

FACTUAL HISTORY

On February 28, 2011 appellant, then a 50-year-old industrial engineering technician, filed a traumatic injury claim (Form CA-1) alleging that on Thursday, February 17, 2011 he sustained a neck sprain when exiting his vehicle in a parking lot. He slipped on ice and fell, hitting the vehicle door on the way to the pavement. The injury occurred at approximately 9:50 a.m. On the reverse side of the form, appellant's regular work hours were recorded as Monday through Friday, 6:00 a.m. to 3:30 p.m. He returned to work that same date at 10:00 a.m. Appellant first received medical care on February 28, 2011. His supervisor checked the box marked "yes" when asked if his knowledge of the facts about the injury agreed with statements of the employee and/or witness.

In a February 25, 2011 medical report, Dr. Douglas C. Fuller, Board-certified in occupational medicine, reported that on February 17, 2011 appellant slipped and fell on ice in the parking lot outside of building 847. Appellant complained of pain since his injury and came down on his right flank and hurt his neck and right shoulder blade. Dr. Fuller noted a history of chronic neck problems and cervical fusion. Upon physical examination, he diagnosed neck sprain and noted a work injury from February 17, 2011. Dr. Fuller opined that appellant's condition was caused by a fall due to tripping, slipping, or stumbling and noted the location of the accident as industrial premises. Appellant was released to work without restrictions and advised to follow up with his treating physician.

Appellant submitted additional medical and diagnostic reports dated February 28, 2011 through February 28, 2012 pertaining to his neck injury.² Per OWCP procedures, his claim was administratively closed for a minor injury with minimal or no lost time from work.³

In a May 19, 2014 CA-110 telephone note, appellant requested that his claim be reopened. The CE informed him that he would need to file a claim for recurrence (Form CA-2a) due to the break in his treatment.

In a May 29, 2014 Form CA-2a, appellant filed a recurrence claim for medical treatment only. He noted the date of the original injury as February 17, 2011 and the date of recurrence as May 20, 2014 reporting right arm, hand, and neck pain since he slipped on the ice. Appellant stated that he worked with a computer, but had right-sided pain on and off. He further stated that using his keyboard caused his right hand and fingers to tingle along with pain in the neck and shoulder which he attributed to his original injury. Appellant explained that his right arm was diagnosed with carpal tunnel and ulnar nerve issues, but that he never had a magnetic resonance imaging (MRI) scan of the neck. He noted a history of prior injuries including trigeminal neuralgia surgery on December 19, 2011 four right shoulder surgeries spanning from

² The Board notes that appellant also submitted medical reports dated November 20 through December 18, 2012 pertaining to bilateral arm injuries under a different Claim No. xxxxxx206. The record for Claim No. xxxxxx206 is not before the Board.

³ An uncontroverted traumatic injury claim in which medical bills are not expected to exceed \$1,500.00 and a wage-loss claim has not been filed may be handled through administrative review. These cases are automatically closed upon case creation, without claims examiner (CE) review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.2(d) (June 2011).

September 27, 2011 through October 30, 2012, left ulnar nerve surgery on November 20, 2012 and February 19, 2013, right ulnar nerve surgery on December 18, 2012, left carpal tunnel surgery on December 17, 2013, and right carpal tunnel surgery on January 14, 2014. On the reverse side of the form, appellant's supervisor stated that he was fully capable of work following the initial injury and no accommodations or adjustments were made to his regular-duty assignments.

In support of his claim, appellant submitted medical and diagnostic reports dated June 18 through July 8, 2014.

By letter dated September 11, 2014, OWCP notified appellant that his claim was initially administratively handled to allow medical payments, as his claim appeared to involve a minor injury resulting in minimal or no lost time from work. However, appellant's claim had been reopened for consideration of the merits because he filed a claim for a recurrence. He was advised that no action could be taken on his Form CA-2a claim until his case had been adjudicated. Appellant was further advised that the evidence of record was insufficient to establish his traumatic injury claim. OWCP requested he submit a response to a questionnaire in order to substantiate the factual basis of his claim and a medical report from his attending physician including a diagnosis, history of the injury, and a physician's opinion on causal relationship supported by medical rationale. The questionnaire requested appellant describe the nature of his injury, how the injury occurred, witness statements, the immediate effects of his injury, any other injuries sustained as a result of the incident, any prior similar injuries, the time of injury, the work activities he was engaged in at the time of injury, and whether he was required by his employing establishment to park in the lot. He was given 30 days to provide the requested information. No further evidence was received.

By decision dated January 29, 2015, OWCP denied appellant's claim finding that the evidence did not establish that the incident occurred as alleged. It noted that he failed to establish fact of injury because he did not respond to the questionnaire that was sent with the September 11, 2014 development letter.

