United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
	)	
and	)	**Docket No. 14-1352**
	)	**Issued: October 1, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Memphis, TN, Employer	)	

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 May 28, 2014 appellant filed a timely appeal from a February 14, 2014 merit decision and a March 19, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 met her burden of proof to establish a traumatic injury in the performance of duty on September 25, 2013; and (2) whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant argues that she was subject to retaliation due to her filing of an EEO claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 26, 2013 appellant, then a 37-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging strain to the neck, left shoulder, left knee and sprains to the right foot and lower back on September 25, 2013. She was injured while performing pat-downs of a person with a disability and a standard pat-down of an officer. A supervisor checked a box noting that appellant was not injured within the performance of duty, explaining that fact of injury and causal relationship had not been established. The supervisor noted that her knowledge of the facts about the claimed injury conflicted with the statements of witnesses. The employing establishment controverted the claim.

By letter dated October 1, 2013, OWCP advised appellant that the evidence of record was insufficient to support her claim. It afforded her 30 days to submit additional evidence and asked her to respond to a questionnaire.

In a memorandum dated September 25, 2013, David M. Harbin, an expert screening training instructor, reviewed the events of that date. He stated that appellant had been evaluated on her ability to perform a standard pat-down and a pat-down on a person with disability in a wheelchair. Mr. Harbin noted that Jana Frierson, master transportation security training instructor, worked directly with appellant in demonstrating these procedures, while Debra Cooper and Calvin Whetstone, supervisory transportation security officers, Randy J. Carroll, instructor, and himself observed the evaluation. Ms. Frierson and Ms. Cooper demonstrated how to perform a pat-down on a person with disabilities, with Ms. Cooper acting as the passenger, before appellant was asked to do so. Appellant demonstrated this pat-down on Ms. Frierson. After she had completed the pat-down of a person with disabilities, she was asked to leave the room while the observers conferred as to its correctness. All observers agreed that appellant had not correctly performed certain parts of the procedure. Appellant was invited back into the room and asked to perform a standard pat-down, which Ms. Frierson and Ms. Cooper demonstrated. After performing the procedure, she was again asked to leave. Again, all observers agreed that appellant had not correctly performed certain parts of the procedure. A record was made of the critical errors of both demonstrations to aid in the remediation/on-the-job training process, which was signed by the observers and given to a manager. Mr. Harbin stated that at no point during the demonstration did he hear appellant say that she was in pain or that she was unable to perform the demonstrations.

On the same date, Ms. Frierson submitted a statement which corroborated the account of Mr. Harbin as to the incident of September 25, 2013. She noted that, while appellant was performing the pat-down of a person with disabilities on her, she heard appellant's grunting, heavy breathing, and moaning noises, but no verbal complaints regarding pain or distress. During the standard pat-down, appellant did not make any statements or complaints that she was in distress or pain.

In a statement dated September 26, 2013, Mr. Carroll corroborated the account by Mr. Harbin as to the incident of September 25, 2013. He stated that at no time during any of the procedures did he hear appellant state that she was in any pain or unable to perform the tasks. On the same date, Ms. Cooper also stated that she witnessed appellant perform a standard pat-down and a pat-down on a person with disabilities on Ms. Frierson. She noted that appellant did

not inform Ms. Frierson that she was in pain before she began the procedures. Ms. Cooper stated that she "did not witness anything that contributed to the claim that was filed" by appellant.

In a memorandum dated September 26, 2013, Mr. Harbin stated that he met appellant on that date, when she was to begin her remedial training. Appellant asked Mr. Harbin if Training Specialist Ray Secession was there, because she wanted to speak to him. Mr. Harbin told her that he was not there and would let Mr. Secession know. He told Mr. Secession that appellant wanted to speak with him when he arrived. After Mr. Secession spoke to appellant, he asked Mr. Harbin to write a statement concerning his conversation with appellant.

On September 26, 2013 Mr. Secession stated that he had spoken to appellant that morning. Appellant told him that she needed to fill out workers' compensation paperwork, because her left shoulder, ankle, leg, and lower back hurt and that she had been up all night. She thought the bending and other activities from the previous day may have caused it. Mr. Secession obtained the paperwork for her and told appellant that she would have to return to the airport to see a manager. He took the paperwork to the airport and gave it to the manager.

In a memorandum dated September 26, 2013, Barbara Smith, safety officer, stated that, after reviewing the statements given by appellant and witnesses to the events of September 25, 2013, she concluded that there were no contributory factors causing the alleged injuries.

By decision dated November 5, 2013, OWCP denied appellant's claim. It found that she did not submit medical evidence in support of her claim. OWCP accepted that appellant was a federal civilian employee who filed a timely claim, and that the evidence supported that the September 25, 2013 incident occurred as described.

On November 20, 2013 appellant requested reconsideration and submitted a letter dated November 18, 2013 signed by Jamie W. Covington, family nurse practitioner, on behalf of Dr. Charles W. Munn, a Board-certified internist. Ms. Covington noted that appellant had been seen on September 16, 2013 with complaints of left foot pain and lower back pain. Appellant followed up on October 1, 2013 with a worsening of her lower back pain, in addition to left knee and left shoulder pain. Ms. Covington stated that appellant saw an orthopedic surgeon, who placed her in a boot and diagnosed her with Achilles tendinitis. She noted that appellant's back had not improved by wearing an orthotic while at work. This letter was not signed by a physician.

