

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

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<b>T.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 14-1047</b>
	)	<b>Issued: October 9, 2014</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>JAMES A. HALEY HOSPITAL, Tampa, FL,</b>	)	
<b>Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Capp P. Taylor, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 1, 2014 appellant, through his attorney, filed a timely appeal of a February 21, 2014 decision of the Office of Workers' Compensation Programs (OWCP) denying further merit review. Because over 180 days elapsed from insurance of the most recent merit decision on April 30, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel stated that Thea Brandon witnessed appellant fall at the time of the alleged incident. He argued that her statement provided a basis for fact of injury and supported

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

appellant's position that he sustained an injury on the job and shifted the burden of proof to OWCP to establish that the injury did not in fact happen. Counsel also argued that the January 9, 2014 report from an attending orthopedic surgeon, constituted relevant new evidence requiring OWCP to reopen appellant's claim for consideration of the merits.

### **FACTUAL HISTORY**

On September 26, 2012 appellant, then a 43-year-old mail clerk, filed a traumatic injury claim alleging that on September 7, 2012 Francis Cordero, a mailroom supervisor, kicked him unexpectedly in the back of his right leg, which caused injury to his lower back. On the reverse of the form, appellant's supervisor, Steven Hellmers, stated that an investigation did not identify any witnesses to confirm that the incident happened as alleged. In a letter dated October 4, 2012, OWCP requested additional factual and medical evidence supporting that the incident occurred as alleged and that a medical condition resulted from the alleged employment event. It allowed 30 days for a response.

Mr. Hellmers submitted a September 14, 2012 report noting that appellant attempted to file assault and battery charges against Mr. Cordero on September 13, 2012 as the result of incident of September 7, 2012. Appellant reported to the police that Mr. Cordero "mule kicked" him on Friday September 7, 2012 at 1:50 pm and that he sought treatment at the emergency room after his workday. Mr. Cordero denied any incident that would result in injury to appellant. Appellant also alleged that Mr. Cordero struck him with a rolled stack of paper on September 12, 2012 while training him on a piece of equipment. Mr. Cordero also denied this incident. He stated that, the allegations had no validity and, if the events occurred at all, there was no intentional or violent harm but rather playful intent. Five possible witnesses were interviewed and denied observing either of the incidents alleged by appellant. Appellant stated to Mr. Hellmers on September 7, 2012 that Mr. Cordero kicked him twice to the knee area making him awkwardly catch himself from falling and resulting in pain in his low back. Mr. Hellmers believed that Mr. Cordero was "goofing around" and did not intend to cause him harm. He verbally counseled Mr. Cordero to refrain from physical contact with any employee.

Appellant stated that there were witnesses to the kicking incident, but that his coworkers refused to come forward. He reported that Mr. Cordero kicked him twice on September 7, 2012 landing the second kick to the back of his right knee or thigh. Appellant had to catch himself to prevent a fall and felt pain in his lower back and thigh. He sought medical treatment. On September 12, 2012 Mr. Cordero struck appellant with a rolled stack of papers three or four times in front of a trainer. Appellant stated that Mr. Cordero was acting playfully and not fighting him but that he felt that, like sarcasm, these events were underhanded acts of violent intent. On September 27, 2012 he repeated his allegations and noted that a repairman was present when Mr. Cordero kicked him, but denied witnessing the event.

Appellant submitted a statement from Omoro K. Williams, a coworker, noting that Mr. Cordero was initially employed as a work-study student and that he liked to touch people in unexpected ways such as a pat on the back or shoulder. Mr. Williams stated that Mr. Cordero had punched him in the side of his stomach and patted him on the back. He noted that Mr. Cordero meant no harm, but that these actions aggravated a back injury. Mr. Williams stated that when Mr. Cordero returned as a supervisor he kicked a mail clerk as a joke.

In a nurse's note dated September 7, 2012, appellant reported right leg pain following a kick. He stated that his supervisor kicked him while playing and joking around. Appellant again sought medical treatment on September 8, 2012. Dr. Samy F. Bishai completed a form report on September 25, 2012 and diagnosed lumbosacral strain. He examined on October 5, 2012 and noted an increase in pain. Dr. Bishai found that appellant was totally disabled pending further testing. He completed a duty status report on October 24, 2012 and diagnosed lumbosacral strain with muscle spasm and reduced range of motion.

