

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

D.B., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Albuquerque, NM, Employer**

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**Docket No. 12-376
Issued: June 20, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On December 13, 2011 appellant filed a timely appeal from an August 11, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and a November 9, 2011 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on June 20, 2011; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 24, 2011 appellant, then a 50-year-old supervisory forestry technician, filed a traumatic injury claim (Form CA-1) alleging that on June 20, 2011 he sustained numbness and weakness in his left arm and a possible heart attack while he was hiking in the performance of duty. He was evaluated by first aid personnel who informed him that his discomfort could be the signs of an early heart attack and recommended that he seek medical treatment. In a witness statement, Coworker Roderick Killner reported that appellant complained of left arm weakness during a walk. Appellant's supervisor noted on the claim form that the alleged injury occurred in the performance of duty.

By letter dated July 12, 2011, OWCP advised appellant of the deficiencies in his claim and requested additional factual and medical evidence to establish his June 20, 2011 injury.

Appellant submitted emergency room (ER) reports, diagnostic tests and notes dated June 20 to 21, 2011 from Lincoln County Medical Center. In a June 20, 2011 medical report, Dr. W. Christopher Robinson, a treating ER physician, reported that appellant was a firefighter from Oregon who had been in New Mexico for the past four days due to fires in the area and developed an upper respiratory infection shortly after arriving. Appellant had no difficulties with any chest pain, discomfort or arm pain. On June 20, 2011 he was walking around the Smokey Bear Range Station when he suddenly developed weakness in his left arm which he had not experienced before. The weakness went away later that day. Dr. Robinson noted that during physical examination appellant had a regular heart rate and rhythm. Appellant was admitted overnight for more testing. A computerized tomography (CT) scan of the head was unremarkable and a chest portable showed no significant cardiopulmonary abnormalities. In a June 21, 2011 discharge summary note, Dr. Robinson diagnosed upper respiratory infection and left arm weakness, noncardiac etiology.

By decision dated August 11, 2011, OWCP denied appellant's claim finding that the medical evidence did not establish an injury related to the established June 20, 2011 employment incident.

By letter dated October 29, 2011, appellant requested reconsideration. He stated that his position as a Wildland Firefighter required him to be in New Mexico on temporary duty to suppress wildfires. At the time of injury, the working and breathing conditions were severely hindered as a result of massive fires in the state and smoke in the air. Appellant further stated that his duty station in Oregon was only 230 feet above sea level, but his temporary-duty station was at 7,500 feet above sea level. He stated that his body did not properly acclimate to the drastic elevation changes. Appellant believed his medical condition was aggravated by the working conditions of poor air quality and high elevation. In support of his claim, he submitted an online article discussing high altitude illness and acute mountain sickness.

Appellant also submitted medical reports dated May 5 to 13, 2011 from Dr. Gregory M. Knopf, Board-certified in family medicine, who diagnosed bilateral decreased hearing. Laboratory reports were also submitted providing results for blood and urine tests. Dr. Knopf reported that appellant's vitamin D level was low and that he had minimally elevated cholesterol at 135.

By decision dated November 9, 2011, OWCP denied appellant's request for reconsideration finding that he did not raise substantive legal questions or include new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.³

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

Under FECA, an employee on travel status, temporary-duty assignment or special mission for his employer is in the performance of duty and therefore under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his special duties. However, the fact that an employee is on a special mission or in travel status during the time that a disabling condition manifests itself does not raise an inference that the condition is causally related to the incidents of employment.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that the June 20, 2011 incident occurred as alleged. Appellant was in the performance of duty while on a temporary-duty status to New Mexico. The fact that he experienced an upper respiratory infection and left arm weakness while walking on temporary duty however does not establish his claim. Appellant must establish that the claimed conditions are causally related to the accepted incident. The Board finds that he did not submit sufficient

² *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

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

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *See H.S.*, 58 ECAB 554 (2007); *see also Ann P. Drennen*, 47 ECAB 750 (1996); *William K. O'Connor*, 4 ECAB 21 (1950).

medical evidence to support that he sustained an injury causally related to the June 20, 2011 employment incident.⁶

Appellant submitted emergency room reports from Dr. Robinson dated June 20 and 21, 2011. Dr. Robinson reported that appellant had developed an upper respiratory infection shortly after arriving in New Mexico. On June 20, 2011 appellant experienced weakness in his left arm when he was walking near the Smokey Bear Range Station. Dr. Robinson reported that the heart showed a regular rate and rhythm, a CT scan of the head was unremarkable and a chest portable showed no significant cardiopulmonary abnormalities. He diagnosed upper respiratory infection and left arm weakness, noncardiac etiology.

