

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

A.M., Appellant)	
)	
and)	Docket No. 13-1063
)	Issued: September 4, 2013
DEPARTMENT OF THE ARMY, RED RIVER)	
ARMY DEPOT, Texarkana, TX, Employer)	
)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 28, 2013 appellant filed a timely appeal of an October 19, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. The Board also has jurisdiction over a January 30, 2013 decision denying merit review. 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 and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained a traumatic injury in the performance of duty on July 23, 2012; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 6, 2012 appellant, then a 66-year-old clerk, filed a traumatic injury claim alleging that on July 23, 2012 he injured his right shoulder while moving a water cooler from the back of a truck.

In a letter dated August 16, 2012, the employing establishment controverted the claim as moving a water cooler was not part of appellant's clerk duties. In addition, it related that appellant's supervisor did not request appellant to move a water cooler. The employing establishment also contested the injury on the grounds that a water cooler weighs 200 pounds and one person would not be able to lift it without assistance.

On August 16, 2012 OWCP received a July 30, 2012 magnetic resonance imaging (MRI) scan diagnosing glenohumeral joint moderate osteoarthritis, moderate infraspinatus tendinopathy and supraspinatus tendinopathy with a large distal anterior tendon full thickness tear.

OWCP also received appellant's August 15, 2012 statement to the employing establishment regarding the July 23, 2012 incident. Appellant stated that he felt a sharp pain in his right shoulder while pulling a water cooler out of his truck. He stated that he was not instructed to move or lift the water cooler and that nobody was assisting him in moving the water cooler.

In an August 16, 2012 report, Dr. Lewis C. Jones, an examining Board-certified orthopedic surgeon, diagnosed a right shoulder rotator cuff tear. Under history of injury, he related that the injury occurred on July 23, 2012 while appellant was moving a large fan weighing about 500 pounds in the back of his truck. A physical examination revealed good right shoulder motion and tenderness on palpation. A review of an x-ray interpretation was negative, but an MRI scan revealed a right shoulder supraspinatus rotator cuff tear.

In correspondence dated September 6, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence required to support his claim and given 30 days to provide the requested information. OWCP also informed appellant that the evidence of record was insufficient to establish that he was injured while performing any employment duties.

In response to OWCP's letter, appellant submitted an August 16, 2012 return to work report containing a diagnosis of right shoulder rotator cuff tear and listing work restrictions.

In a September 12, 2012 letter, Dr. James R. Sarrett, a treating Board-certified family practitioner, reported seeing appellant on July 25, 2012 for right shoulder pain. Appellant related injuring his right shoulder at work three days previously while lifting an object from a truck. A review of a subsequent MRI scan revealed a right shoulder rotator cuff tear and moderate degenerative changes, which have been present for a long time. Dr. Sarrett opined that the right shoulder rotator cuff tear was due to the work injury claimed by appellant.

By decision dated October 19, 2012, OWCP denied appellant's traumatic injury claim on the grounds that fact of injury had not been established. The basis for the denial of appellant's claim was due to discrepancies in the history of the alleged July 23, 2012 incident and the lack of

any rationalized medical evidence explaining how the right shoulder rotator cuff was causally related to the July 23, 2012 incident.

On October 13, 2012 appellant requested reconsideration.

By decision dated January 30, 2013, OWCP denied reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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.³ 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.⁴

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.⁵ 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.⁶ 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.⁷

ANALYSIS -- ISSUE 1

OWCP denied appellant's claim because it found that he did not establish the first component of fact of injury due to discrepancies in the incident history and the lack of any reasoned medical evidence. It found that there were inconsistencies in how the injury occurred on July 23, 2012. OWCP also found no well-rationalized medical opinion explaining how appellant's right rotator cuff tear was causally related to the July 23, 2012 incident.

The Board finds that appellant has not submitted sufficient evidence showing that his claimed injury constituted an employment incident that occurred in the performance of his duties as a clerk. Appellant was provided with an opportunity to clarify how his claimed injury was performed in the performance of duty, but failed to submit such information or evidence which would shed further light on this matter. He alleged that he sustained an injury on July 23, 2012 due to moving a water cooler from the back of his truck. The employing establishment

² 5 U.S.C. § 8101 *et seq.*

³ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁴ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 3.

⁶ *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

⁷ *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 3.

controverted the claim on the grounds that moving a water cooler was not part of appellant's work duties. In addition, it noted that a water cooler weighs about 200 pounds and requires more than one person to lift it. Furthermore, appellant acknowledged in an August 15, 2012 statement that he had not been instructed by the employing establishment to move or lift the water cooler and that nobody was assisting him in moving the water cooler. He has not identified any particular work duty he was performing while removing a water cooler from his truck at the time of the alleged injury. Appellant has not explained how he was engaged in his employer's business or that he was engaged in doing something incidental thereto on July 23, 2012.⁸

Appellant did not establish the existence of an employment factor for the further reason that his claim contains inconsistencies regarding the ability of one person being able to lift a 200-pound water cooler and Dr. Lewis stating that the injury occurred as a result of appellant moving a 500-pound fan around in his truck. He did not submit sufficient evidence to establish that he experienced an employment incident at a specific time, place and manner.⁹ For these reasons, appellant has not established that he was in the performance of duty at the time of the alleged July 23, 2012 incident.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁰ 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.¹¹ 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.¹² 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.¹³

⁸ See *Bonnie A. Contreras*, *supra* note 3; *Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001).

⁹ See *Delores C. Ellyet*, 41 ECAB 992 (1990); *Ruthie M. Evans*, 41 ECAB 416 (1990). To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether "fact of injury of injury" has been established. The employee must first submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury. See *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ 5 U.S.C. §§ 8101-8193. Section 8128(a) 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.

¹¹ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹² *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹³ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ANALYSIS -- ISSUE 2

Appellant's October 13, 2012 request for reconsideration did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP or submit any evidence with his reconsideration request. The Board finds that appellant is not entitled to a review of the merits of his claim based on any of the three requirements under section 10.606(b)(2).

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his October 13, 2012 request for reconsideration.¹⁴

CONCLUSION

The Board further finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 30, 2013 and October 19, 2012 are affirmed.

Issued: September 4, 2013
Washington, DC

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

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

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

¹⁴ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, *supra* note 11; *Candace A. Karkoff*, 56 ECAB 622 (2005) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).