

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

J.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rochester, MN, Employer**

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**Docket No. 14-1132
Issued: December 24, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 18, 2014 appellant filed a timely appeal from a January 15, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and a March 13, 2014 nonmerit decision denying his request for reconsideration. 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.

ISSUES

The issues are: (1) whether appellant sustained an injury on March 11, 2013 in the performance of duty; and (2) whether OWCP properly denied his request to reopen his case for further review of the merits under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 14, 2013 appellant, then a 64-year-old letter carrier technician, filed a traumatic injury claim alleging that on March 11, 2013 he injured his middle back and ribs when he slipped on ice in the parking lot of the employing establishment at 6:45 a.m. His tour of duty is from 7:30 a.m. to 4:00 p.m. The employing establishment informed OWCP that it had directed appellant to report for duty at 6:30 a.m. on March 11, 2013. Appellant stopped work on March 18, 2013.

On March 11, 2013 appellant sought treatment at a local emergency room for rib pain, and trouble breathing after a fall on ice walking into the employing establishment. A physician diagnosed a thoracic back contusion and found that appellant should not work that day.²

In a report dated March 18, 2013, Dr. Angela Borders-Robinson, an osteopath, related that Dr. Craig M. Chambers, a Board-certified internist, referred appellant to her under workers' compensation for an evaluation of left-sided rib pain after a fall on March 11, 2013 in a parking lot at work. She diagnosed post-traumatic myofascial pain syndrome in the mid-thoracic region and referred him for physical therapy.

On April 8, 2013 Dr. Borders-Robinson discussed appellant's history of a fall on ice in a parking lot. She noted that his thoracic back pain had improved with physical therapy and that x-rays did not show a fracture.³ Dr. Borders-Robinson diagnosed post-traumatic myofascial pain syndrome. She found that appellant was currently unable to perform his regular employment.

By letter dated April 23, 2013, OWCP requested that appellant submit additional medical evidence, including a detailed report from his attending physician addressing the relationship between any diagnosed condition and the identified work incident. It further informed him that a finding of pain did not constitute a diagnosis.

In a report dated April 23, 2013, Dr. Borders-Robinson related that appellant sustained back pain in the thoracic spine after a fall on ice at work. She found that he could return to work without restrictions at the conclusion of physical therapy. Dr. Borders-Robinson diagnosed "post[-]traumatic myofascial pain syndrome, currently improving with physical therapy." She released appellant to return to work without restrictions on May 1, 2013.

By decision dated May 28, 2013, OWCP denied appellant's claim on the grounds that the medical evidence was insufficient to establish that he sustained a diagnosed condition causally related to the accepted March 11, 2013 employment incident. It noted that a finding of "pain" did not constitute a diagnosed condition.

² A chest x-ray dated March 11, 2013 did not reveal a fracture.

³ An x-ray of the thoracic spine obtained on March 18, 2013 showed generalized osteopenia but no fracture.

On June 5, 2013 appellant requested reconsideration. In a report dated June 5, 2013, Dr. Borders-Robinson stated:

“There is some question about the diagnosis of [m]yofascial pain syndrome. Apparently, someone is convinced that this is a symptom, not a diagnosis. I can assure you that this is a diagnosis which indeed has a diagnosis code of 729.1. [Appellant’s] symptoms [are] mid thoracic back pain from trauma.”

Dr. Chambers noted in a report dated March 14, 2013, received by OWCP on August 21, 2013 that appellant reported that he slipped and fell on ice in a parking lot at work. Appellant subsequently experienced upper back pain and rib pain. Dr. Chambers found tenderness at the left paraspinous muscle in the intrascapular area. He diagnosed pain after a fall on March 11, 2013.

By decision dated September 13, 2013, OWCP denied modification of its May 28, 2013 decision. It again determined that a finding of pain was insufficient to constitute a diagnosis under FECA. OWCP noted that the record contained medical reports regarding a left thumb condition that were not relevant to the current file number.⁴

On November 19, 2013 appellant requested reconsideration. In a statement dated November 9, 2013, he noted that some evidence had been included from another claim and that Dr. Borders-Robinson could not change her diagnoses as it would be fraudulent. Appellant submitted a June 4, 2013 physical therapy report.

In a decision dated January 15, 2014, OWCP denied modification of its September 13, 2013 decision. It found that a physical therapist’s report was insufficient to show a diagnosed condition due to the March 11, 2013 employment injury.

In a form dated February 27, 2014, appellant again requested reconsideration. By decision dated March 13, 2014, OWCP found that he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under section 8128.

On appeal, appellant asserted that OWCP had confused his current claim with another claim. He advised that Dr. Borders-Robinson instructed him to send her medical reports in support of his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ 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

⁴ The record contains reports dated May 22 and July 8, 2013 regarding a left thumb condition.