While Dr. Robinson diagnosed upper respiratory infection and noted left arm weakness, he did not explain how the accepted June 20, 2011 incident caused or contributed to these findings. His report indicates that appellant had developed an upper respiratory infection prior to the June 20, 2011 employment incident. Regarding a possible heart condition, Dr. Robinson ruled out cardiac etiology based upon his objective examination findings and diagnostic testing. The Board has held that the opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.⁷ Without medical reasoning explaining how the June 20, 2011 employment incident caused or contributed to his upper respiratory infection and left arm weakness or a cardiac condition, Dr. Robinson's reports are insufficient to meet appellant's burden of proof.⁸

On appeal, appellant contends that he sustained a heart attack which was causally related to the June 20, 2011 employment incident. His physician, however, did not diagnose cardiac arrest. Appellant's belief that work caused a medical problem is not in question, but that belief, however sincerely held, does not constitute the medical evidence necessary to establish a diagnosis and causal relationship. The record is without rationalized medical evidence establishing that he sustained an injury causally related to the accepted June 20, 2011 employment incident. Thus, appellant has failed to meet his burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP 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

⁶ See *Robert Broome*, 55 ECAB 339 (2004).

⁷ See *Lee R. Haywood*, 48 ECAB 145 (1996).

⁸ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁹ Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion because appellant failed to show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent evidence not previously considered.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his December 13, 2011 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law.

The Board finds that appellant also did not advance a new and relevant legal argument or submit new and relevant evidence not previously considered.

Appellant argued that his injury was employment related and he provided additional details regarding the events surrounding the June 20, 2011 employment incident. The underlying issue in this case was whether appellant sustained an injury causally related to the accepted June 20, 2011 employment incident. That is a medical issue which must be addressed by relevant medical evidence.¹¹

While appellant submitted new medical reports dated May 5 to 13, 2011 from Dr. Knopf, these reports are not relevant to the alleged injury. Dr. Knopf's reports only provide a diagnosis of appellant's preexisting bilateral hearing loss, vitamin D deficiency and elevated cholesterol level. Further, these medical reports are of no probative value in establishing causation because they predate the June 20, 2011 employment incident.¹² Appellant failed to provide a medical report which substantiates that he sustained an injury due to the June 20, 2011 employment incident. The article submitted by him from About.com discussing high altitude illness and acute mountain sickness is also irrelevant and immaterial as it does not contain the opinion of a

⁹ *D.K.*, 59 ECAB 141 (2007).

¹⁰ *K.H.*, 59 ECAB 495 (2008).

¹¹ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹² The Board notes that in its November 9, 2011 nonmerit decision, OWCP referenced an August 9, 2011 medical report from Dr. Sutherland, a Form CA-20 and Form 827 from a different claim filed by appellant in claim File No. xxxxxx130. These documents were not submitted in this claim, File No. xxxxxx515 and appellant's claim, File No. xxxxxx130, is not explained or developed in the record before the Board in this appeal. Thus, OWCP improperly reviewed the medical evidence in claim File No. xxxxxx130. Therefore, the Board will not consider the evidence from claim File No. xxxxxx130.

physician supporting causal relationship based on a complete factual and medical background.¹³ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, while appellant submitted new evidence, it was not relevant in addressing causal relationship.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on June 20, 2011 in the performance of duty, as alleged. OWCP properly denied his request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated November 9 and August 11, 2011 be affirmed.

Issued: June 20, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹³ *Supra* note 9.

¹⁴ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).