Mr. Cordero completed a statement on October 25, 2012 and denied doing anything to harm anyone on September 7, 2012. He stated that he treated all employees with dignity and respect.

Appellant submitted an additional statement on October 29, 2012 reviewing the submitted evidence and describing his symptoms. He noted that he had a previous service-related injury to his lower back, knees and legs.

By decision dated November 8, 2012, OWCP denied appellant's claim on the grounds that he failed to submit the necessary factual evidence to establish that his employment incident occurred as alleged. It noted that there were inconsistencies in the factual record which cast doubt upon whether the employment incident occurred as alleged.

Appellant requested an oral hearing before an OWCP hearing representative on November 13, 2012.

In a narrative report dated September 25, 2012, Dr. Bishai noted that appellant stated that his supervisor had kicked him in the back of the leg resulting in injury to his back. He diagnosed dorsolumbar strain, herniated lumbar disc and bilateral radiculopathy in the lower extremities. Dr. Bishai diagnosed herniated lumbar disc with radiculopathy on October 24, 2012. He completed a narrative report on December 4, 2012 and repeated his diagnoses and opined that appellant was totally disabled. Dr. Bishai stated that appellant was experiencing an aggravation of his preexisting back condition, which initially developed in the military. He concluded, "[I]t is my opinion that [appellant's] injuries of September 7, 2012 when he was kicked in the leg and back caused an injury and aggravation of a preexisting condition of his back and it is a permanent aggravation of this condition."

Appellant testified at the oral hearing on February 14, 2013. He stated that he was talking with Mr. Cordero, who kicked behind him and then struck him with a second kick. Appellant lost his balance and landed in a chair to keep from falling to the floor. He noted that he had problems with balance due to his service-related disability. Appellant stated that he caught himself with his arms leaning into the chair. The incident resulted in back and leg pain. Appellant stopped work and did not return.

During the oral hearing, counsel read from February 7, 2013 statement from Ms. Brandon, a coworker, who reported seeing appellant falling backward. Ms. Brandon stated that appellant tried to grab a chair and table to break his fall. She stated that she did not see Mr. Cordero kick appellant. Mr. Cordero gave her a ride home and stated that he and appellant

played like that. Ms. Brandon admonished Mr. Cordero not to put his feet on people even playing.

Following the oral hearing appellant submitted additional reports from Dr. Bishai dated February 27 and March 6, 2013. Dr. Bishai noted appellant's complaints of neck pain and pain in his lower back. He continued to support appellant's disability for work.

Mr. Hellmers reviewed the hearing transcript on March 18, 2013 and stated that he interviewed Ms. Brandon during the initial investigation and she did not state that she had witnessed anything related to appellant's traumatic event. He disputed her allegation that she reported appellant's stumble to him.

By decision dated April 30, 2013, the hearing representative found that the case record did not contain any witness statements supporting appellant's version of events. She noted that the claim form was filed two weeks after the alleged incident and that she did not find appellant's testimony to be credible. The hearing representative stated that Mr. Cordero denied that the incident occurred and that the medical records failed to provide a reasoned opinion supporting that the diagnosed degenerative back condition and herniated disc were related to appellant's alleged employment incident. She found that due to the late reporting and lack of contemporaneous medical evidence that the incident did not occur as alleged.

Appellant submitted additional reports from Dr. Bishai dated April 11 and May 16, 2013, who reiterated the findings and conclusions together with prior reports of record. He submitted a series of reports dated January 4 to December 11, 2013, from Dr. Claude Barosy, a family practitioner, who listed a date of injury of September 7, 2012, provided findings on physical examination and diagnosed lumbar sprain, lumbar disc syndrome and bilateral radiculopathy. Dr. Barosy found herniated discs at L3-4 and L5-S1. He recommended physical therapy.

