United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 15-0767**
	)	**Issued: July 15, 2015**
U.S. POSTAL SERVICE, POSTAL & DISTRIBUTION CENTER, Fort Myers, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 10, 2015 appellant filed a timely appeal from a December 30, 2014 merit decision and a February 17, 2015 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 has met his burden of proof to establish an injury in the performance of duty on November 14, 2014; and (2) whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant alleges that his supervisor had sent him out on the road and he was on the clock when the injury happened. He provided a witness statement and a copy of the

[1] 5 U.S.C. § 8101 *et seq.*

accident report. However, this information was not available to OWCP at the time of its decision and the Board may not consider such new information on appeal.[2]

FACTUAL HISTORY

On November 14, 2014 appellant, then a 59-year-old laborer/custodian, filed a traumatic injury claim alleging that at approximately 10:45 a.m. he injured his right elbow and ribs and suffered a headache as a result of a motor vehicle accident. On the claim form, appellant's supervisor, indicated that appellant was injured in the performance of duty. Appellant received medical care from Lee Memorial Hospital that same day.

With his claim appellant submitted a Form CA-16, Authorization for Examination and/or Treatment, and a November 14, 2014 report from Dr. James S. Gostigian, an internist of the Lee Memorial Health System, who diagnosed a right chest wall contusion. No history of injury was provided with the report.

By letter dated November 28, 2014, OWCP advised appellant of the deficiencies in his claim and provided him 30 days in which to submit additional factual and medical evidence, which would include a diagnosis of a medical condition sustained as a result of the claimed events. Appellant was asked whether he was on agency premises and performing regularly assigned duties when the injury occurred. If the injury occurred off agency premises, he was asked to identify the location of the area where the injury occurred in relation to the regular workplace and explain what he was doing when the injury occurred and why he was off agency premises. Appellant was also requested to provide any investigations made by the State Highway Patrol, by other law enforcement officers, or by his agency.

In response, appellant submitted a 21-page report dated November 14, 2014 from the Lee Memorial Health System, which provided a history of the injury, a diagnosis, and copies of diagnostic testing. Copies of a November 25 and December 16, 2014 modified custodian position were provided.

In a November 24, 2014 report, Dr. Steven R. Anthony, an osteopath, noted the history of the November 14, 2014 injury and provided an impression of low back pain and rib contusion versus intercostal strain. Physical therapy was recommended. In a November 24, 2014 order, Dr. Anthony requested physical therapy for lumbago and contusion of chest wall. He also provided work restrictions.

By decision dated December 30, 2014, OWCP denied appellant's claim finding the evidence insufficient to establish that the November 14, 2014 incident occurred as alleged. Specifically it found that appellant had not met his burden of proof to establish fact of injury as he failed to provide the requested statement regarding the circumstances of the November 14, 2014 incident along with the accident report. As appellant failed to submit the requested factual information, OWCP was unable to verify that appellant was injured while in the performance of his duties on November 14, 2014.

[2] Evidence which was not before OWCP at the time of its final decision will not be considered by the Board on appeal. *See* 20 C.F.R. § 501.2(c)(1); *James C. Campbell*, 5 ECAB 35 (1952).

On February 3, 2015 OWCP received appellant's January 20, 2015 request for reconsideration. With his reconsideration request, appellant submitted medical reports and work restrictions from Dr. Anthony, diagnostic testing, and copies of physical therapy reports.

By decision dated February 17, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish 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]

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[5] 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.[6] First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[7] 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.[8]

It is the claimant's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether an employment incident occurred as alleged. The evidence must be sufficient to establish whether the claimant was in the course of federal employment at the time of the incident, so that a proper determination may be made as to whether an injury occurred while in the performance of duty.[9] As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or

[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] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

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

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

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

[9] *T.S.*, Docket No. 09-2184 (issued June 9, 2010).

at lunch time, are compensable.[10] An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling employment duties or is engaged in doing something incidental thereto. Arising out of employment relates to the causal connection between the employment and the injury claimed.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established an employment-related injury on November 14, 2014 in the performance of duty. Appellant, a custodian, did not establish that his motor vehicle accident occurred while he was in the course of performing work duties.

It is the claimant's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether the claimant was in the course of federal employment at the time of the incident.[12] This encompasses not only the work setting but also a causal concept, *i.e.*, in order for an injury to be considered as arising out of employment, the facts must show a substantial employer benefit or requirement which gave rise to the injury.[13] It is incumbent upon a claimant to establish that the claimed injury arose out of employment.[14]

Appellant bears the burden of proof to establish the essential elements of his claim, which includes fact of injury. Other than noting that he had sustained injuries after his car flipped over on November 14, 2014, he has failed to provide any specific details of where and how the injury occurred so that an injury in the performance of duty may be established. In the absence of such evidence, OWCP properly found that appellant failed to establish an injury in the performance of duty. While the evidence from Lee Memorial Health System and Dr. Anthony establishes that appellant had an injury on November 14, 2014, this evidence is insufficient to establish that the injury occurred while appellant was in the performance of duty on November 14, 2014.[15] Under the circumstances, OWCP properly determined that appellant had not established an injury in the performance of duty.

In its November 28, 2014 development letter, OWCP informed appellant that the information initially provided was insufficient to support his claim. Appellant was provided a

[10] *F.S.*, Docket No. 09-1573 (issued April 6, 2010).

[11] *B.C.*, Docket No. 09-653 (issued December 24, 2009).

[12] *See T.S., supra* note 9.

[13] *Paula G. Johnson*, 53 ECAB 722 (2002).

[14] *Id.*

[15] A properly executed CA-16 form can form a contractual agreement for payment of medical expense, even if the claim is not accepted. *See* 20 C.F.R. § 10.300; *Val D. Wynn*, 40 ECAB 666 (1989). The Board notes that, under 5 U.S.C. § 8103, OWCP also has broad discretion to approve medical care which it finds necessary and reasonable in cases of emergency or other unusual circumstances. Upon return of the case record, OWCP shall determine whether appellant's initial medical care in the hospital emergency room should be authorized pursuant to 20 C.F.R. § 10.300 or 10.304, which provides that, in cases involving emergencies or unusual circumstances, OWCP may authorize treatment.

series of questions regarding the factual circumstances of the alleged incident and advised to provide details which would clarify whether the November 14, 2014 accident occurred in the performance of duty. He provided no response.

As appellant has not met his burden of proof to establish performance of duty, it is not necessary to discuss the probative value of the medical reports.[16]

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,[17] 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.[18] 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.[19] 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.[20]

ANALYSIS -- ISSUE 2

The underlying issue on reconsideration is whether appellant has submitted sufficient evidence relevant to the issue of performance of duty. Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Consequently, appellant was not entitled to a review of the merits based on the first and second above noted requirements under 20 C.F.R. § 10.606(b)(2).

The Board also finds he did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits. On reconsideration, appellant submitted medical reports and work restrictions from Dr. Anthony, diagnostic testing, and copies of physical therapy reports. These reports, however, did not explain how appellant was injured in a car accident as part of performing his duties as a laborer/custodian. Thus, these reports, while new, are insufficient to reopen appellant's claim for further merit review.

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[16] *Tracey P. Spillane*, 54 ECAB 608 (2003).

[17] Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(2).

[19] *Id.* at § 10.607(a).

[20] *Id.* at § 10.608(b).

The Board finds that appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not meet any of the regulatory requirements and OWCP properly declined to reopen his claim for further merit review.[21]

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on November 14, 2014, as alleged. Furthermore, the Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2015 and December 30, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (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).