

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

C.L., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Richmond, VA, Employer)

**Docket No. 13-1607
Issued: December 12, 2013**

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 June 27, 2013 appellant filed a timely appeal from a February 15, 2013 merit decision and a May 22, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUES

The issues are whether: (1) appellant met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) OWCP properly refused to reopen her case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the May 22, 2013 OWCP decision and 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. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that she sustained carpal tunnel syndrome from typing every day at work and that her claim for compensation should be approved.

FACTUAL HISTORY

On January 2, 2013 appellant, then a 48-year-old customer service representative, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome due to the use of a bad keyboard, desk and chair in the performance of her federal employment.

In a January 7, 2013 letter, OWCP requested additional factual and medical evidence. It afforded appellant 30 days to submit evidence and respond to its inquiries. Appellant submitted a position description.

In a January 17, 2012 statement, Susan Pykosh, appellant's supervisor, noted that appellant had advised her on November 28, 2012 that she was having pain in her wrists and was wearing support gloves on her wrists. Appellant was elected union president and took office on October 1, 2012. She was assigned to Ms. Pykosh's team but did not perform the duties as a customer service representative and had not performed such duties since she took office on October 1, 2012. Appellant complained that her desk and chair in the union office caused pain in her wrists. Ms. Pykosh stated that she had no way of knowing what duties appellant performed as union president. As a customer service representative prior to taking office, appellant used the computer and typed seven to eight hours a day.

By decision dated February 15, 2013, OWCP denied the claim. It found that appellant failed to establish fact of injury, finding that no factor of employment had been established. OWCP noted that she had not performed her federal duties since she took union office on October 1, 2012.

On March 5, 2013 appellant requested reconsideration. She submitted diagnostic testing dated December 31, 2012 through January 10, 2013 which revealed bilateral carpal tunnel syndrome. In a January 10, 2013 report, Dr. Charles R. Kaelin, a Board-certified orthopedic surgeon, diagnosed carpal tunnel syndrome. He indicated that the context of the pain occurred with movement and prolonged typing.

By decision dated May 22, 2013, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence or show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 and that an injury⁴ was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she sustained bilateral carpal tunnel syndrome in the performance of duty. Appellant alleged that she sustained this condition due to the use of a bad keyboard, desk and chair at work. In a January 17, 2012 statement, Ms. Pykosh, appellant's supervisor, noted that appellant had informed her on November 28, 2012 that she was having pain in her wrists and wore support gloves on her wrists. She explained that appellant had not performed customer service representative duties since she had been elected union president and took office on October 1, 2012. Appellant complained that her desk and chair in the union office caused the pain in her wrists. Ms. Pykosh stated that she had no way of knowing what duties appellant performed as union president. Prior to taking office with the union, appellant used the computer and typed from seven to eight hours a day.

The evidence of record does not adequately establish the duties appellant performed in the course of her federal employment or how often and how long she performed them. By letter dated January 7, 2013, OWCP informed her of the deficiencies in her claim. Appellant did not provide a response to OWCP's request for additional information as to her specific employment

⁴ OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

⁵ See *O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ See *D.R.*, Docket No. 09-1723 (issued May 20, 2010). See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ See *O.W.*, *supra* note 5.

duties and activities. Accordingly, the Board finds that appellant failed to meet her burden of proof to establish fact of injury.⁸

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed conditions became apparent during a period of employment, nor her belief that the conditions were caused by her employment is sufficient to establish a causal relationship.⁹ She failed to establish the first component of fact of injury. It is not necessary to discuss the medical evidence.¹⁰

On appeal, appellant contends that she sustained carpal tunnel syndrome from typing every day at work and, thus, her claim for compensation should be approved. For the reasons stated above, the Board finds that her arguments are not substantiated.

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.¹¹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹²

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.¹³ 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.¹⁴ 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.¹⁵

⁸ See *M.L.*, Docket No. 12-957 (issued December 7, 2012).

⁹ See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹⁰ See *Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

¹¹ *Supra* note 1. 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).

¹² See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

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

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

ANALYSIS -- ISSUE 2

In support of her March 5, 2013 reconsideration request, appellant submitted diagnostic testing dated December 31, 2012 through January 10, 2013 and a January 10, 2013 report from Dr. Kaelin, who diagnosed carpal tunnel syndrome. The Board finds that submission of these reports did not require reopening her case for merit review as they were medical in nature. The basis on which OWCP denied appellant's claim was her failure to establish the work duties alleged on her claim form. The evidence submitted does not establish a factor of federal employment which was the issue before OWCP. Therefore, this evidence does not constitute relevant and pertinent new evidence and is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did she submit any relevant and pertinent new evidence not previously considered. The Board finds that she did not meet any of the necessary requirements and is not entitled to further merit review.¹⁸

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty. The Board further finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁶ See *A.L.*, *supra* note 13. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁷ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁸ See *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the May 22 and February 15, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 12, 2013
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