Appellant requested reconsideration on February 3, 2014 and stated that he was submitting new medical evidence from Dr. Bishai. He asked that OWCP review Mr. Williams' statement, the February 7, 2013 statement from Ms. Brandon and a March 29, 2013 statement from local union president Donald Parent. Counsel contended that Ms. Brandon saw appellant fall, although she did not see the actual horseplay that he alleged caused the fall. Her statement was, therefore, significant. On March 29, 2013 Mr. Parent discussed appellant's claim with another employee who informed him that Mr. Cordero had kicked appellant and that Mr. Williams had witnessed this event.

In a report dated January 9, 2014, Dr. Bishai noted that appellant had preexisting back problems related to his military service. He stated that this condition did not include radicular symptoms. Dr. Bishai reported appellant's statements that on September 7, 2012 he was kicked in the leg by a coworker during horseplay, which caused him to lose his balance and break his fall by catching himself on a chair. Appellant reported that he immediately felt pain in his low back. Dr. Bishai stated, "[I]t is my opinion that [appellant] suffered lumbar disc herniation with bilateral lower extremity radiculopathy as a result of the incident at work on September 7, 2012."

In a decision dated February 21, 2014, OWCP denied appellant's request for reconsideration of the merits. It found that he failed to submit new and relevant evidence or argument in support of his request.

### **LEGAL PRECEDENT**

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>2</sup> Section 10.606(b) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.<sup>3</sup> Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.<sup>4</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>5</sup>

### **ANALYSIS**

OWCP denied appellant's traumatic injury claim on the grounds that he failed to provide sufficient factual evidence to establish that he was kicked by his supervisor in an act of horseplay on September 7, 2012 at the time, place and in the manner alleged. As noted the Board does not have jurisdiction over the merits of the claim.

Appellant submitted a new statement dated March 29, 2013 from Mr. Parent discussing whether Mr. Cordero had kicked one of his coworkers. This statement is not relevant to appellant's claim. The issue is whether he submitted sufficient factual evidence that Mr. Cordero kicked him on September 7, 2012, not whether Mr. Cordero had engaged in horseplay with other individuals. As this statement is not relevant to the underlying issue in appellant's claim it does not require OWCP to reopen his claim for consideration of the merits.

Appellant also submitted medical evidence. He submitted a series of medical reports from Drs. Bishai and Barosy. These reports are not relevant to the issue for which his claim was denied, whether the factual evidence in the record supported that the employment incident occurred as alleged. Appellant has stated that Mr. Cordero kicked him on September 7, 2012

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606.

<sup>4</sup> *Id.* at § 10.608.

<sup>5</sup> *R.P.*, Docket No. 14-413 (issued July 8, 2014).

causing him to stumble and catch himself on a chair injuring his back. While Mr. Bishai describes appellant's version of events in his January 9, 2014 report, he was not a witness and cannot provide first hand affirmation of the event. He also provided similar statements in reports previously considered by OWCP. The remainder of the new medical evidence does not provide a description of the alleged employment incident and is not relevant to the reason that appellant's claim was denied. Therefore, the medical evidence is not sufficient to require OWCP to reopen his claim for consideration of the merits.

Appellant also resubmitted factual and medical evidence in support of his request for reconsideration. As the statements from Mr. Williams and Ms. Brandon and medical evidence from Dr. Bishai was reviewed by the hearing representative and OWCP in prior decisions, this does not constitute relevant new evidence and is not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

On appeal, counsel argued that Ms. Brandon witnessed appellant stumble at the time of the incident and her statement provided a basis for finding fact of injury. This contention was not raised previously to OWCP.<sup>6</sup>

As appellant has neither demonstrated that, a point of law was erroneously applied or interpreted nor advanced a relevant legal argument not previously considered nor submitted pertinent new and relevant evidence not previously considered, OWCP did not abuse its discretion in denying further consideration of the merits of his claim.

### **CONCLUSION**

The Board finds that OWCP properly declined to reopen appellant's claim for review of the merits on February 21, 2014.

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<sup>6</sup> 20 C.F.R. §§ 501.2(c) and 501.3.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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