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

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| **W. C., Appellant** | ) | |
| **and** | ) | **Docket No. 09-114** |
| | ) | **Issued: March 13, 2009** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATON MEDICAL CENTER, Salisbury, NC, 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
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On October 15, 2008 appellant filed a timely appeal from an August 1, 2008 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and a September 25, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the September 25, 2008 nonmerit decision.

### ***ISSUES***

The issues are: (1) whether appellant has established that he sustained an injury to his right shoulder on December 17, 2007 in the performance of duty; and (2) whether the Office properly denied his request for further merit review of his claim pursuant to 5 U.S.C. § 8128.

### ***FACTUAL HISTORY***

On June 12, 2008 appellant, then a 59-year-old housekeeping aid, filed a claim alleging that on December 17, 2007 he sustained right shoulder pain while loading a cart. He did not stop

work. Appellant's supervisor asserted that he was on annual leave at the time of the alleged injury. The record indicates that appellant received treatment in the emergency room on July 25, 2007 for right upper arm pain. Appellant related a history of arthritis with no history of a known injury. On August 18, 2007 he again sought treatment in the emergency room for arm pain.

A magnetic resonance imaging (MRI) scan study of appellant's right upper extremity dated February 4, 2008 showed a suspected near full thickness tears in the supraspinatus and infraspinatus articular surfaces and bicep and subscapularis tendinopathy. The radiologist noted that the MRI scan study was initially scheduled for November 26, 2007.

On June 20, 2008 the employing establishment controverted appellant's claim. The employing establishment noted that he did not file a claim until six months after the alleged injury and that he had sought medical treatment for the right shoulder beginning in July 2007.

By letter dated June 25, 2008, the Office requested additional factual and medical information from appellant. It asked appellant to comment on the employing establishment's assertion that he was on leave at the time of the alleged injury and to explain his delay in filing the claim.

In a report dated June 17, 2008, Dr. William Stephen Furr, a Board-certified orthopedic surgeon, diagnosed rotator cuff tears of the infraspinatus and supraspinatus tendons. He recommended a rotator cuff repair and further diagnostic studies.

By letter dated July 21, 2008,[1] appellant related that on July 20, 2008 he experienced sharp pain and some tingling and burning in his right shoulder while emptying bags of magazine into a dumpster. The pain increased over the next few days and he had to use sick leave. The medication appellant used for arthritis did not help the pain. He worked light duty in November and December 2007. Appellant's right shoulder "totally gave way with a feeling it was going to fall off." He submitted a July 25, 2007 x-ray report of his right shoulder which revealed no abnormalities. The report noted that appellant had a history of right shoulder pain without trauma.

By decision dated August 1, 2008, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that the December 17, 2007 work incident occurred at the time, place and in the manner alleged. It further noted that he submitted no medical evidence relating any diagnosed condition to the alleged December 17, 2007 employment incident.

On August 11, 2008 appellant requested reconsideration. In a decision dated September 25, 2008, the Office denied his request on the grounds that he did not submit new and relevant evidence or raise an argument sufficient to warrant reopening his case for further merit review.

[1] Appellant dated the letter July 21, 2009; however, this is clearly a typographical error as it was received by the Office on July 28, 2008.

## ***LEGAL PRECEDENT -- ISSUE 1***

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[7]

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.[8] An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[9] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[10] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to

[2] 5 U.S.C. §§ 8101-8193.

[3] *Anthony P. Silva*, 55 ECAB 179 (2003).

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

[5] *Delphyne L. Glover*, 51 ECAB 146 (1999).

[6] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[7] *Id.*

[8] *See Louise F. Garnett*, 47 ECAB 639 (1996).

[9] *See Betty J. Smith*, 54 ECAB 174 (2002).

[10] *Id*.

work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.[11] However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[12]

## ***ANALYSIS -- ISSUE 1***

On June 29, 2008 appellant filed a traumatic injury claim alleging that on December 17, 2007 he sustained an injury to his right arm while loading a cart. The Office denied his claim on the grounds that he did not demonstrate that the specific event occurred at the time, place and in the manner described. The initial question is whether appellant has established that the December 17, 2007 employment incident occurred as alleged. An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[13] An employee has not met his burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of his claim.[14]

The Board finds that appellant has not established the occurrence of the December 17, 2007 employment incident. He did not notify the employing establishment of the alleged incident until June 12, 2008 and did not provide any explanation for his delay in notification. The employing establishment asserted that he was on annual leave on December 17, 2007. The medical evidence showed that appellant received treatment for right shoulder pain in July 2007, well before the December 17, 2007 alleged work incident. Additionally, none of the medical evidence submitted contains a history of an incident occurring at work on December 17, 2007. By letter dated June 25, 2008, the Office requested that appellant clarify the circumstances surrounding the injury and explain his delay in reporting the injury to the employing establishment and filing a claim. Appellant submitted a statement describing an injury occurring on July 20, 2008. He did not mention the December 17, 2007 employment incident. Appellant did not promptly notify the employing establishment of the injury and the record contains no medical evidence containing a history of the alleged incident. Consequently, he has not substantiated that the December 17, 2007 employment incident occurred as alleged and, therefore, has not established an injury in the performance of duty.

[11] *Linda S. Christian*, 46 ECAB 598 (1995).

[12] *Gregory J. Reser*, 57 ECAB 277 (2005).

[13] *See Betty J. Smith*, *supra* note 9.

[14] *See Linda S. Christian*, *supra* note 11.

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[15] 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.[16] 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.[17] 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.[18]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[19] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[20] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[21]

## ***ANALYSIS -- ISSUE 2***

By decision dated August 1, 2008, the Office denied appellant's claim on the grounds that he failed to establish the occurrence of the December 17, 2007 alleged work incident. On August 11, 2008 appellant requested reconsideration by placing a checkmark on the appeal request form accompanying the August 1, 2008 decision. He did not, however, constitute any evidence or argument in support of his request for reconsideration. As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.[22]

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[15] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[16] 20 C.F.R. § 10.606(b)(2).

[17] *Id.* at § 10.607(a).

[18] *Id*. at § 10.608(b).

[19] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[20] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[21] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[22] Appellant submitted new medical evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

## ***CONCLUSION***

The Board finds that appellant has not established that he sustained an injury to his right shoulder on December 17, 2007 in the performance of duty. The Board further finds that the Office properly denied his request to reopen his case for further review of the merits under section 8128.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 25 and August 1, 2008 are affirmed.

Issued: March 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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