

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

B.C., Appellant

and

**U.S. POSTAL SERVICE, TUSTIN POST
OFFICE, Tustin, CA, Employer**

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**Docket No. 13-290
Issued: November 8, 2013**

Appearances:
Thomas Martin, Esq., for the appellant
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 November 20, 2012 appellant, through his attorney, filed a timely appeal of the August 2, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed between the most recent merit decision dated December 13, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's attorney contends that the evidence submitted on reconsideration before OWCP is sufficient to establish that appellant sustained injuries while in the performance of duty on November 24, 2010.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 26, 2010 appellant, then a 57-year-old customer service supervisor, filed a traumatic injury claim, under OWCP File No. xxxxxx615, alleging that at 7:00 p.m. on November 24, 2010 he sustained a head contusion and injuries to his nose, arm, hands, right knee, neck and back when he tripped and fell on his face while going to his car.² He stopped work on November 26, 2010.

In a November 29, 2010 letter, Narvella Slack, postmaster, controverted the claim, contending that appellant was not in the performance of any official duties at the time of injury. On November 18, 2010 supervisors were instructed to work eight hours a day unless they were conducting a "3999" route inspection or directly instructed to work more than eight hours by Postmaster Slack, who stated that accompanying time keeping records showed that appellant ended his tour of duty at 1600 hours, three hours before his fall. It was unknown as to what he was doing at that time. Postmaster Slack contended that three hours was not a reasonable amount of time to exit the facility. On the date of injury appellant was scheduled to work eight hours and he did not perform a "3999" route inspection and was not given any additional duties. He was not authorized to be in the facility conducting personal business. Postmaster Slack indicated that appellant's work schedule was 0700 to 1600.

In a January 18, 2011 decision, OWCP denied appellant's claim finding that he was not in the performance of duty at the time of the November 24, 2010 incident. It found that he was not performing any tasks at work or that he was assigned to perform any work at the time of injury. OWCP further found that the medical evidence did not discuss appellant's particular work duties or mention that his fall occurred at work.³

On January 28, 2011 appellant requested an oral hearing before an OWCP hearing representative.

In a July 12, 2011 decision, an OWCP hearing representative affirmed the January 18, 2011 decision, finding that appellant did not sustain an injury in the performance of duty on November 24, 2010. The evidence was not sufficient to establish that he was engaged in the duties of the employing establishment.

By letter dated September 12, 2011, appellant, through his attorney, requested reconsideration.

² In a prior appeal related to appellant's occupational disease claim under OWCP File No. xxxxxx143, the Board issued an order dated May 27, 2010, which dismissed his appeal of an apparent December 24, 2008 OWCP decision denying his request for right foot surgery. The Board found that the record did not contain an adverse OWCP decision over which it could take jurisdiction. Docket No. 09-1731 (issued May 27, 2010). In a June 3, 2010 decision, the Board affirmed a December 24, 2008 OWCP decision denying appellant's occupational disease claim under OWCP File No. xxxxxx154 for a right foot condition and a February 17, 2009 OWCP decision denying his request for reconsideration. Docket No. 10-1208 (issued June 3, 2010).

³ In the January 18, 2011 decision, OWCP also denied appellant's claim for wage-loss compensation from January 8 through 28, 2011 as he did not establish a work-related injury.

In a December 13, 2011 decision, OWCP denied modification of the July 12, 2011 decision. It found that appellant did not submit any evidence to establish that he was authorized to work beyond his normal work schedule or that he was performing duties related to his employment.

On April 30, 2012 appellant's attorney requested reconsideration and submitted additional evidence.

In an April 18, 2012 statement, Catherine M. Sutton, secretary for Branch 373 of the Orange County National Association of Postal Supervisors, contended that appellant was working on the clock on November 24, 2010. She provided a history of injury that he worked until 7:00 p.m. and he fell on an uneven sidewalk on postal property while on his way to his car. After appellant returned to work, he submitted paperwork requesting pay which was denied by Postmaster Slack. Ms. Sutton stated that she should have paid him and then followed an established procedure that would have confirmed he was on the clock and on postal property. She noted that a clerk and Postmaster Slack walked out of the office just after 7:00 p.m. with appellant on the date of injury. Postmaster Slack talked about the day with him and never mentioned to him or anyone else that he worked late that day. Appellant was finishing paperwork on a computer. Ms. Sutton noted a settlement agreement regarding an Equal Employment Opportunity complaint he filed against Postmaster Slack which provided him with an opportunity to move to another office away from her until his retirement.

In a March 1, 2012 statement, John Hoff, a carrier, related that at approximately 5:15 p.m. on November 24, 2010 he received a telephone call from appellant who was working at the employing establishment. He stated that appellant asked him to help Monique Comeix, a carrier, and he agreed.

In an August 2, 2012 decision, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was repetitious and insufficient to warrant a review of its prior decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁴ OWCP's 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.⁵ 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

⁴ 5 U.S.C. §§ 8101-8193. Section 8128 of FECA provides that 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).

⁵ 20 C.F.R. § 10.606(b)(3).

of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁷ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸

ANALYSIS

On November 26, 2010 appellant filed a claim for traumatic injury, which OWCP denied by decisions dated January 18, July 12 and December 13, 2011. OWCP found that he was not in the performance of duty on November 24, 2010 as the evidence of record was insufficient to establish that he was engaged in the duties of the employing establishment at the time of injury. Appellant requested reconsideration on April 30, 2012. The Board finds that OWCP improperly denied merit review of the claim.

In support of his reconsideration request, appellant submitted narrative statements from Ms. Sutton and Mr. Hoff which described how the November 24, 2010 injury occurred and time of injury. Their statements directly address grounds upon which OWCP denied his claim as they relate to whether he was in the performance of duty prior to his injury. The Board finds that the statements of Ms. Sutton and Mr. Hoff constitute relevant and pertinent new evidence not previously considered by OWCP. As this evidence meets one of the standards for obtaining a merit review of appellant's case, the Board finds that OWCP improperly denied appellant's request. Appellant is entitled to a merit review.

Accordingly, the Board will remand the case for a merit review. After such further development of the evidence as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied merit review of appellant's claim.

⁶ *Id.* at § 10.607(a).

⁷ *See A.L.*, Docket No. 08-1730 (issued March 16, 2009). *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁸ *Id.* *See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: November 8, 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