

On appeal, appellant contends that he submitted sufficient evidence to establish his claim and further submitted additional medical evidence.

FACTUAL HISTORY

On September 26, 2014 appellant, a 57-year-old highway engineer, filed an occupational disease claim (Form CA-2), alleging that he sustained an injury to his back and shoulder area due to factors of his federal employment, including electronic drafting. He became aware of his condition on April 3, 2014 and first attributed it to his federal employment on May 5, 2014.

In a September 30, 2014 narrative statement, appellant indicated that computer-aided design was not a part of his job duties as a construction engineer, yet electronic drafting was requested of him for the past nine months and caused him a lot of pain during the month of August 2014.

Appellant submitted two prescriptions dated September 19, 2014 from Dr. Andres Pena, a Board-certified physiatrist, who diagnosed myofascial neck and shoulder pain, ordered physical therapy, and recommended an ergonomic evaluation.

In an August 27, 2014 report, Dr. James Abshire, a Board-certified internist, noted that appellant was evaluated on August 26, 2014. He advised that appellant was “to refrain from assignments relating to drawing graphs on the Google Earth and Excel programs due to medical problems.”

In an October 9, 2014 letter, OWCP notified appellant that the evidence submitted was insufficient to support his claim and requested additional factual and medical evidence. It allotted 30 days for appellant to respond to its inquiries and submit additional evidence.

Appellant resubmitted the August 27, 2014 report from Dr. Abshire and the September 19, 2014 prescriptions from Dr. Pena.

By decision dated November 12, 2014, OWCP denied the claim on the basis that appellant failed to establish fact of injury. It found that the evidence was insufficient to establish the implicated employment factors, specifically the frequency and duration of the electronic drafting he had indicated on his claim form.

On December 2, 2014 appellant requested reconsideration and submitted an x-ray of the cervical spine dated August 26, 2014.

In reports dated November 7, 2014 through January 27, 2015, Dr. Franklin Chinn, Jr., an occupational medicine specialist, diagnosed aggravation of preexisting cervical arthritis and degenerative disc disease due to work activities, cervical radiculitis and chronic pain, and left hand numbness. He noted that appellant’s left hand numbness appeared to be a result of his cervical radiculitis, but noted that peripheral entrapment neuropathy could not be totally excluded. Dr. Chinn opined that appellant was “not able to do computer graphic design without repeatedly aggravating [his] condition.” He released appellant to modified duty and recommended an evaluation of his workstation for ergonomic improvements.

By decision dated February 10, 2015, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP. It found that the medical evidence he submitted was irrelevant and immaterial as it failed to address the frequency and duration of the implicated employment factors.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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, and that an injury⁴ was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty.

³ *Supra* note 1.

⁴ OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

⁵ *See O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *See D.R.*, Docket No. 09-1723 (issued May 20, 2010). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *See O.W.*, *supra* note 5.

The evidence of record does not contain the duties appellant performed in the course of his federal employment or explain how often and how long he performed the duties. Appellant merely stated that he sustained medical conditions due to electronic drafting at work. He stated that computer-aided design was not a part of his job duties, but there is no evidence to establish that fact. OWCP informed appellant of the deficiencies in his claim, but he did not provide the required documentation prior to OWCP's issuance of its November 12, 2014 decision. Accordingly, the Board finds that he failed to meet his burden of proof to establish fact of injury.⁸

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's claimed conditions became apparent during a period of employment, nor his belief that the conditions were caused by his employment, is sufficient to establish a causal relationship.⁹ Since appellant failed to establish the first component of fact of injury, it is not necessary to discuss whether he submitted medical evidence sufficient to establish that a medical condition existed.¹⁰

On appeal, appellant contends that he submitted sufficient evidence to establish his claim. For the reasons stated above, the Board finds appellant's argument is not substantiated.

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

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹¹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹²

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP 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.¹³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must

⁸ See *M.L.*, Docket No. 12-957 (issued December 7, 2012).

⁹ See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹⁰ See *Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

¹¹ *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹² See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹³ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

be received within one year of the date of that decision.¹⁴ 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.¹⁵

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

In support of his December 2, 2014 reconsideration request, appellant submitted an x-ray of the cervical spine and medical reports from Dr. Chinn. The Board finds that submission of this evidence did not require reopening appellant's case for merit review as they did not address the frequency and duration of the implicated employment factors, which was the issue before OWCP. Therefore, they do not constitute relevant and pertinent new evidence and are not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did he submit any relevant and pertinent new evidence not previously considered. The Board finds that he did not meet any of the necessary requirements and is not entitled to further merit review.¹⁸

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty. The Board further finds that OWCP properly refused to reopen his case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

¹⁶ *See A.L., supra* note 13. *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁷ *Id.* *See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁸ *See L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2015 and November 12, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 20, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board