On April 16, 2015 appellant requested reconsideration of OWCP's January 29, 2015 decision. He stated that on February 17, 2011 he slipped and fell on ice, causing injury to his neck and right elbow. Appellant stated that he was working to get this case reopened and had another existing claim for carpal tunnel and elbow surgeries under Claim No. xxxxxx206. He had been working with his CE under that claim to determine whether his right arm injury was related to his neck injury and was advised that the neck would have to be treated under this Claim No. xxxxxx016.

In support of his claim, appellant submitted additional medical reports dated April 24, 2014 through February 26, 2015.

By decision dated May 11, 2015, 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. It noted that appellant failed to respond to OWCP's questionnaire and did not provide a factual statement which would establish the factual portion of his claim.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, and its implementing regulations, an employee bears the burden of proving all essential elements of a claim, including that he or she experienced a specific event, incident or exposure at the time, place, and in the manner alleged, and that the alleged injury occurred in the performance of duty.⁴ Board precedent requires that an injury sustained in the performance of duty must have arisen: (1) at a time when the employee may reasonably be stated to be engaged in his or her masters business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.⁵

The Board has included within the performance of duty a reasonable time before and after work to allow for coming and going, as well as personal ministrations, such as lunch or bathroom breaks, engaged in for the benefit of the employing establishment.⁶ If the injury does not take place during those periods or on employing establishment premises, the Board will place special emphasis on whether the employee was engaged in an activity related to fulfilling the duties of his employment.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on February 17, 2011.

Appellant alleged that on February 17, 2011 he slipped and fell on ice in an employing establishment parking lot, causing a neck injury.⁸ He has not provided the sufficient detail needed to establish that the incident occurred in the manner alleged, and in the performance of duty.⁹ Appellant stated that the incident occurred in the Air Force base parking lot. It is unclear if he was in the performance of duty when this incident occurred.

Appellant's CA-1 form lacks a sufficient explanation to establish that the alleged incident occurred in the performance of duty, as alleged. He reported that his injury occurred when exiting his vehicle in a parking lot and noted the time of injury as 9:50 a.m. On the reverse side of the form, appellant's work start time is noted as 6:00 a.m. In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or

⁴ *Supra* note 1; 20 C.F.R. § 10.115.

⁵ *Mary Keszler*, 38 ECAB 735 (1987).

⁶ *George E. Franks*, 52 ECAB 474 (2001).

⁷ *See Venicee Howell*, 48 ECAB 414 (1997); *Narbik A. Karamian*, 40 ECAB 617 (1989).

⁸ An injury occurring on Air Force base property constitutes an injury on premises. *See generally L.L.*, Docket No. 10-2384 (issued July 15, 2011).

⁹ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.¹⁰ It is unclear whether the incident occurred during appellant's normal work hours or if he was just arriving for the start of his shift. It is also unclear why he was exiting his vehicle at this time and whether this act related to his federal employment duties. The record is silent on what, if any, employment duties appellant was performing at 9:50 a.m. in the parking lot where he sustained his injury. Appellant failed to respond to OWCP's questionnaire and his April 16, 2015 request for reconsideration did not provide further insight to the questions raised. He failed to provide an adequate description of the February 17, 2011 employment incident which he believed caused or aggravated his condition to establish that an injury occurred at the time, place, and in the manner alleged, and in the performance of duty. Thus, appellant did not meet his burden of proof.¹¹

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), 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.¹² 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)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal 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 of the merits of the claim. In his July 13, 2012 application for reconsideration, he did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a new and relevant legal argument. He argued only that his injury was employment related and that he followed proper protocol once he realized his cervical injury was not related to Claim No. xxxxxx206.

¹⁰ See *Vincent A. Rosenquist*, 54 ECAB 166, 168 (2002); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹¹ Given that appellant did not establish an employment incident in the performance of duty, further consideration of the medical evidence is unnecessary. See *Bonnie A. Contreas*, 57 ECAB 364, 368 n.10 (2006).

¹² *D.K.*, 59 ECAB 141 (2007).

¹³ *K.H.*, 59 ECAB 495 (2008).

The underlying issue on appeal involves fact of injury; whether the incident occurred at the time, place, and in the manner alleged within the performance of duty. Appellant's reconsideration request does not provide greater detail pertaining to whether the incident occurred within the course of his employment. He failed to respond to OWCP's September 11, 2014 questionnaire. Instead appellant submitted new evidence in the form of medical reports. While these documents have some connection to his claim, they are not relevant to the issue for which OWCP denied appellant's claim, the failure to establish that the incident occurred in the performance of duty at the time, place, and in the manner alleged. Therefore, these documents do not constitute a basis for reopening appellant's claim.¹⁴ A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing that his February 17, 2011 injury occurred in the performance of duty.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 an injury in the performance of duty on February 17, 2011. OWCP properly denied his request for reconsideration.

¹⁴ *David J. McDonald*, 50 ECAB 185 (1990).

ORDER

IT IS HEREBY ORDERED THAT the May 11 and January 29, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 8, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board