⁵ See *supra* note 1.

employment injury.⁶ 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.⁷

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁹ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.¹⁰

ANALYSIS -- ISSUE 1

Appellant alleged that he injured his middle back and ribs on March 11, 2013 at 6:45 a.m. when he slipped on ice in the parking lot of the employing establishment, who verified that he was told to report to work at 6:30 a.m. on March 11, 2013. OWCP accepted that the slip and fall occurred at the time, place, and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

On March 11, 2013 appellant received treatment in the emergency room for rib pain following a fall on ice while walking into his work location. A physician diagnosed a thoracic back contusion. Dr. Borders-Robinson, however, did not specifically address the cause of the diagnosed condition and thus her report is of little probative value.¹¹

In a report dated March 18, 2013, Dr. Borders-Robinson evaluated appellant for rib pain on the left side subsequent to a fall on March 11, 2013 in a parking lot at work. She diagnosed post-traumatic myofascial pain syndrome of the mid-thoracic spine. While Dr. Borders-Robinson recounted appellant’s description of his March 11, 2013 slip and fall on ice, she did not specifically attribute the myofascial pain syndrome to the fall on March 11, 2013 or explain how the thoracic myofascial pain resulted from this incident.¹² As discussed, medical evidence that does not offer any opinion on the cause of an employee’s diagnosed condition or is unsupported by medical rationale is of limited probative value on the issue of causal relationship.¹³

⁶ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁷ See *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁹ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹⁰ *Id.*

¹¹ See *Conard Hightower*, 54 ECAB 796 (2003).

¹² See *C.K.*, Docket No. 13-504 (issued April 25, 2013).

¹³ See *supra* note 11; *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

Dr. Borders-Robinson also failed to provide a clear diagnosis of a thoracic condition but instead found myofascial pain of the thoracic spine. A diagnosis of pain, however, does not constitute a firm medical diagnosis.¹⁴

In progress reports dated April 8 and 23, 2013, Dr. Borders-Robinson reviewed appellant's history of a fall on ice in a parking lot at work. She diagnosed post-traumatic myofascial pain syndrome. Again, Dr. Borders-Robinson did not specifically attribute the myofascial pain syndrome to the fall on ice, provide a diagnosis other than pain syndrome, or support her opinion with medical rationale. A physician must provide an opinion on whether the employment incident described caused or contributed to a claimant's diagnosed medical condition, and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical, and rationale.¹⁵

On June 5, 2013 Dr. Borders-Robinson related that myofascial pain syndrome constituted a diagnosis rather than a symptom. She indicated that appellant's symptom was pain in his thoracic spine as a result of trauma. Dr. Borders-Robinson did not address how his fall on ice resulted in myofascial pain syndrome and thus her opinion is insufficient to meet appellant's burden of proof.¹⁶

In a report dated March 14, 2013, Dr. Chambers discussed appellant's history of a fall on ice at work. On examination, he found tenderness at the left paraspinal muscle. Dr. Chambers diagnosed pain subsequent to a fall on March 11, 2013. However, as noted, a finding of pain does not constitute the diagnosis of a specific medical condition.¹⁷

Appellant submitted physical therapy reports; however, physical therapy reports do not constitute probative medical evidence as a physical therapist is not a "physician" as defined under FECA.¹⁸

On appeal, appellant alleged that OWCP had confused appellant's claim with another claim. OWCP, in its September 13, 2013 decision, noted that some evidence relevant to a left thumb claim was contained in the case record. It did not, however, weigh this evidence in consideration of appellant's claim and thus the inclusion of this evidence in the record did not affect the outcome of the current case.

Appellant notes that he submitted evidence from Dr. Borders-Robinson in support of his claim. As discussed, however, Dr. Borders-Robinson reports are insufficient to meet his burden of proof as she did not provide an opinion on whether the employment incident described caused

¹⁴ See *T.K.*, Docket No. 08-715 (issued September 23, 2008); *Robert Broome*, 55 ECAB 339 (2004).

¹⁵ See *John W. Montoya*, 54 ECAB 306 (2003).

¹⁶ See *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (a medical report is of little probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁷ See *supra* note 14.

¹⁸ 5 U.S.C. § 8101(2); see also *E.S.*, Docket No. 14-493 (issued June 16, 2014).

or contributed to a diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rationale.¹⁹

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 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,²⁰ 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.²¹ 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.²² 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.²³

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²⁴ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁵ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁶

ANALYSIS -- ISSUE 2

In a form dated February 27, 2014, appellant requested reconsideration by OWCP. He did not, however, establish that it erroneously applied or interpreted a point of law nor did he raise any legal argument in support of his reconsideration request not previously considered. Appellant did not submit any pertinent new and relevant evidence. The underlying issue in this

¹⁹ See *supra* note 15.

²⁰ See *supra* note 1. Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application.”

²¹ 20 C.F.R. § 10.606(b)(3).

²² *Id.* at § 10.607(a).

²³ *Id.* at § 10.608(b).

²⁴ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

²⁵ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁶ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

case, whether he sustained an injury on March 11, 2013, is medical in nature and can only be resolved through the submission of probative medical evidence from a physician.²⁷ Consequently, as appellant's reconsideration request failed to meet any of the three criteria, OWCP properly denied his reconsideration request.²⁸

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on March 11, 2013 in the performance of duty. The Board further finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the March 13 and January 15, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 24, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁷ *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).

²⁸ Appellant submitted new medical evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c)(1).