedent.

Appellant submitted the same legal argument on appeal to the Board. As noted above, only rationalized medical evidence from physicians will generally support the existence of a claimed work-related condition.¹⁸ Establishing the existence of a work-related condition is a separate issue from authorizing treatment of a condition once it has been established by probative medical evidence.¹⁹ As such, appellant's legal argument did not have a reasonable color of validity.

The Board accordingly 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 a traumatic injury in the performance of duty on December 20, 2013. The Board further finds that OWCP properly denied appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁸ See *supra* note 7.

¹⁹ 20 C.F.R. §§ 10.115-121.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 28 and March 20, 2014 are affirmed.

Issued: December 15, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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