

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

---

C.B., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
HUDSON POSTAL STATION, Modesto, CA, )  
Employer )

---

**Docket No. 13-1300  
Issued: November 8, 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  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 7, 2013 appellant filed an appeal of a December 4, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his claim and a February 4, 2013 decision denying his request for a hearing as untimely. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether OWCP properly denied appellant's traumatic injury claim on the grounds that fact of injury was not established; and, (2) whether it properly denied his request for a hearing as untimely.

On appeal, appellant asserts that he was injured in the performance of duty on August 31, 2012 although he was initially confused about the date. He alleged that a supervisor tried to

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

prevent him from receiving state unemployment benefits after removing him for attendance issues related to the injury.

### **FACTUAL HISTORY**

On September 28, 2012 appellant, then a 40-year-old distribution clerk, filed a claim for traumatic injury (Form CA-1) asserting that he sustained a left shoulder injury on “Aug not sure 2012” when the pallet jack he was operating malfunctioned. He filed a second Form CA-1 on October 19, 2012, asserting that the injury occurred on August 31, 2012. The employing establishment controverted the claim, contending that appellant could not recall the date of injury and did not report it until September 24, 2012.

Supervisor M.M. submitted a September 28, 2012 statement noting that on an unspecified date, appellant asked for another pallet jack as one had broken under an overweight load. Appellant called in sick on August 30, 2012 asserting that, while swimming after work, he aggravated a prior shoulder injury sustained in a motorcycle accident. Supervisor C.A. submitted a September 28, 2012 statement noting that on an unspecified date appellant informed her that he hurt his shoulder while dropping papers and that a pallet jack had broken.

In a September 27, 2012 statement, appellant stated that the incident with the pallet jack occurred “several weeks ago” and that he told Supervisor C.A. on September 26, 2012 that he intended to seek medical treatment.

Dr. Alexis Dasig, an attending physician specializing in occupational medicine, provided a September 28, 2012 report relating appellant’s account of an August 28, 2012 injury that occurred when the floor of the pallet jack he was operating dropped unexpectedly, jerking his left shoulder. He diagnosed a frozen left shoulder and probably torn left rotator cuff.

In a September 28, 2012 letter, appellant stated that he “can’t remember the date” of the incident, but that it occurred when a pallet jack malfunctioned while his team was offloading a truck. He asserted that he informed Supervisor C.A. of the injury when it occurred.

By October 30, 2012 letter, OWCP advised appellant of the evidence needed to establish his claim, including factual evidence corroborating the claimed incident and a statement from his physician supporting that the incident would cause the claimed left shoulder injury. In response, appellant submitted reports from Dr. Dasig dated from October 1 to November 9, 2012, repeating appellant’s account of an August 28, 2012 workplace incident in which he injured his left shoulder when a pallet jack dropped unexpectedly.

In a November 20, 2012 statement, appellant recalled that on September 28, 2012 he told Dr. Dasig about an accident occurring “around the end of August ... around August 28.” After further reflection, he believed that the incident occurred on August 31, 2012. Appellant asserted that he told supervisor C.A. of the left shoulder injury at the time of the incident and four weeks later when he sought medical treatment. He noted that he injured his right hand in a June 2012 motorcycle accident but did not sustain a left shoulder injury at that time.

By decision dated December 4, 2012, OWCP denied the claim finding that the factual evidence did not support that the claimed August 2012 incident occurred at the time, place and in

the manner alleged. It noted that the factual evidence contained several conflicting dates and accounts of the mechanism of injury. OWCP cautioned that even if appellant were to establish the claimed incident as factual, the medical evidence did not explain why that incident would cause the claimed left shoulder injury.

In a January 4, 2013 letter, appellant requested a telephonic oral hearing. He submitted June 14, 2012 hospital records regarding abrasions and a right scaphoid fracture caused by a motorbike accident. Appellant also submitted a December 31, 2012 report and an undated note from Dr. Dasig diagnosing a frozen left shoulder.

