

FACTUAL HISTORY

On October 23, 2006 appellant, then a 46-year-old mail processor, filed a traumatic injury claim alleging that on the same day he sustained a neck strain due to moving suddenly when “Safety Specialist Reed” grabbed his identification badge during a fire drill at the employing establishment.

On November 6, 2006 the Office informed appellant that the evidence received was insufficient to support his claim as it did not establish that he experienced the incident, that he had a diagnosed condition and that his injury was related to his employment.

The Office received additional information from appellant including October 23, 2006 discharge instructions, and October 23, 2006 vital signs and pain assessment. The Office also received an October 23, 2006 duty status report from Dr. Erin Rohlman, M.D., who found neck sprain with muscle spasms and diagnosed neck strain. In an October 27, 2006 witness statement, Safety Specialist Arthur Reed stated that he approached employees who were smoking during the fire drill and asked their names but at no time did he touch anyone. Mr. Reed noted that none of the employees he approached during the fire drill made any quick movements or exhibited pain symptoms in his presence. In the October 23, 2007 emergency department physician’s documentation, Dr. Rohlman diagnosed neck sprain and stated that appellant felt pain in his neck when he “jerked away from someone” at work.

On December 12, 2006 the Office denied appellant’s claim on the grounds that the evidence was insufficient to establish that the event occurred as alleged and that there was no medical evidence of a diagnosed condition related to the claimed event.

On March 7, 2007 appellant requested an oral hearing. On April 5, 2007 the Office denied appellant’s request on the grounds that his request was untimely as it was made more than 30 days after the issuance of a final decision by the Office.

On May 17, 2007 appellant requested reconsideration. The Office received an October 23, 2006 patient visit summary and appellant’s insurance information as well as a copy of the October 23, 2006 duty status report from Dr. Rohlman. On May 24, 2007 the Office issued a nonmerit decision denying reconsideration on the grounds that no new evidence was submitted.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act¹ has the burden of establishing that 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 timely filed within the applicable time limitation period 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.² These are the essential

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

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. 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.⁴ 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.⁵

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a neck condition in the performance of duty on October 23, 2006 when he jerked suddenly away from a coworker. The Office denied the claim on the grounds that appellant submitted insufficient evidence to establish that the incident occurred as alleged, that he sustained a diagnosed condition and that the condition was causally related to the incident.

The factual evidence of record is not sufficient to establish appellant's account of events. Mr. Reed stated in an October 27, 2006 letter that while he did approach some employees during the fire drill he did not touch anyone nor did he see anyone make any quick movements or exhibit pain symptoms in his presence. There were no other witness statements to support appellant's account of events.

The lack of factual corroboration as to the occurrence of the incident is compounded by the insubstantial medical evidence. While the medical evidence establishes that appellant had a diagnosed condition, neck sprain, it fails to establish how the condition is causally related to the alleged incident. Both the October 23, 2006 duty status report and the physician documentation diagnose neck sprain but do not explain how the alleged incident caused the neck sprain.

The Board finds that the record does not sufficiently corroborate appellant's version of an October 23, 2006 traumatic incident. The Board also finds that the medical evidence fails to establish that appellant's neck sprain was related to this alleged incident. Due to the conflicting evidence regarding the time, place and the manner in which the alleged incident occurred⁶ and due to the lack of medical evidence establishing that the alleged incident caused appellant's condition; he has not established his claim.

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Id.* For a definition of the term traumatic injury, see 20 C.F.R. § 10.5(ee). For a definition of the term occupational disease or illness, see 20 C.F.R. § 10.5(g).

⁶ *See Caroline Thomas*, 51 ECAB 451, 455 (2000).

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought.⁷ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁸ The Board has held that the Office, in its broad discretionary authority in the administration of the Act,⁹ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹¹

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office issued its decision on December 12, 2006. Appellant requested an oral hearing on March 7, 2007, more than 30 days after the date of issuance of the decision appealed.

After it determined that appellant's request was untimely, the Office exercised its discretion by denying appellant's request for a hearing. The Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because he failed to file the request within the statutory time frame.

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act¹² does not entitle a claimant to a review of an Office decision as a matter of right.¹³ The Act does not mandate that the Office review a final decision simply upon request by a claimant.¹⁴

⁷ 20 C.F.R. § 10.616(a) (2004).

⁸ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹¹ *Claudio Vazquez*, *supra* note 8.

¹² 5 U.S.C. § 8128(a).

¹³ *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁴ *Donna M. Campbell*, 55 ECAB 241 (2004).

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁵

ANALYSIS -- ISSUE 3

The Office is required to reopen a case for merit review if an application for reconsideration demonstrates that the Office erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not argue that the Office erroneously applied a point of law. He submitted evidence that was new but it was not relevant and pertinent. The evidence submitted after the merit decision consists of an October 23, 2006 patient visit summary, appellant's insurance information from his doctor visit and a copy of the October 23, 2006 duty status report from Dr. Rohlman. The duty status report is a copy, therefore, duplicative as it was already reviewed by the Office. The patient visit summary merely states that appellant received education materials, prescriptions and follow-up instruction and the insurance information sheets but contains no medical information. None of the submitted evidence addressed the issue of whether appellant sustained an injury at work and are therefore not relevant. As appellant did not submit any relevant and pertinent new evidence he is not entitled to merit review by the Office.

CONCLUSION

The Office properly denied appellant's traumatic injury claim, denied appellant's request for an oral hearing as untimely filed and denied merit review.

¹⁵ 20 C.F.R. § 10.606(b)(2)(iii) (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 24 and April 5, 2007 and December 12, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 11, 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