United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant **and** **DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Vicksburg, MS, Employer**	)	**Docket No. 12-1728** **Issued: April 4, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 15, 2012 appellant filed a timely appeal from an April 6, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision denying his claim for a traumatic injury and a July 11, 2012 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

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 May 14, 2011, as alleged; and (2) whether

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the July 11, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant requests that OWCP pay his outstanding medical bills.

FACTUAL HISTORY

On May 27, 2011 appellant, then a 59-year-old high voltage electrician, filed a traumatic injury claim (Form CA-1) alleging a lower back injury as a result of lifting pole line cross arms in the performance of duty on May 14, 2011. He did not stop work.

In a May 31, 2011 report, Dr. John R. Ford, a Board-certified family medicine specialist, diagnosed chronic back pain and noted that appellant had sought emergency room treatment over the weekend. Appellant had pain radiating down the leg and some palpable tenderness over the back. His neurologic examination was normal. Dr. Ford released appellant to light duty with restrictions on heavy lifting and climbing effective June 6, 2011.

In a June 1, 2011 witness statement, appellant's coworker testified that he was working with appellant on May 14, 2011 disassembling cross arms from power poles. Appellant was loading the cross arms into a government vehicle when the witness noticed him holding his lower back. He thought he had pulled his back because he had pain in his lower back. The witness indicated that appellant had been having trouble with his back for the prior two weeks.

A magnetic resonance imaging (MRI) scan report dated June 2, 2011 revealed mild right foraminal stenosis at L4-5. Appellant also submitted physical therapy notes dated July 5 through August 11, 2011.

In an August 15, 2011 report, Dr. Robert C. Strong, a Board-certified anesthesiologist, diagnosed degenerative disc disease, lumbar spondylosis and right sacroiliitis. He noted that sometime around the middle of May 2011, appellant was lifting some utility pole cross arms at work and experienced pain in his back that became worse. Appellant had previously been treated by Dr. Strong for cervical radiculopathy and had cervical epidural steroid injections. Dr. Strong was not sure if appellant's pain was related to radiculopathy. On September 1, 2011 he administered a right sacroiliac joint injection.

In a February 16, 2012 letter, OWCP requested additional factual and medical evidence. It afforded appellant 30 days to submit additional evidence and respond to its inquiries. Appellant did not respond.

By decision dated April 6, 2012, OWCP denied the claim finding that the incident did not occur as alleged and that appellant failed to submit evidence containing a medical diagnosis in connection with the injury or events. Thus, appellant had not established fact of injury.

On May 23, 2012 appellant requested reconsideration. In a narrative statement, he reiterated that he was lifting cross arm poles on May 14, 2011 when he felt pain in his lower back. Appellant reported it to his supervisor, who he informed of his need to see a doctor about his back pain. He was in so much pain that he had to go to the emergency room on May 27, 2011. At that time, they took x-rays, told appellant nothing was broken, gave him pain

medicine and directed him to follow-up with his doctor. He went to the emergency room again on May 29, 2011 and followed-up with Dr. Ford on May 31, 2011. Appellant reiterated that he went to physical therapy and saw a pain management physician who gave him an injection.

By decision dated July 11, 2012, OWCP denied appellant's request for reconsideration 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 by it.

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 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]

ANALYSIS -- ISSUE 1

OWCP did not accept that the May 14, 2011 employment incident occurred as alleged. As noted above, the first element of fact of injury requires that appellant submit evidence establishing that an incident occurred at the time, place and in the manner alleged. On his claim form, appellant reported that he sustained a lower back injury as a result of lifting pole line cross arms in the performance of duty on May 14, 2011. In support of his claim, appellant submitted a June 1, 2011 witness statement from a coworker, who verified that he worked with appellant on May 14, 2011 disassembling cross arms from power poles. The witness further testified that appellant was loading the cross arms into a government vehicle when he began holding his lower

[3] 5 U.S.C. §§ 8101-8193.

[4] OWCP 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] *See 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).

back. The Board finds that there are no discrepancies regarding the occurrence of the May 14, 2011 employment incident. There are no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident.[7] The statements of appellant and the witness are consistent with the surrounding facts and circumstances. Appellant filed the claim on May 27, 2011, less than 30 days after the May 14, 2011 incident. This does not constitute late notification of injury. The Board finds that the evidence of record is sufficient to establish that the May 14, 2011 incident occurred at the time, place and in the manner alleged.

The issue is whether appellant sustained an injury as a result of the May 14, 2011 employment incident. Although Dr. Ford diagnosed chronic back pain, he did not provide medical rationale explaining how it was caused or aggravated by the May 14, 2011 employment incident.[8] Similarly, Dr. Strong's August 15, 2011 report indicated that appellant was lifting utility pole cross arms at work in May 2011, but failed to explain how the mechanism of the May 14, 2011 employment incident caused or aggravated appellant's condition. Lacking thorough medical rationale on the issue of causal relationship, the reports of Drs. Ford and Strong are of limited probative value and insufficient to establish that appellant sustained an employment-related injury in the performance of duty on May 14, 2011. The Board finds that appellant did not meet his burden of proof to establish a medical diagnosis in connection to the May 14, 2011 employment incident.

The June 2, 2011 MRI scan is diagnostic in nature and therefore does not address causal relationship. The physical therapy notes dated July 5 through August 11, 2011 do not constitute medical evidence as they were not prepared by a physician.[9] As such, the Board finds that appellant did not meet his burden of proof with these submissions.

As appellant has not submitted any medical evidence to support his allegation that he sustained an injury related to the May 14, 2011 employment incident, he has failed to meet his burden of proof to establish the medical component of fact of injury.

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

[7] *See S.A.*, Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident).

[8] *See I.J.*, 59 ECAB 408 (2008).

[9] Physical therapists are not physicians under FECA. *See* 5 U.S.C. § 8101(2).

an award for or against compensation.[10] OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[11]

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, 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 argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[12] 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.[13] 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.[14]

ANALYSIS -- ISSUE 2

In support of his May 23, 2012 reconsideration request, appellant submitted a narrative statement. The Board notes that submission of this statement did not require reopening appellant's case for merit review. As OWCP denied his claim based on the lack of supportive medical evidence and his narrative statement merely reiterates factual history of record, appellant's statement is not relevant and pertinent and is not sufficient to require OWCP to reopen his claim for consideration of the merits.[15]

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. As he did not meet any of the necessary requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on May 14, 2011, as alleged. The Board further finds that OWCP properly refused to reopen his case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

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[10] 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 his own motion or on application. 5 U.S.C. § 8128(a).

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

[12] 20 C.F.R. § 10.606(b)(2). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[13] 20 C.F.R. § 10.607(a).

[14] *Id*. at § 10.608(b).

[15] *See James W. Scott*, 55 ECAB 606 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2012 decision of the Office of Workers' Compensation Programs is modified to reflect that the May 14, 2011 incident occurred as alleged and is affirmed as modified. The July 11, 2012 OWCP decision is affirmed.

Issued: April 4, 2013
Washington, DC

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

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

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