By decision dated February 4, 2013, OWCP denied appellant's January 4, 2013<sup>2</sup> request for a hearing on the grounds that it was not timely filed within 30 days of the December 4, 2012 decision. It exercised its discretion by performing a limited review of the evidence and further denied his request as the issue in the case could be addressed equally well pursuant to a valid request for reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

---

<sup>2</sup> OWCP noted that as it did not retain the postmark from appellant's request for hearing, it would utilize January 4, 2013, the date appellant signed his hearing request.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>7</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

## ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a left shoulder injury at work when a pallet jack malfunctioned. However, he provided several conflicting dates for the claimed incident. Appellant noted in a September 27, 2012 statement that the injury occurred “several weeks ago” but that he informed his supervisor on the unspecified date of injury. In his September 28, 2012 claim form, he stated that he injured his left shoulder on “Aug not sure 2012.” Similarly, appellant noted in a September 28, 2012 letter that he could not remember the date of the incident. His October 19, 2012 claim form lists August 31, 2012 as the date of injury. Appellant affirmed the August 31, 2012 date in a November 20, 2012 statement.

The employing establishment contended that appellant did not report a left shoulder injury until September 24, 2012. Supervisor M.M. noted that appellant reported a broken pallet jack but not a left shoulder injury. Instead, appellant called in sick on August 30, 2012 asserting that he injured his shoulder while swimming, aggravating a prior injury sustained in a motorcycle accident. Supervisor C.A. noted that appellant informed her that he hurt his shoulder while dropping papers and that a pallet jack had broken, but did not recall the date of this conversation. Both supervisory statements differ significantly from appellant’s account of events.

The Board notes that OWCP advised appellant by October 30, 2012 letter of the evidence needed to establish his claim, including factual corroboration identifying the date of the claimed incident. However, appellant did not submit such evidence. The Board finds that, due to the conflicting evidence regarding the time, place and manner in which the alleged incident occurred, he has not established his claim.<sup>8</sup> Therefore, OWCP’s December 4, 2012 decision was appropriate under the law and facts of the case.

The Board notes that Dr. Dasig, an attending physician specializing in occupational medicine, provided several reports relating appellant’s account of an August 28, 2012 workplace injury. However, as appellant failed to establish the threshold issue of fact of injury, it is premature to address the secondary issue of causal relationship by reviewing the medical evidence in this case.

On appeal, appellant asserts that he was injured in the performance of duty on August 31, 2012 although he was initially confused about the date. He alleged that a supervisor tried to prevent him from receiving state unemployment benefits after removing him for attendance issues related to the injury. As stated above, the factual inconsistencies in appellant’s versions of events and the lack of contemporaneous evidence cast significant doubt on the validity of the claim. The Board notes that it has no jurisdiction over state unemployment benefits.

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.

---

<sup>8</sup> See *Caroline Thomas*, 51 ECAB 451, 455 (2000).

## LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of OWCP. Section 8124 (b)(1) provides as follows: “Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier’s date marking of the request.<sup>9</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>10</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>11</sup>

## ANALYSIS -- ISSUE 2

OWCP denied appellant’s traumatic injury claim by decision issued December 4, 2012. Appellant’s letter requesting a hearing was dated January 4, 2013, more than 30 days after issuance of the December 4, 2012 decision.<sup>12</sup> Thus, OWCP properly found that his request for an oral hearing was not timely filed under section 8124(b)(1) of FECA and that he was not entitled to a hearing as a matter of right.

OWCP then exercised its discretion and denied appellant’s request for a hearing on the additional grounds that he could address the fact of injury issue in his case equally well by submitting relevant evidence accompanying a valid request for reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP’s decision, the Board finds that OWCP did not abuse its discretion in denying appellant’s untimely request for an oral hearing.<sup>13</sup>

## CONCLUSION

The Board finds that appellant has not established that he sustained a left shoulder injury in the performance of duty due to inconsistencies in the evidence regarding the occurrence of the alleged incident. The Board further finds that OWCP properly denied appellant’s request for a hearing as untimely.

---

<sup>9</sup> 20 C.F.R. § 10.616(a).

<sup>10</sup> *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>11</sup> *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>12</sup> The 30<sup>th</sup> day was Thursday, January 3, 2013.

<sup>13</sup> *See Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 4, 2013 and December 4, 2012 are affirmed.

Issued: November 8, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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