

FACTUAL HISTORY

On April 16, 2014 appellant, then a 45-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that on March 27, 2014 his back began to feel sore while in training and that, when he went to the restroom, the pain became severe enough that he could barely stand or walk. He stated that his injury was to the lower right of his back. The employing establishment controverted continuation of pay, stating, "Need to establish how this injury is work related and what [appellant] was doing to cause the back strain."

In a hospital note dated March 28, 2014, Dr. Bryant M. Beesley, an emergency physician, diagnosed appellant with acute lumbar myofascial strain and hypertension.³ He recommended that appellant not work for a week and to take Naproxen and Flexeril for his back pain.

By letter dated April 22, 2014, OWCP advised appellant of the deficiencies in his claim. It noted that he had not provided sufficient evidence to establish that he actually experienced an incident alleged to have caused injury, and asked that he submit a response to its questionnaire to substantiate the factual elements of his claim. OWCP asked appellant to state where he was and what he was doing at the time the injury occurred; whether he had any similar disability or symptoms before the injury; and to explain why he was not at his normal duty station at the time of his injury. It also asked him to submit medical evidence in support of his claim. OWCP afforded him 30 days to submit this additional evidence.

In an attending physician's report dated March 28, 2014, Dr. Beesley diagnosed appellant with myofascial strain, noting a spasm of the right lower paralumbar muscle. He stated that appellant had lower back pain due to sitting in class all day. Dr. Beesley stated that appellant had no limitations and was able to resume work on April 4, 2014.

In a report dated March 28, 2014, Dr. Joseph A. Orzel, a Board-certified radiologist, examined the results of an x-ray of appellant's lumbar spine. He stated that the alignment appeared normal and that he did not observe any acute osseous abnormality.

In hospital notes dated March 28, 2014, a nurse noted that appellant had stated that his lower back pain started when he got up to use the restroom at about 11:00 p.m.

By decision dated May 28, 2014, OWCP denied appellant's claim as the evidence submitted was insufficient to establish the factual component of fact of injury, as he had not responded to OWCP's inquiries. It stated that it was unable to determine where and how his injury occurred from his training, and whether he was authorized to be away from his duty station at the time of injury.

By form received on June 9, 2014, appellant requested reconsideration of his claim. He attached a statement, which read in relevant part, "To Whom It May Concern, along with my appeal request I have enclosed a copy of my approved travel voucher, a copy of my class nomination form, and the letter that was requested of me clarifying my reason for being away

³ Dr. Beesley's certification in a medical specialty could not be confirmed with the American Board of Medical Specialties or the American Osteopathic Association.

from my duty station and etc.”⁴ Appellant attached a form authorizing and certifying training from March 24 through 28, 2014. He also attached a travel voucher.

By decision dated June 19, 2014, OWCP denied appellant’s request for reconsideration. It found that he had not submitted relevant and pertinent new evidence not previously considered by OWCP, because his statement lacked detail as to what part of his training had caused an injury to his back.

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 timely filed within the applicable time limitation period of FECA, that an injury⁶ 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.⁷

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 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.⁸

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.⁹ An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹⁰ An employee

⁴ This letter of clarification does not appear in the case record.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ OWCP’s regulations 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. 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).

⁷ *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *Id.* *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁹ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

¹⁰ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹¹ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹² However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹³

While on temporary-duty assignment, an employee is covered by FECA 24 hours a day with respect to any injury that results from activities incidental to the temporary assignment. The fact that an employee was on a special mission or in travel status during the time the condition manifested itself does not raise an inference that the condition was causally related to the incidents of employment.¹⁴

ANALYSIS -- ISSUE 1

While appellant attributed his lower back condition to training exercise in the course of his federal employment, he did not describe what aspect of that training caused his back spasm. Even if he was in travel status for training, it remained his burden to establish that the alleged condition was causally related to incidents of employment.¹⁵ In an April 22, 2014 letter, OWCP noted that appellant had not provided sufficient evidence to establish that he actually experienced an incident alleged to have caused injury and asked that he submit a response to its questionnaire to substantiate the factual elements of his claim. It asked him to state where he was and what he was doing at the time the injury occurred; whether he had any similar disability or symptoms before the injury; and to explain why he was not at his normal duty station at the time of his injury. Appellant did not respond.

A statement describing the particular employment incident that caused or contributed to the claimed lower back condition is crucial to appellant's claim. As noted, appellant's burden of proof includes the submission of a factual statement including the time, place, and manner of his injury. His assertion that his lower back began to hurt during workplace training does not support that a particular workplace incident caused or aggravated a lower back condition.

Appellant has not submitted a clear description to OWCP clarifying the manner in which his lower back condition was alleged to arise from a traumatic incident on March 27, 2014. Thus, the Board finds that he has not established that he sustained a lower back condition in the performance of duty.

¹¹ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹² *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

¹³ *D.B.*, 58 ECAB 464, 466-67 (2007); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

¹⁴ *See A.F.*, Docket No. 14-1392 (issued October 21, 2014).

¹⁵ *Id.*

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), 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.¹⁶ 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.¹⁷

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.¹⁸ 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.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 2

OWCP issued a May 28, 2014 merit decision denying appellant's claim for compensation. By form received June 9, 2014, appellant requested reconsideration of this decision.

The issue presented on appeal of the May 28, 2014 decision is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. With his June 9, 2014 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

¹⁶ *Id.* at § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

¹⁷ 20 C.F.R. § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

¹⁸ *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

¹⁹ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

²⁰ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

The underlying issue in this case is whether appellant has established that he or she actually experienced the employment incident at the time, place, and in the manner alleged. A claimant may be entitled to a merit review by submitting new and relevant evidence, but he did not do so in this case. With his request, appellant submitted a travel voucher and a form authorizing and certifying training from March 24 through 28, 2014. He also submitted a statement which indicated that a letter clarifying the events of March 27, 2014 was attached, however, this letter does not appear in the case record. While the statement, travel voucher, and form authorizing and certifying training were not previously of record, they are not relevant to the grounds upon which OWCP denied appellant's claim. Appellant's claim was denied because it lacked a clear statement of the manner in which he alleged that he was injured on March 27, 2014. Neither the statement accompanying the travel voucher and form authorizing and certifying training, nor the voucher and form themselves clarify the nature of the alleged traumatic incident. As such, these documents were not relevant and insufficient to require a merit review of his 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 constitute 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 his burden of proof to establish that he sustained a traumatic injury in the performance of duty on March 27, 2014. The Board further finds that OWCP properly denied his request for review of the merits of his 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 June 19 and May 28, 2014 are affirmed.

Issued: March 26, 2015
Washington, DC

Patricia Howard 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