

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

S.W., Appellant)
)
and)
)
DEPARTMENT OF DEFENSE, DEFENSE)
LOGISTICS AGENCY, LAND & MARITIME)
DIVISION, Philadelphia, PA, Employer)
_____)

**Docket No. 12-1127
Issued: October 10, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2012 appellant filed a timely appeal from a January 18, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying a traumatic injury claim and a March 19, 2012 nonmerit decision denying 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 established that she sustained a traumatic head and right ankle injuries in the performance of duty on October 24, 2011; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On appeal appellant explained that she was off work during the week before the claimed October 24, 2011 incident due to an asthma flare-up she attributed to working in a cold

¹ 5 U.S.C. § 8101 *et seq.*

environment. She fainted on October 24, 2011 while returning to her workstation after filing a complaint. Appellant submitted new evidence accompanying her request for appeal.

FACTUAL HISTORY

On November 30, 2011 appellant, then a 52-year-old quality assurance specialist, filed a traumatic injury claim (Form CA-1) alleging that on October 24, 2011 she struck her head and sprained her right ankle when she “passed out” but was “unsure why.” She stopped work at the time of the injury. In a November 30, 2011 statement, one of appellant’s coworkers asserted that she “was in conversation with [appellant] when she suddenly went down on the floor. Another coworker and myself helped pick her up.”

In a November 3, 2011 report, Dr. George E. Fisher, an attending Board-certified internist, stated that within a reasonable degree of medical certainty the injury sustained by appellant was a result of “adverse conditions” in her workplace.

In a December 15, 2011 letter, OWCP advised appellant of the additional evidence needed to establish her claim. It instructed her to submit a factual statement further explaining why she felt that the October 24, 2011 fall was work related, along with any witness statements corroborating her account of events. OWCP also asked appellant to provide a statement from an attending physician explaining how and why the implicated work factors would have caused her to fall. It afforded her 30 days in which to submit such evidence. Appellant did not submit additional evidence.

By decision dated January 18, 2012, OWCP denied appellant’s claim on the grounds that fact of injury was not established. It found that there was insufficient evidence to establish that the October 24, 2011 incident occurred as alleged. OWCP further found that there was no medical evidence providing a diagnosis which could be connected to the claimed event.

In a February 2, 2012 letter, appellant requested reconsideration. She submitted a January 31, 2012 report from Dr. Fisher who noted treating her beginning on November 3, 2011 for asthma and anxiety. Dr. Fisher related appellant’s account of working in a laboratory environment at 57 degrees. On October 24, 2011 the cold, dry air precipitated an asthma attack, with wheezing and coughing contributing her to anxiety and stress. Dr. Fisher explained that the attack worsened, causing stress leading to a vasovagal reaction, sympathetic decrease in tone and decreased cardiac output. “These factors lead to a hypoperfusion of the brain and subsequent fainting or syncope episode.... [Appellant’s] case [was] consistent with the norm as she suffered a sprain/strain of her right ankle as she lost tone and fell to the ground.” Dr. Fisher stated that, within a reasonable degree of medical certainty, appellant’s exposure to cold, dry air at work on October, 24, 2011 caused the asthma attack with subsequent fainting.

By decision dated March 19, 2012, OWCP denied reconsideration on the grounds that Dr. Fisher’s January 31, 2012 report was irrelevant to the claim as appellant did not establish the October 24, 2011 incident as factual.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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 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

In order to determine whether an employee sustained a traumatic 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 that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁵ 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.⁶

It is a general rule of workers’ compensation law that an injury resulting from an idiopathic fall -- where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of the employment -- the injury is not a personal injury while in the performance of duty as it does not arise out of a risk connected with the employment.⁷ On the other hand, if the cause of the fall cannot be determined, or the reason it occurred cannot be explained, then it is an unexplained fall that comes within the general rule that an injury occurring on the industrial premises during working hours is compensable.⁸

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁹

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁷ *Steven S. Saleh*, 55 ECAB 169 (2003); *Karen K. Levene*, 54 ECAB 671 (2003).

⁸ *Id.*

⁹ *Solomon Polen*, 51 ECAB 341 (2000).

ANALYSIS -- ISSUE 1

Appellant claimed that she struck her head and sprained her right ankle when she fainted and fell to the floor at work on October 24, 2011. The Board finds there are inconsistencies in the evidence that cast doubt as to whether the incident occurred at the time, place and in the manner alleged. Appellant did not file a claim or notify her supervisor of the claimed fall until November 30, 2011, more than a month after the alleged incident. Also, there is no employing establishment incident report of record. Although a coworker stated on the claim form that she saw appellant fall suddenly to the floor, the coworker did not specify a date or location for the incident. Appellant did not submit any supplemental factual statement regarding the circumstances of the claimed October 24, 2011 fall, although she was advised to do so on December 15, 2011. Dr. Fisher, an attending Board-certified internist, stated in a November 3, 2011 report that appellant sustained an unspecified injury due to “adverse conditions” in her workplace, but did not diagnose any injury or the specifics of an October 24, 2011 incident. The vague nature of the evidence of record creates significant uncertainty as to the manner in which appellant experienced the claimed October 24, 2011 incident.¹⁰ The Board finds that as she has not established the threshold issue of fact of injury, it would be premature to address whether the October 24, 2011 incident could constitute a compensable “unexplained” fall.¹¹

Given the inconsistencies in the factual and medical evidence, the Board finds that there is insufficient evidence to establish that appellant sustained a right ankle or head injury on October 24, 2011 in the performance of duty as alleged.¹²

On appeal, appellant newly attributed the October 24, 2011 episode to an asthma attack caused by working in a cold environment. She also submitted new evidence. However, the Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final merit decision in the case.¹³

Appellant may submit such new evidence or argument with a valid 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.

¹⁰ See *Caroline Thomas*, 51 ECAB 451, 455 (2000).

¹¹ *Supra* note 7.

¹² *Caroline Thomas*, *supra* note 10. Furthermore, there is no need to consider medical evidence on causal relationship as the claimed work incident is not established. See *S.P.*, 59 ECAB 184 (2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider any medical evidence).

¹³ 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁴ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that 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 Section 10.608(b) provides that, when an application for review of the merits of a claim 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.¹⁶

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁷ The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.¹⁸ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁹

ANALYSIS -- ISSUE 2

Following OWCP's January 18, 2012 decision denying appellant's claim, appellant requested reconsideration and submitted a narrative report from Dr. Fisher. The critical issue at the time OWCP denied appellant's claim was the factual question of whether the October 24, 2011 falling incident occurred as alleged. As Dr. Fisher's report does not provide factual evidence relevant to that issue, it is irrelevant to the claim. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.²⁰

Accordingly, the Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 issued its March 18, 2012 decision denying merit review.

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

¹⁷ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁸ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹⁹ *Annette Louise*, 54 ECAB 783 (2003).

²⁰ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

CONCLUSION

The Board finds that appellant has not established that she sustained a right ankle or head injury on October 24, 2011. The Board further finds that OWCP properly denied her request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 19 and January 18, 2012 are affirmed.

Issued: October 10, 2012
Washington, DC

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

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

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