

FACTUAL HISTORY

On May 18, 2011 appellant, then a 60-year-old mail carrier, filed a traumatic injury claim alleging that on April 26, 2011 he felt pain in his right shoulder when he closed a postal vehicle door. He stopped work that day.

On May 27, 2011 OWCP advised appellant that he had not submitted any evidence to support his claim and requested additional evidence. It requested a more detailed description of the alleged April 26, 2011 incident and a medical report from his treating physician with a diagnosis of his condition and an explanation of how his medical condition was caused or aggravated by the alleged work event.

In a May 3, 2011 medical report, Dr. Bryan G. Frentz, a Board-certified orthopedic surgeon, noted appellant's complaints of right shoulder pain that started on April 26, 2011 when he felt a "pop" inside his shoulder as he lifted an object at work. He noted that appellant previously underwent right shoulder arthroscopy with subacromial decompression and was doing well until a recent April 26, 2011 injury while lifting an object at work. Examination of the right shoulder revealed no muscle asymmetry or scapular winging and full passive range of motion with pain at flexion greater than 100 and abduction greater than 90. Appellant's cross-arm test was negative and his impingement and Hawkin's signs were positive. An x-ray examination of his right shoulder showed no fractures or dislocations and no glenohumeral joint degenerative changes or proximal migration of the humeral head. Dr. Frentz observed degenerative changes of the acromioclavicular (AC) joint with inferior osteophyte formation and evidence of previous anterior acromioplasty. He diagnosed rotator tendinitis and osteoarthritis.

In a May 27, 2011 report, Dr. Frentz noted appellant's continued complaints of pain with certain movements, particularly when lying on the involved side and with overhead, lifting activities. He noted that appellant had a recent April 26, 2011 injury when he lifted an object at work. Dr. Frentz reviewed appellant's history and conducted an examination. A magnetic resonance imaging (MRI) scan of the right shoulder revealed rotator cuff tendinosis without full thickness tear. Dr. Frentz diagnosed rotator tendinitis and osteoarthritis and recommended physical therapy twice a week for four weeks.

In a June 17, 2011 report, Dr. Frentz noted appellant's complaints of continued right shoulder pain with certain movements and related that on April 26, 2011 he had a right shoulder injury at work while pulling an object. He explained that appellant's right shoulder injury was the result of a pulling injury which caused a subluxation of the right shoulder and a humeral avulsion glenohumeral ligament (HAGL) lesion. Examination of the right shoulder revealed no muscle asymmetry and scapular winging and a nontender AC joint. Appellant's cross-arm test was negative and impingement and Hawkin's signs were positive. MRI scan of the right shoulder revealed rotator cuff tendinitis without full thickness tear and HAGL lesion present. Dr. Frentz diagnosed right rotator cuff tendinitis and osteoarthritis.

In a decision dated June 29, 2011, OWCP denied appellant's claim on the grounds of insufficient factual evidence alleging that the April 26, 2011 employment incident occurred at the time, place and in the manner alleged and insufficient medical evidence establishing that he sustained any diagnosed condition causally related to the alleged incident.

On July 7, 2011 appellant submitted a request for reconsideration. No additional evidence was received.

By decision dated July 26, 2011, OWCP denied appellant's request for reconsideration finding that he did not submit any evidence sufficient to warrant further merit review under 5 U.S.C. § 8128(a). It noted that he did not submit any evidence with his request for reconsideration and did not raise any substantive legal questions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² has the burden of proof to establish that the essential elements of his claim by the weight of the reliable, probative and substantial evidence,³ including that he is an "employee" within the meaning of FECA⁴ and that he filed his claim within the applicable time limitation.⁵ The employee must also establish that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.⁷ There are two components involved in establishing the fact of injury. 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.⁸ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁹

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty,¹⁰ nor can it find fact of injury if the evidence fails to establish that the employee sustained an injury within the meaning of FECA. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and

² *Id.* at §§ 8101-8193.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951).

⁵ *R.C.*, 59 ECAB 42 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954).

⁶ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008).

⁷ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁸ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁹ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Elaine Pendleton*, 40 ECAB 1143 (1989).

his subsequent course of action.¹¹ 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 cause doubt on an employee's statements in determining whether he has established his claim.¹²

ANALYSIS -- ISSUE 1

Appellant alleges that on April 26, 2011 he sustained a right shoulder injury as a result of closing his postal vehicle door at work. As part of his burden of proof, he must establish all the elements of his claim, including that he experienced the April 26, 2011 incident at the time, place and in the manner alleged. In a decision dated June 29, 2011, OWCP denied appellant's claim finding insufficient evidence to establish that the April 26, 2011 incident occurred as alleged and that any diagnosed condition resulted from the alleged incident. The Board finds that the evidence fails to establish that he sustained an injury in the performance of duty on April 26, 2011.

The Board notes that the evidence submitted is insufficient to establish fact of injury because inconsistencies in the record do not support that the specific event or incident occurred at the time, place and in the specific manner alleged. Appellant alleges on appeal and in his Form CA-1 that on April 26, 2011 he experienced a popping and cracking with pain in his right shoulder when he closed the postal vehicle door after making a delivery. In Dr. Frenz's medical reports, however, he related that appellant's right shoulder pain started on April 26, 2011 when he felt a "pop" inside his shoulder as he lifted an object at work. He further explained that appellant's right shoulder injury was the result of a "pulling" injury, which caused a subluxation of the right shoulder and a HAGL lesion. As previously stated, the Board cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged.¹³ The Board notes that Dr. Frenz's description of a lifting and pulling incident at work contradicts appellant's statements that he closed a postal vehicle door and does not support that the April 26, 2011 employment incident occurred as alleged. Moreover, appellant did not provide prompt notification as he waited until May 18, 2011 to file his claim form. The Board finds that the inconsistencies in the evidence cast serious doubt as to whether the specific April 26, 2011 event occurred at the time, place and in the manner alleged. Accordingly, appellant did not meet his burden of proof to establish fact of injury.¹⁴

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.

¹¹ *Gene A. McCracken*, 46 ECAB 593 (1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹² *Constance G. Patterson*, 41 ECAB 206 (1989).

¹³ *Pendleton*, *supra* note 10.

¹⁴ *See McCracken*, *supra* note 11; *Mary Joan Coppolino*, 43 ECAB 988 (1992).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹⁵ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district OWCP.¹⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁷

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.¹⁸ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁹ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²⁰

ANALYSIS -- ISSUE 2

On July 7, 2011 appellant submitted a request for reconsideration. By decision dated July 26, 2011, OWCP denied his request for reconsideration finding that he did not submit any evidence sufficient to warrant further merit review under 5 U.S.C. § 8128(a). The issue, therefore, is whether it properly denied appellant's July 7, 2011 request for reconsideration by determining whether his request met at least one of the three standards for obtaining a merit review of his case.

The Board finds that OWCP properly denied appellant's request for reconsideration as he did not meet any of the requirements sufficient to warrant merit review. In his July 7, 2011 request for reconsideration, appellant did not show that OWCP erroneously applied or

¹⁵ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹⁶ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁷ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

interpreted a specific point of law. He did not submit any evidence in support of his claim and did not advance a relevant legal argument not previously considered by OWCP.

The Board finds that OWCP properly denied further merit review of his case. The Board will affirm the July 26, 2011 decision.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a right shoulder injury in the performance of duty on April 26, 2011. The Board also finds that OWCP did not abuse its discretion by denying appellant's July 7, 2011 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 26 and June 29, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 22, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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