United States Department of Labor
Employees' Compensation Appeals Board

J.I., Appellant	)	
and	)	**Docket No. 12-494**
	)	**Issued: August 16, 2012**
DEPARTMENT OF THE NAVY, CMDR, NAVAL INSTLATNS-SPRT OFF, Washington Navy Yard, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2011 appellant filed a timely appeal from a June 30, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an employment-related injury and a September 2, 2011 nonmerit decision denying his request for reconsideration.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Appellant submitted a timely request for an oral argument before the Board pursuant to 20 C.F.R. § 501.5(b). Pursuant to 20 C.F.R. § 501.5(a), oral argument may be held in the discretion of the Board. The Board has duly considered the matter and finds that appellant's request for oral argument is denied. Oral argument in this case would delay issuance of a Board decision and would not serve a useful purpose. Appellant's contentions are addressed in this decision based on the record as submitted.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an aggravation of a preexisting back injury in the performance of duty on May 11, 2011 as alleged; and (2) whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 13, 2011 appellant, then a 52-year-old fire protection inspector, filed a traumatic injury claim (Form CA-1) alleging that he aggravated a preexisting back injury as a result of being rear-ended while stopped at a traffic light in a government vehicle in the performance of duty on May 11, 2011. The employing establishment indicated that appellant's preexisting back injury dated back to September 24, 2009.

By letter dated May 26, 2011, OWCP notified appellant of the deficiencies of his claim and allotted 30 days for the submission of additional factual and medical evidence.

Appellant submitted a motor vehicle accident report dated May 11, 2011 and two reports dated May 12, 2011 by Jessie L. Hollinger, a physician's assistant, who diagnosed lumbar strain and released him to limited duty that same day and to full duty on May 23, 2011. He also submitted a June 6, 2011 report with an illegible signature releasing him to full duty with no restrictions that day.

By decision dated June 30, 2011, OWCP denied appellant's claim finding that he failed to establish fact of injury. The medical evidence failed to provide a medical diagnosis in connection with the accepted incident.

On July 14, 2011 appellant requested reconsideration and resubmitted the June 6, 2011 report with illegible signature. He also submitted a July 13, 2011 report by Dr. Michael S. Szkotnicki, a family medicine physician, who diagnosed lumbar strain and radiculopathy. Dr. Szkotnicki indicated that appellant's conditions were caused or aggravated by a car accident in the performance of duty.

By decision dated September 2, 2011, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence or show that it erroneously applied or interpreted a point of law not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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 FECA, that the claim was timely filed within the applicable time

[3] 5 U.S.C. §§ 8101-8193.

limitation period of FECA, that an injury[4] was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5]

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. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[6]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[7] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[8] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, 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 and persuasive evidence.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof in establishing that on May 11, 2011 he aggravated a preexisting back injury as a result of being rear-ended while stopped at a traffic light in a government vehicle. As noted, the determination of fact of injury requires that appellant submit medical evidence establishing that the employment incident

[4] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[5] *T.H.*, 59 ECAB 388 (2008). *See Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[8] *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

[9] *See Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

caused a personal injury. The record establishes that appellant was involved in a motor vehicle accident and the incident is accepted in this case. However, the Board finds that the evidence submitted failed to provide a firm diagnosis and is therefore insufficient to establish fact of injury.

The case record contains a report dated June 6, 2011 with an illegible signature. This form, lacking proper identification, cannot be considered as probative medical evidence. A medical report may not be considered as probative medical evidence if there is no evidence that the person completing the report is a physician as defined in FECA.[10] Therefore, appellant did not meet his burden of proof.

Similarly, the two May 12, 2011 reports from Ms. Hollinger, a physician's assistant, are of no probative value as she is not a physician under FECA.[11] As such, the Board finds that appellant did not meet his burden of proof with these submissions.

The medical evidence of record failed to provide a firm diagnosis in connection with the May 11, 2011 incident. Accordingly, the Board finds that appellant did not establish an employment-related injury.

On appeal appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision.[12]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.[13] OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[14]

[10] *See Merton J. Sills*, 39 ECAB 572 (1988). *See also Bradford L. Sutherland*, 33 ECAB 1568 (1982).

[11] 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." *See also Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

[12] *See* 20 C.F.R. § 501.2(c)(1).

[13] 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, the 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).

[14] *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[15] To be entitled to a merit review of an OWCP 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.[16] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[17]

ANALYSIS -- ISSUE 2

In support of his July 14, 2011 reconsideration request, appellant resubmitted the June 6, 2011 report with an illegible signature. The Board finds that submission of this report did not require reopening appellant's case for merit review because it was previously reviewed by OWCP in the June 30, 2011 decision. As the report repeats evidence already in the case record, it is duplicative and does not constitute relevant and pertinent new evidence.

Appellant also submitted a new CA-20 report dated July 13, 2011 from Dr. Szkotnicki, who diagnosed lumbar strain and radiculopathy. Dr. Szkotnicki indicated by check mark that appellant's conditions were caused or aggravated by a car accident in the performance of duty.

The Board finds that Dr. Szkotnicki's July 13, 2011 report constituted relevant and pertinent new evidence not previously considered by OWCP. As it meets one of the standards for obtaining a merit review of his case, the Board finds that OWCP improperly denied appellant's request. The Board will set aside the September 2, 2011 decision denying appellant's request for reconsideration and will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not submit sufficient evidence to establish that he sustained an aggravation of a preexisting back injury in the performance of duty on May 11, 2011. The Board further finds that OWCP improperly denied appellant's July 14, 2011 request for reconsideration.

[15] 20 C.F.R. § 10.606(b)(2). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[16] *Id*. at § 10.607(a).

[17] *Id*. at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2011 decision of the Office of Workers' Compensation Programs is affirmed and the September 2, 2011 decision is set aside and the case remanded for further action consistent with this decision.

Issued: August 16, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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