

her flight experienced turbulence and that upon arriving at San Francisco International Airport, she felt light headed and had pressure or fullness in her ears as well as some hearing loss. She alleged that when she stood to walk off the aircraft, she felt unbalanced and had ringing in her ears, dizziness and was extremely exhausted. In support of her claim, appellant submitted a note by a physician's assistant, Jeff Young, dated January 16, 2004, wherein he indicated that she could not work on January 17 and 18, 2004 due to illness.

By letter dated February 23, 2004, the Office requested that appellant submit further information including a physician's opinion as to how her injury resulted in a medical condition as well as documentation to support that the incident occurred in the performance of duty. She responded by submitting two notes. The first note dated January 16, 2004 and signed by a physician whose signature is illegible, requested that appellant be excused from work from January 16 to 18, 2004 due to illness. The other dated February 12, 2004, signed by Mr. Young, requested that she be excused from work January 31, February 1 and 11 to 13, 2004 due to illness.

The Office issued a decision on March 24, 2004 denying appellant's claim, finding that, although the evidence of file supported that the claimed event occurred, there was no medical evidence that provided a diagnosis which could be connected to the events of employment. The Office indicated later in the same decision, that the employing establishment had not submitted the information requested regarding her duty while in a travel status and that the evidence was also insufficient to support that appellant was in the performance of duty when the claimed incident occurred.

By letter dated June 9, 2004, appellant requested reconsideration. In support thereof, she submitted answers to questions propounded to the employing establishment by the Office. Appellant's supervisor indicated that on January 15, 2004 she was traveling on official duty between Phoenix, Arizona and San Francisco, California as a detainee escort. Appellant also submitted another report by Mr. Young on the stationery of Dr. Lawrence Bence, a general practitioner, dated March 19, 2004, indicating that he treated her for a medical condition that occurred on or around January 15, 2004 when appellant had a sudden onset of vertigo (dizziness) while she was flying between Phoenix, Arizona and San Francisco, California on federal duty. He noted that the condition did not resolve February 12, 2004, at which time she had a magnetic resonance imaging scan that showed chronic sinusitis for which appellant is currently receiving treatment. Dr. Bence stated that he believed that her condition was exacerbated by the airplane travel required for her employment. He noted that appellant was improving and was expected to make a complete recovery.

By decision dated June 21, 2004, the Office denied appellant's request for reconsideration without reviewing the case on the merits as it found that the note signed by the physician's assistant did not constitute medical evidence and was speculative at best.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act 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 filed within the applicable time limitation 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.¹ 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.²

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. There are two components involved in establishing the fact of injury. 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.³ 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.⁴

The Board has recognized that the Act covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.⁵

ANALYSIS -- ISSUE 1

In the instant case, the Office indicated in its March 24, 2004 decision that the evidence of file supported that the claimed event occurred. The Board notes that 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 evidence.⁶ Accordingly, the Board finds that the Office properly determined that appellant’s uncontradicted statement that she experienced turbulence on a flight on January 15, 2004 after which she felt light headed and had pressure or fullness in her ears and some hearing loss was sufficient to establish that the claimed event occurred. However, the Board finds that the Office also properly found that at the time of its March 24, 2004 decision denying appellant’s claim there was no evidence that she was traveling on official government business. Accordingly, the Office properly denied her claim for fact of injury as appellant had not established that she was in the performance of duty on March 24, 2004.⁷

¹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

² *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

³ See *Tracey P. Spillane*, 54 ECAB ____ (Docket No. 02-2190, issued June 12, 2003); *Deborah L. Beatty*, 54 ECAB ____ (Docket No. 02-2294, issued January 15, 2003).

⁴ *Id.*

⁵ See *Larry G. Peters*, 51 ECAB 231 (1999).

⁶ *Thelma Rogers*, 42 ECAB 866 (1991).

⁷ As the Board finds that appellant failed to establish that she was in the performance of duty on January 15, 2004 when she allegedly sustained injuries at the time of issuance of the March 24, 2004 Office decision, a review of the medical evidence is unnecessary.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁸ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁹ To be entitled to a merit review of an Office 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.¹⁰ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS -- ISSUE 2

Appellant's claim was denied as she did not submit evidence sufficient to establish that she sustained an injury in the performance of duty and because she did not submit sufficient medical evidence to support her claim. With her request for reconsideration, appellant submitted evidence in support of the fact that she was injured in the performance of duty. Specifically, she submitted a supervisor's statement wherein he indicated that on January 15, 2004 appellant was traveling on official duty between Phoenix, Arizona and San Francisco, California as a detainee escort. This served as pertinent new and relevant evidence sufficient to reopen the case as to the issue of whether appellant was in the performance of duty at the time of the incident. As this evidence was not previously of record or reviewed by the Office and pertained directly to the issue of the case, the Board finds that she met the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(2)(iii).¹² The Board finds that the supervisor's statement was sufficient to require reopening appellant's case for further review of the merits. As the Office failed to review this new evidence, the Board finds it improperly denied appellant's request for further merit review. The June 21, 2004 decision will be set aside and the case remanded for consideration of all the medical and documentary evidence contained in the record.

CONCLUSION

As appellant did not submit evidence sufficient to show that she was in the performance of duty on January 15, 2004 the Office properly denied her claim on March 24, 2004. However, the Board finds that with respect to the June 21, 2004 decision denying reconsideration, the Office improperly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁸ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ 20 C.F.R. § 10.608(b).

¹² See *Claudio Vazquez*, 52 ECAB 496 (2001).

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2004 decision of the Office of Workers' Compensation Programs is affirmed. However, the decision of the Office dated June 21, 2004 is set aside and this case is remanded for further action in accordance with this decision of the Board.

Issued: April 26, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member