

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

J.W., Appellant

and

**NATIONAL AERONAUTICS & SPACE
ADMINISTRATION, GODDARD SPACE
FLIGHT CENTER, Greenbelt, MD, Employer**

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**Docket No. 14-825
Issued: September 4, 2014**

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On February 28, 2014 appellant, through his attorney, filed a timely appeal of a February 21, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed from issuance of the last merit decision of November 30, 2012 to the filing of this appeal, the Board has no jurisdiction over the merits of the case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 501.3(e).

On appeal, appellant's attorney asserts that OWCP did not analyze relevant, new legal arguments presented on reconsideration.

FACTUAL HISTORY

On September 11, 2012 appellant, then a 54-year-old wheelchair-bound satellite communications engineer, filed a traumatic injury claim alleging that he broke his leg on September 4, 2012 when he fell from his wheelchair while exiting an employing establishment taxi. He stopped work that day and did not return.

The medical evidence of record reveals that appellant, who has muscular dystrophy, was admitted to the hospital from the emergency room on September 4, 2012 where a comminuted mildly displaced fracture of the right femur was diagnosed. On September 10, 2012 he underwent open reduction internal fixation of the fracture and was transferred to a skilled nursing facility on September 19, 2012.

In letters dated October 25, 2012, OWCP informed appellant of the evidence needed to support his claim. It also requested that the employing establishment respond regarding the circumstances of the injury.

In correspondence dated November 9, 2012, Myrtis Coggins, an injury compensation specialist, advised that appellant was on the premises of the employing establishment at the time of injury. Appellant's scheduled tour of duty was 8:00 a.m. to 4:30 p.m. and that, by their records, the injury occurred at approximately 9:20 a.m. on September 4, 2012. In regard to whether appellant was in the performance of duty, Ms. Coggins stated that he had returned to work that day after an absence of approximately six months. Before reporting to his workstation in Building 25, he first went to Building 1 to gather some information and then to Building 21. He had not yet reported to his supervisor to receive a new work assignment. Ms. Coggins related that appellant was riding in a government-owned vehicle for wheelchair transportation when the injury occurred.

In a November 25, 2012 narrative statement, appellant noted that since the accident he was home-bound and virtually bedridden. He stated that his time card showed that he was in pay status throughout his time at the employing establishment prior to his accident on September 4, 2012. Appellant arrived at work at 7:55 a.m. and first visited human resources in Building 1 and spoke with someone about his absence. He then entered an employing establishment vehicle to travel to Building 21 to renew overdue library books that he used in his job as a satellite communications engineer. Building 21 also contained a credit union and cafeteria and he would have also visited those but for the accident. The driver who took him to Building 21 failed to properly deploy the wheelchair ramp which caused his wheelchair to drop, throwing him to the sidewalk where he broke his right femur. On November 29, 2012 appellant filed a claim for compensation commencing December 10, 2012. The employing establishment noted that he received continuation of pay from September 5 to October 19, 2012 and sick leave thereafter.

By decision dated November 30, 2012, OWCP denied appellant's claim. It found that, by going to Building 21 to return library books prior to reporting to work, he deviated from his employment and was not in the performance of duty when injured.

On November 25, 2013 appellant, through his attorney, requested reconsideration. He contended that he did not deviate from duty on September 4, 2012 when injured on the employing establishment premises. Appellant asserted that coverage extended to a reasonable interval before or after the work shift while the employee was on the premises and engaged in preparatory or incidental acts. Counsel noted that appellant was injured after the start of his work shift and on the employing establishment premises. After leaving human resources to review his personnel file, appellant went to the library in Building 21 on employing establishment premises, to renew technical manuals that he had used in his work. He was injured on exiting from the employing establishment vehicle upon arrival at Building 21. Counsel argued that, even though the manuals were not required, the employing establishment would derive a benefit from appellant's use of the two technical manuals.³ Appellant noted that he would have also used the cafeteria in Building 21, which would be related to personal ministrations and within the course of employment.

In a decision dated February 21, 2014, OWCP denied appellant's request for reconsideration. It found the evidence and argument cumulative, that he submitted duplicates of statements previously submitted.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁴ Section 10.608(a) of the Code of Federal Regulations (C.F.R.) provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

³ The attorney attached title pages of the two manuals: "Bayesian Reliability Analysis" and "Practical Electronic Reliability Engineering."

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the decision of OWCP dated February 21, 2014 denying appellant's application for review. Because more than 180 days elapsed from the date of OWCP's merit decision of November 30, 2012 to the filing of this appeal with the Board on February 28, 2014, the Board lacks jurisdiction to review the merits of this claim.⁸

On September 4, 2012 appellant sustained a fracture of the right femur when he fell from a wheelchair ramp as he was exiting an employing establishment vehicle on the premises of the employing establishment. He underwent corrective surgery on September 10, 2012 and was transferred to a skilled nursing facility on September 19, 2012.⁹ Appellant, who had been absent from work for approximately six months, reported to work that day at Building 1, where he visited human resources then left to go to Building 21, to visit the library where he was going to renew manuals he used in his work and to visit the cafeteria. OWCP denied the claim on November 30, 2012, finding that he deviated from duty before work that day because he was going to the library to renew books.

Appellant, through his attorney, requested reconsideration on November 25, 2013. The attorney argued that appellant was in the performance of duty when injured on September 4, 2012, noting that the books he was renewing were technical manuals that he used in his work and also indicating that he would also visit the cafeteria for a personal break.

The Board finds that appellant through counsel, has advanced legal arguments that are relevant, not previously considered and pertinent to the issue of whether he was in the performance of duty on September 4, 2012 when injured. On reconsideration appellant's attorney asserted that appellant did not deviate from duty on September 12, 2012 when he travelled from Building 1, where he visited human resources, to Building 21, where he was injured. As noted in Ms. Coggins' statement, there is no question that appellant was on employing establishment premises, travelling in an employing establishment vehicle when the accident occurred. Appellant fell from the wheelchair ramp and broke his right femur. The facts in this case indicate that Building 21 housed the library, credit union and cafeteria. Counsel asserted that, even though appellant was not required to use the technical manuals he was going to renew at the library his employer would derive substantial a benefit. He further asserted that employment injuries that occurred during personal ministrations were within the performance of duty, maintaining that appellant also intended to visit the cafeteria. As noted, these legal arguments are relevant to the determination of whether appellant was in the performance of duty. OWCP did not specifically address either of these contentions in the prior adjudication of his claim.

⁸ See *supra* note 1.

⁹ The record does not contain an accident report describing the specific circumstances of the September 4, 2012 incident and does not indicate whether appellant returned to work.

As appellant has advanced a legal argument not previously considered by OWCP. He is entitled to a review of the merits of his claim under section 10.606(b)(2) of OWCP's regulations.¹⁰ The case will be remanded for this purpose.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: September 4, 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

¹⁰ 20 C.F.R. § 10.606(b)(2); *see T.F.*, Docket No. 10-1701 (issued May 3, 2011).