United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
	)	**Docket No. 06-2174**
and	)	**Issued: April 18, 2007**
	)	
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Atlanta, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 26, 2006, which denied modification of a decision dated December 2, 2005, which denied his claim for a traumatic injury. He also appealed a decision dated June 5, 2006, which denied merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review in a decision dated June 5, 2006.

FACTUAL HISTORY

On October 20, 2005 appellant, then a 50-year-old supervisory park ranger, filed a claim alleging that, on September 23, 2005, he wrestled with a fleeing suspect and was exposed to his blood which was allegedly positive for the human immunodeficiency virus. He did not stop work.

By letter dated October 28, 2005, the Office advised appellant of the type of factual and medical evidence needed to establish his claim and requested that he submit such evidence, particularly requesting that appellant submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

In a decision dated December 2, 2005, the Office denied appellant's claim on the grounds that appellant failed to establish fact of injury as required by the Federal Employees' Compensation Act.[1]

In a letter dated December 7, 2005, appellant requested reconsideration. He submitted a providers report dated September 23, 2005, prepared by Dr. Chris Gisness, Board-certified in emergency medicine, who noted that appellant was a park ranger and was exposed to bloody body fluids from an individual he was apprehending. Dr. Gisness indicated that during the incident appellant was wearing gloves and had no open lesions. Also submitted were doctor's orders from Grady Health System dated September 23, 2005, which noted that appellant was tested for human immunodeficiency virus and hepatitis B and C. Also submitted were emergency room treatment notes from September 25, 2005, where appellant presented with complaints of exposure to body fluid which was positive for human immunodeficiency virus. The physical examination revealed no abnormalities and appellant was advised to follow-up in three days.

In a decision dated January 26, 2006, the Office denied modification of the prior decision finding that appellant failed to establish that he sustained a work-related injury. The Office found that, although appellant was exposed to blood from a person who was allegedly positive for human immunodeficiency virus during his employment, he had not established that he had sustained a medical illness or compensable condition as a result of such exposure.

By a letter dated February 8, 2006, appellant requested reconsideration and submitted additional evidence. In a statement dated April 15, 2006, he referenced an incident report prepared by a coworker, Jon Thacker, dated April 3, 2006, who was involved in the work incident of September 23, 2005. In the incident report dated September 23, 2005, Mr. Thacker indicated that, on September 23, 2005, while on patrol, he and appellant apprehended a panhandler who, upon search of this person, was discovered to be bleeding. He indicated that he had the suspect's blood on his hands and the suspect advised that he tested positive for human immunodeficiency virus.

[1] 5 U.S.C. §§ 8101-8193.

In a decision dated June 5, 2006, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[2]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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 which is alleged to have occurred.[3] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. 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.[4]

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.[5] 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]

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

[3] *Michael E. Smith*, 50 ECAB 313 (1999).

[4] *Id*.

[5] *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] *Jimmie H. Duckett,* 52 ECAB 332 (2001); *Franklin D. Haislah,* 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

The Act[7] defines "injury" stating that this "includes, in addition to injury by accident, a disease proximately caused by the employment and damage to or destruction of medical braces, artificial limbs and other prosthetic devices which shall be replaced or repaired and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services."

Chapter 2.805.8 of the Office's procedure manual[8] provides:

> "High-Risk Employment. Certain kinds of employment routinely present situations which may lead to infection by contact with animals, human blood, bodily secretions and other substances. Conditions such as [human immunodeficiency virus] (HIV) infection and hepatitis B more commonly represent a work hazard in health care facilities, correctional institutions and drug treatment centers, among others, than in [f]ederal workplaces as a whole. Likewise, claims for brucellosis, anthrax and similar diseases will most often arise among veterinarians and others who regularly work with livestock."

Chapter 3.400.7 of the Procedure Manual[9] provides:

> "Other Modes of Treatment.
>
> > a. Preventive (Prophylactic) Treatment. The [Act] does not authorize provision of preventive measures such as vaccines and inoculations and in general, preventive treatment is a responsibility of the employing agency under the provisions of 5 U.S.C. § 7901. However, preventive care can be authorized by [the Office] for the following:
> >
> > > (1) Complications of preventive measures which are provided or sponsored by the agency, such as adverse reaction to prophylactic immunization.
> > >
> > > (2) An injury involving actual or probable exposure to a known contaminant, thereby requiring disease-specific measures against infection. Included among such treatments would be tetanus antitoxin or booster toxoid injections for puncture wounds; administration of rabies vaccine where a bite from a rabid animal or one whose status was unknown, is involved; or AZT where exposure to HIV virus has occurred."

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[7] 5 U.S.C. § 8101(5).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship,* Chapter 2.805.8 (October 1995).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.7 (April 1992).

