

FACTUAL HISTORY

On February 16, 2012 appellant, then a 48-year-old supervisory unit administrator, filed a traumatic injury claim alleging that she pulled out a couple of fairly heavy footlockers that day to get to a wall locker when she stepped backward and fell. She described her injury as a contusion to the right hip, back, wrist and lower leg, as well as a neck sprain. In an attached statement, appellant explained: After pulling all of the boxes “I was stepping out of the ISU-90 and the next thing I remembered was falling. There was nothing I could grab a hold of so I just let myself fall and raised by arms over my head because some of the boxes I had just pulled were falling as well.”

On that same day, a physician’s assistant at the emergency room recorded the history of injury as follows: “The accident occurred yesterday. The fall occurred from a stool. [Appellant] fell from a height of [three to five] feet. She landed hard on a hard floor. There was no blood loss. The point of impact was the left hip.” An emergency room nurse reported that appellant was standing on a container approximately six to seven inches off the ground when she fell onto concrete. Six days later, a sergeant who had arrived on the scene shortly after the fall described what appellant told her husband when he came to take her to the emergency room: “[Appellant] told him that her shoe got stuck, she fell and hurt her wrist.”

In an April 19, 2012 decision, OWCP denied appellant’s claim. Noting conflicting information surrounding the claimed injury, it found that she failed to establish that she experienced the claimed accident, event or employment factor at the time, place and in the manner alleged.

On May 2, 2012 OWCP received appellant’s reconsideration request. Appellant noted the discrepancy in the histories reported by the emergency room personnel and advised that the physician’s assistant had apologized and sent her a corrected medical note. She submitted an addendum from the physician’s assistant at the emergency room, who revised the history of injury as follows: “The accident occurred less than [one-]hour ago. Incident: while patient was in metal container (connex) moving equipment and fell while getting out of container landing on right side on concrete. [Appellant] fell from a height of [one to two] feet. She landed on concrete. There was no blood loss. The point of impact was the right hip.”

In a May 8, 2012 decision, OWCP denied appellant’s reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence.

On appeal, appellant submits, among other things, an affidavit and an e-mail exchange from August 2012, as well as copies of photographs to show bruises on various parts of her body.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.⁴

A person who claims benefits under FECA has the burden of establishing by a preponderance of the reliable, probative and substantial evidence the essential elements of his or her claim, including the fact that he or she sustained an injury at the time, place and in the manner alleged.⁵ To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁶

ANALYSIS -- ISSUE 1

On her claim form, appellant alleged that she injured herself on February 16, 2012 when she "stepped backward and fell," bruising her right hip. After she arrived at the emergency room, a physician's assistant related an entirely different mechanism of injury. The physician's assistant stated that the accident occurred the day before, on February 15, 2012, when appellant fell from a stool at a height of three to five feet, landing on her left hip. An emergency room nurse explained that appellant was standing on a container approximately six to seven inches off the ground when she fell. A sergeant heard appellant tell her husband that her shoe got stuck and she fell.

Thus, the evidence does not present a clear picture of the incident that is alleged to have caused an injury. Particularly concerning are the emergency room descriptions, from two sources, indicating that appellant fell from a stool or container on which she was standing. This is not how she described her fall on her claim form or to her husband before she went to the emergency room. Moreover, the physician's assistant indicated that the fall actually occurred the day before, with appellant landing on her left hip, not the right.

³ 5 U.S.C. § 8102(a).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Henry W.B. Stanford*, 36 ECAB 160 (1984); *Samuel L. Licker*, 4 ECAB 458 (1951).

⁶ *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984). See also *George W. Glavis*, 5 ECAB 363 (1953).

Such inconsistencies in the evidence are sufficient to cast doubt on the validity of appellant's injury claim. They cast doubt on whether she injured herself as alleged. For this reason, the Board finds that appellant has not met her burden of proof to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The Board will therefore affirm the April 19, 2012 decision denying her injury claim.

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 vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁷

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought.

The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (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.⁸

A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606.

⁹ *Id.* at § 10.608.

ANALYSIS -- ISSUE 2

OWCP received appellant's reconsideration request within two weeks of the April 19, 2012 decision denying her injury claim. Appellant's request was therefore timely. The question for determination is whether her request met at least one of the three standards for obtaining a merit review of her case.

Regulations require OWCP to consider all evidence submitted appropriately.¹⁰ OWCP did not address nor acknowledge the revised medical report submitted by appellant in her request for reconsideration.

Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before OWCP at the time of its final decision,¹¹ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As Board decisions are final as to the subject matter appealed,¹² it is crucial that all evidence relevant to that subject matter which was properly submitted prior to the time of issuance of its final decision be addressed by OWCP.

In the instant case, OWCP clearly did not review the evidence received prior to the issuance of its May 8, 2012 final decision. The Board, therefore, must set aside the decision and remand the case to OWCP to fully consider the evidence which was properly submitted by appellant prior to its May 8, 2012 decision.¹³

The Board finds that this case is not in posture for decision. The Board will set aside OWCP's May 8, 2012 decision and remand the case for a proper review and final decision on appellant's timely reconsideration request.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on February 16, 2012, as alleged. Inconsistencies in the history of injury are unresolved. The Board also finds that this case is not in posture for decision on whether OWCP properly denied her request for merit review, pursuant to 5 U.S.C. § 8128(a). OWCP must address her argument and appropriately consider the evidence she submitted to support her request.

¹⁰ *Id.* at § 10.119.

¹¹ *See id.* at § 501.2(c)(1).

¹² *Id.* at § 501.6(c).

¹³ *William A. Couch*, 41 ECAB 548, 553 (1990); *J.E.*, Docket No. 12-1154 (issued January 4, 2013).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed. OWCP's May 8, 2012 decision is set aside and the case remanded for further action.

Issued: March 5, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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