

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

C.B., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
MATERIAL COMMAND, Corpus Christi, TX,
Employer**

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**Docket No. 09-127
Issued: April 3, 2009**

Appearances:

Chris J. Soto, for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2008 appellant filed a timely appeal from a July 1, 2008 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and an August 6, 2008 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty on May 1, 2008 as alleged; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 13, 2008 appellant, then a 56-year-old aircraft sheet metal worker, filed a Form CA-1, traumatic injury claim, alleging that on May 1, 2008 he sustained injuries to the right side

of his torso, face and back when he fell approximately 12 feet from a helicopter onto a large work table and floor. He felt a tug on his lifeline prior to falling. On the claim form, Ralph Coleman, a coworker, advised he witnessed the incident. Appellant stopped work on May 1, 2008 and returned to work on or about May 13, 2008.

In a May 21, 2008 letter, the Office advised appellant of the factual and medical evidence needed to establish his claim and allowed 30 days for the submission of evidence. It asked that he have his attending physician submit a detailed, narrative medical report that included a history of injury, a firm diagnosis and an explanation regarding why the condition diagnosed was believed to have been caused or aggravated by the May 1, 2008 incident.

In response, appellant submitted a statement describing how the May 1, 2008 incident occurred. He indicated that he was taken by ambulance to Bayview Hospital and released that day. A copy of the May 1, 2008 ambulance report was received together with a May 1, 2008 work release and a May 1, 2008 medication form from Corpus Christi Medical Center Bay Area Emergency Department.

In a May 12, 2008 dispensary permit, Dr. L.L. Grabhorn, an employing establishment physician, released appellant to full work without limitations.

In a July 1, 2008 decision, the Office denied appellant's claim on the grounds that fact of injury was not established. It found that the May 1, 2008 incident occurred as alleged. However, there was no medical evidence that established an injury to the incident.

On July 24, 2008 appellant requested reconsideration. No additional evidence was submitted.

By decision dated August 6, 2008, the Office denied appellant's request for reconsideration of the merits as he had not submitted any new evidence or argument with his request.¹

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² 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, that an injury was sustained while in the performance of duty and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³

¹ The record contains evidence received after the Office issued the August 6, 2008 decision. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c). Appellant may submit such evidence to the Office with a request for reconsideration under 5 U.S.C. § 8128.

² 5 U.S.C. §§ 8101-8193.

³ *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the incident caused a personal injury, which generally, can be established only by medical evidence.⁴

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.⁵ To be rationalized, the opinion must be based on a complete factual and medical background of the claimant,⁶ and must be one of reasonable medical certainty,⁷ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.

ANALYSIS -- ISSUE 1

The record supports that on May 1, 2008 appellant fell approximately 12 feet from a helicopter onto the floor during the performance of his duties. The Office accepted the incident. The Board finds appellant has established that he experienced the employment incident as claimed. Appellant alleged that the May 1, 2008 incident caused injuries to the right side of his torso, face and back. However, he has not submitted sufficient medical evidence establishing that the May 1, 2008 employment incident caused or aggravated a diagnosed medical condition.

On May 21, 2008 the Office advised appellant of the medical evidence needed to establish his claim. Appellant submitted a copy of a May 1, 2008 ambulance report, portions of his May 1, 2008 emergency records from Corpus Christi Medical Center Bay Area Emergency Department, and a May 12, 2008 dispensary permit. However, this evidence does not note any specific diagnosis arising from the May 1, 2008 employment incident. To establish fact of injury, appellant must submit a medical report from a physician establishing that the work incident caused a personal injury or diagnosed condition. Dr. Grabhorn's May 12, 2008 report indicated that appellant could perform regular duty. He did not address whether the May 1, 2008 work incident caused or aggravated a diagnosed condition. The medical evidence of record does not establish that appellant sustained a diagnosed condition arising from the May 1, 2008 employment incident.⁸ Because appellant has not submitted sufficient medical evidence, the Board finds he has not met his burden of proof to establish fact of injury in this case.

⁴ *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁶ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *John W. Montoya*, 54 ECAB 306 (2003).

⁸ As previously noted, the record on appeal contains evidence received after the Office issued the August 6, 2008 decision. *See supra* note 1.

LEGAL PRECEDENT -- ISSUE 2

The Act⁹ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹⁰ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹¹

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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.¹²

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹³ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

On July 24, 2008 appellant requested reconsideration. However, he did not submit any new evidence or arguments with his request.

Appellant did not raise any new arguments or present new evidence that the Office erroneously applied or interpreted a specific point of law. He did not advance any relevant legal arguments not previously considered by the Office or present any relevant and pertinent new evidence not previously considered. Appellant is not entitled to further review of the merits of his claim under any of the criteria of section 10.606(b)(2).¹⁵

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ *Id.* at § 8128(a). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

¹¹ 20 C.F.R. § 10.605.

¹² *Id.* at § 10.606. See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹³ 20 C.F.R. § 10.607(a). See *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁴ 20 C.F.R. § 10.608(b). See *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹⁵ 20 C.F.R. § 10.606(b)(2); see *W.C.*, 59 ECAB ____ (Docket No. 07-2257, issued March 5, 2008).

¹⁵ 5 U.S.C. §§ 8101-8193.

As appellant did not meet any of the regulatory requirements for review of the merits of his claim, the Board finds that the Office properly denied his July 24, 2008 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on May 1, 2008 as alleged. The Board further finds that the Office properly denied appellant's request for merit review of his claim pursuant to section 8128.

ORDER

IT IS HEREBY ORDERED THAT the August 6 and July 1, 2008 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: April 3, 2009
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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