In a statement dated November 20, 2013, appellant noted that she had not carefully read a document sent to her by OWCP which stated that "[n]urse practitioners and physician assistants are not considered qualified physicians." Once she reviewed the document, she realized that the November 20, 2013 report needed to be countersigned by a physician. Appellant alleged that due to a current open EEO complaint, she had experienced an elevated level of controversy in filing her claim, causing her to make trivial mistakes due to stress. She stated that she was subjected to threats of disciplinary action and had repeatedly pleaded with her superiors that she was unable to complete her duties due to back and foot pain. Appellant wore a visible orthotic foot brace that extended to her upper left knee, as well as a back brace, but was forced to complete the pat-down procedure of a person with disabilities. She stated that it caused pain and her range of motion was so limited that she failed to pass the evaluation.

In a statement dated December 18, 2013, Ms. Cooper noted that she did not recall seeing appellant wearing a foot brace or stating that she was unable to perform the procedures on September 25, 2013. In a statement of the same date, Mr. Harbin advised that he did not recall observing appellant wearing a foot brace or any other brace/appliance on her feet on September 25, 2013. Mr. Whetstone, Ms. Frierson and Mr. Carroll also noted that they did not observe appellant wearing a foot brace during her evaluations on September 25, 2013.

By decision dated February 14, 2014, OWCP reviewed the merits of appellant's claim. It found that the report of November 20, 2013 did not provide a history of work injury or mention the incident on September 25, 2013, and thus it did not suffice to meet her burden of proof to establish causal relation.

On March 10, 2014 appellant requested reconsideration and submitted the second page of a Form CA-1 from the employing establishment, which had been marked "void." The supervisor who completed the Form CA-1 had checked boxes indicating that appellant was injured in the performance of duty on September 25, 2013, that her knowledge of the facts about the injury agreed with the statements of the employee and/or witnesses and the document did not contain a controversion of continuation of pay.

By decision dated March 19, 2014, OWCP denied appellant's request for reconsideration without reviewing the merits of the case. It noted that the Form CA-1 appellant had submitted was already part of the case file.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] 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 timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[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. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment

[2] *Supra* note 1.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

ANALYSIS -- ISSUE 1

Appellant alleged that on September 25, 2013 she sustained injuries to her neck, left shoulder, left knee, right foot and lower back in the performance of duty. OWCP accepted that she performed a pat-down of a person with a disability and a standard pat-down, during a training demonstration. While appellant subsequently alleged that she was "forced" to complete the pat-down of an individual with a disability while wearing a visible orthotic foot brace and back brace, the Board finds that she has not established this as factual. An employee's statement regarding the occurrence of an employment incident will stand unless refuted by strong or persuasive evidence.[6] The record contains the statements from Ms. Cooper, Mr. Harbin, Mr. Whetstone, Ms. Frierson and Mr. Carroll, who were all present during the pat-down demonstration in question. Each individual related that they did not observe appellant wearing a brace during the incident in question.

The Board finds that appellant has not established her claim because she did not submit sufficient medical evidence from a physician to establish that she sustained an injury due to the September 25, 2013 incident.

Appellant submitted only one piece of medical evidence, a letter dated November 18, 2013 signed by Ms. Covington, a nurse. A nurse practitioner does not qualify as a physician under FECA. Such medical reports do not qualify as probative medical evidence supportive of a claim for federal workers' compensation, unless countersigned by a physician.[7] The letter dated November 18, 2013 was not signed by a physician: the only signature appearing on the letter is that of Ms. Covington. The Board finds this letter does not constitute probative medical evidence. As appellant did not submit any other medical evidence in support of her claim, she has not established a firm medical diagnosis of any condition in connection with the work-related incident of September 25, 2013.

The Board finds that appellant did not submit sufficient medical evidence providing a diagnosis from a qualified physician. Appellant failed to establish that she had any diagnosed condition resulting from the September 25, 2013 employment incident. On appeal, she argued that she had been subject to retaliation due to the filing of an EEO claim. This argument is not relevant to the grounds upon which appellant's claim was denied.

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.

[5] *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

[6] *Virgil F. Clark*, 40 ECAB 575 (1989); *Robert A. Gregory*, 40 ECAB 478 (1989).

[7] *Id.*

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by 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.[8] Section 10.608(b) of OWCP's regulations provide that 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.[9]

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.[10] 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.[11] 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.[12]

ANALYSIS -- ISSUE 2

OWCP issued a February 14, 2014 merit decision denying appellant's claim for compensation. On March 10, 2014 appellant requested reconsideration of this decision.

The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen her case for review of the merits. In her March 10, 2014 request for reconsideration, appellant did not contend that OWCP erroneously applied or interpreted a specific point of law, or did she advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

The underlying issue is whether appellant submitted sufficient medical evidence to establish the causal relationship of her claimed injuries to the September 25, 2013 incident. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant evidence in this case. With her request, appellant submitted the second page of a Form CA-1 marked "void." While OWCP incorrectly stated that this evidence was previously of record, this was harmless error. The void Form CA-1 is irrelevant to the grounds upon which OWCP denied appellant's claim. Appellant's claim was

[8] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

[9] *Id*. at § 10.608(b); *K.H.*, 59 ECAB 495, 499 (2008).

[10] *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

[11] *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

[12] *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

denied because there was no medical opinion by a physician addressing how the employment incident on September 25, 2013 caused or contributed to any of her claimed conditions. As the void Form CA-1 did not contain any medical information and was not signed by a physician, it did not constitute medical evidence. As such, it was not relevant and thus insufficient to require a merit review of her claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a traumatic injury in the performance of duty on September 25, 2013. The Board further finds that OWCP properly denied appellant's request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 19 and February 14, 2014 are affirmed.

Issued: October 1, 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