

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

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**M.H., Appellant**

**and**

**U.S. POSTAL SERVICE, MONTEREY  
STATION, Lubbock, TX, Employer**

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**Docket No. 15-1670  
Issued: December 15, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 3, 2015 appellant filed a timely appeal from an April 16, 2015 merit decision and a June 16, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant established an injury in the performance of duty on January 5, 2015, as alleged; and (2) whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted new evidence on appeal. The Board cannot consider this evidence submitted for the first time on appeal as the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final merit decision. 20 C.F.R. § 501.2(c)(1); *see also Dennis E. Maddy*, 47 ECAB 259 (1995). However, as noted above, this evidence can be submitted with a timely filed request for reconsideration to OWCP.

## **FACTUAL HISTORY**

On January 8, 2015 appellant, then a 65-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on January 5, 2015 he slipped on ice and sustained a strain of his left lower back.

In support of his claim, appellant submitted multiple documents from Concentra Medical Centers. In a January 8, 2015 note, Melissa L. Kemp, a physician assistant, diagnosed unspecified accidental fall, other symptoms referable to back, contusion of interscapular region, contusion of elbow, and contusion of hip. In a January 13, 2013 note, Michelle Coale, a nurse practitioner, diagnosed back muscle spasm, contusion of left back wall of thorax, and accidental fall. In reports dated from January 6 to 16, 2015, physical therapist John Martin and Ms. Coale noted treatment of appellant with therapeutic exercises for contusion of left back wall of thorax, contusion of left elbow, contusion of right hip, and back muscle spasm from an accidental fall. Appellant was released from care and to regular-duty work by his physical therapist on January 19, 2015.

On January 14, 2015 appellant accepted an offer of a modified limited-duty job with the employing establishment.

By decision dated April 16, 2015, OWCP denied appellant's claim.

On April 26, 2015 appellant submitted a request for reconsideration. He resubmitted the same notes from Concentra Medical Centers that were already in the record. These reports included duplicate copies of notes by Ms. Kemp and duplicate physical therapy notes. Appellant also submitted the results of an investigative interview conducted on January 14, 2015. He noted in this interview that he was aware of procedures for walking on ice and that there was no rail on the steps. Appellant noted that, when he slipped on ice and fell, he landed on his back and left elbow. He also submitted a January 19, 2015 clinical summary of his treatment prepared by Ms. Kemp. Ms. Kemp noted that appellant had current health issues of back muscle spasm; contusion of elbow, left; contusion of hip, left; contusion of left back wall of thorax; and fall, accidental. She noted that he was released from treatment as maximum medical improvement had been reached.

By decision dated June 16, 2015, OWCP denied appellant's reconsideration request without conducting a merit review.

## **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 timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to

the employment injury.<sup>3</sup> 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.<sup>4</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.<sup>5</sup> In order to meet his or her burden of proof to establish the fact that he or she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he or she actually experienced the employment injury or exposure at the time, place, and in the manner alleged.<sup>6</sup>

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>7</sup> The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

It is undisputed that appellant slipped and fell on ice on January 5, 2015. However, the medical evidence does not establish a firm medical diagnosis causally related to the accepted injury.

Appellant has not submitted any qualifying medical evidence containing a firm medical diagnosis or an opinion that the diagnosis was causally related to his accepted employment incident. All of the reports submitted were signed by physical therapists, a nurse, or a physician

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<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> *See supra* note 3.

<sup>6</sup> *Linda S. Jackson*, 49 ECAB 486 (1998).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

<sup>8</sup> *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

assistant. These reports have no probative value to establish appellant's claim as these medical care providers are not considered physicians as defined under FECA.<sup>9</sup>

An award of compensation may not be based on surmise, conjecture, or speculation. Neither, the fact that appellant's claimed condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish causal relationship.<sup>10</sup> Because he has not provided a medical opinion clearly explaining how the accepted employment incident resulted in a firm medical diagnosis, he failed to meet his burden of proof, and OWCP properly denied his claim for compensation.

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) of FECA,<sup>11</sup> OWCP 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.<sup>12</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>13</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits. Submission of evidence which repeats or duplicates evidence already in the record does not constitute a basis for reopening a case.<sup>15</sup> The majority of the evidence submitted on reconsideration, including the reports of appellant's physical therapists and the nurse practitioner's January 8, 2015 note, are duplicative of reports

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<sup>9</sup> Section 8102(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. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.404; *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>10</sup> *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

<sup>11</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he 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>12</sup> 20 C.F.R. § 10.606(b)(3).

<sup>13</sup> *Id.* at § 10.607(a).

<sup>14</sup> *Id.* at § 10.608(b).

<sup>15</sup> *See D.K.*, 59 ECAB 141 (2007).

already in the record. The clinical summary of appellant's treatment prepared by Ms. Kemp on January 19, 2015 is repetitive of the other reports. Therefore, this duplicative or repetitive evidence is not sufficient to merit opening appellant's case for reconsideration.

The new evidence is also insufficient to warrant further merit review. The investigative report concerns how the employment incident occurred. However, OWCP accepted that the employment incident occurred as alleged. The underlying issue in this case was whether appellant sustained a medical diagnosis causally related to the accepted incident. That is a medical issue which must be addressed by relevant medical evidence.<sup>16</sup> Accordingly, appellant failed to submit any new and relevant evidence addressing causal relationship in support of her claim.<sup>17</sup>

The Board finds that appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not meet any of the regulatory requirements and OWCP properly declined to reopen his claim for further merit review.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant did not establish an injury in the performance of duty on January 5, 2015, as alleged. The Board further finds that OWCP properly refused to reopen his claim for merit review pursuant to 5 U.S.C. § 8128(a).

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<sup>16</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>17</sup> *D.H.*, Docket No. 15-1090 (issued July 29, 2015).

<sup>18</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 16 and April 16, 2015 are affirmed.

Issued: December 15, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board