ANALYSIS -- ISSUE 1

The Board finds sufficient evidence in the record from which to conclude that a work incident occurred on September 23, 2005, which consisted of appellant being exposed to blood from a suspect who allegedly tested positive for human immunodeficiency virus.[10] Whether the employment incident caused a personal injury generally can be established only by medical evidence and appellant has not submitted rationalized, probative medical evidence to establish that the employment incident on September 23, 2005 caused a diagnosed medical condition.[11]

Exposure to a disease does not fall within the definition of an injury as set forth in the Act.[12] Appellant's law enforcement position falls within the Chapter 2.805.8 of the procedure manual[13] with regard to high-risk employment in which the employment routinely presents situation which may lead to infection by contact with human blood, bodily secretions and other substances. He is required to arrest suspects and some suspects have communicable diseases. In this instance appellant was issued protective gear including gloves in order to minimize the danger of exposure to such diseases; however, this gear does not guarantee protection from exposure. The evidence reveals that the present claim does not involve personal injury as he did not sustain a bruise, cut, scrape or bite to exposed skin. As noted above, such exposure is not by itself a personal physical injury. The Board further notes that appellant would not be afforded coverage under Chapter 3.400.7(a)(2) of the Office's procedure manual[14] which only affords preventive care once there is "an injury involving actual or probable exposure." As noted, an injury has not been established.

Appellant submitted a report from Dr. Gisness, dated September 23, 2005, who noted that appellant was a park ranger and was exposed to bloody body fluids from an individual he was apprehending. Dr. Gisness indicated that during the incident appellant was wearing gloves and had no open lesions. Also submitted were doctor's orders from Grady Health System dated September 23, 2005, which noted that appellant was tested for human immunodeficiency virus and hepatitis B and C. However, Dr. Gisness did not find that appellant sustained an injury as a result of the apprehension of the suspect and possible blood contact. Further, he found no open sores or lesions that might have been exposed to any contaminated fluids.

Appellant also submitted emergency room treatment notes from September 25, 2005, where he presented with complaints of exposure to body fluid from an individual who was positive for human immunodeficiency virus. The physical examination revealed no

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[10] 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. *See Edward W. Malaniak*, 51 ECAB 451 (2000).

[11] A claimant's burden of proof includes the submission of rationalized medical evidence, based on a complete factual and medical background, showing causal relationship. *See Calvin E. King*, 51 ECAB 394 (2000).

[12] 5 U.S.C. § 8101(5).

[13] *Supra* note 8.

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.7(a)(2) (April 1992).

abnormalities and he was advised to follow-up in three days. However, as noted above, the health practitioner did not find that appellant sustained an injury as a result of the possible blood contact. Further, the physical examination was normal, with no open sores or lesions that might have been exposed to any contaminated fluids.

In this case, appellant did not establish that he contracted human immunodeficiency virus. His claim was for "exposure to infected HIV blood" but all the tests he underwent for human immunodeficiency virus were negative. Since none of the medical evidence of record establishes that appellant contracted human immunodeficiency virus or that he sustained any personal injury at work, he has failed to establish his claim.[15] The Board notes that the evidence submitted was insufficient to show that appellant sustained an injury in the performance of duty and that fear of future injury is not compensable under the Act.[16]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[17]

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[18] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[19] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the (Office); or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

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[15] *See Duane B. Harris*, 49 ECAB 170, 173-74 (1997); *O. Paul Gregg*, 46 ECAB 624, 634 (1995).

[16] *See Mary Geary,* 43 ECAB 300, 309 (1991); *Pat Lazzara,* 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of future injury is not a basis for compensation).

[17] *See Dennis M. Mascarenas,* 49 ECAB 215 (1997).

[18] 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[20]

ANALYSIS -- ISSUE 2

Appellant's January 24, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office.

Appellant's request for reconsideration referenced an incident report prepared by a coworker, Mr. Thacker, dated April 3, 2006, who was present during the work incident of September 23, 2005. However, his letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant, as noted, submitted the September 23, 2005 incident report from Mr. Thacker. However, this incident report, while new, is not relevant because the incident on September 23, 2005 is not in dispute and was accepted by the Office. The underlying issue is medical in nature but appellant did not submit any new medical evidence supporting that employment factors caused an injury on September 23, 2005. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.[21] Therefore, the Board finds that the Office properly denied appellant's requests for reconsideration without reviewing the merits of the claim.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an injury causally related to his September 23, 2005 employment incident and that the Office properly denied appellant's requests for reconsideration without conducting a merit review of the claim.[22]

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[20] *Id*. at § 10.608(b).

[21] *Supra* note 19.

[22] With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the June 5 and January 26, 2006 and December 2, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 18, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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