

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

R.B., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
NATIONAL CEMETERY ADMINISTRATION,
Calverton, NY, Employer**)

**Docket No. 16-1071
Issued: December 14, 2016**

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 April 25, 2016 appellant filed a timely appeal from a December 2, 2015 merit decision and a March 29, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish an injury in the performance of duty on September 7, 2015; and (2) whether OWCP properly denied appellant's request for a review of the written record.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant has submitted new evidence on appeal. However, the Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

FACTUAL HISTORY

On September 7, 2015 appellant, then a 46-year-old clerk and assistant, filed a traumatic injury claim (Form CA-1) claiming that at 7:00 a.m. on Monday, September 7, 2015, he sustained injury to his left knee when he lifted a door stop with his left foot and heard a pop in his left knee. He indicated that the claimed injury occurred at the Administrative Building of the Calverton National Cemetery. On the same form, appellant's immediate supervisor noted that appellant's regular work schedule was 8:00 a.m. to 4:30 p.m., Monday through Friday.³ Appellant stopped work on September 7, 2015 and received continuation of pay. OWCP administratively approved a limited amount of medical expenses without formally considering the merits of his claim.

Appellant submitted several medical reports, including a September 8, 2015 emergency room report in which an attending nurse noted that he reported that he injured his left knee at work and heard a pop on an unspecified date. The nurse provided a diagnosis of left quadriceps muscle rupture. In a September 11, 2015 report, Dr. Philip Burns, an attending osteopath, advised that appellant reported that on September 7, 2015 he was moving a doorjamb at work when he experienced sharp pain in his left knee. He diagnosed medial meniscus tear of the left knee, left knee pain, and gait disorder. In a September 23, 2015 report, Dr. Burns diagnosed medial meniscus tear of the left knee and noted that appellant was under his care for a "work[-]related injury sustained to his left knee on [September 7, 2015]." He recommended that appellant be off work and noted that he would be reevaluated on October 16, 2015 at which time a return to work date would be determined. On October 16, 2015 Dr. Burns found that appellant could return to work on October 19, 2015.

In an October 30, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim for a September 7, 2015 work injury.⁴ It advised that the current evidence of record "is not sufficient to support that [appellant was] injured while performing any duty of [his] employment" and requested that appellant complete and return an enclosed questionnaire regarding this matter. The questionnaire noted, "The evidence indicates that [appellant was] injured before [his] regularly scheduled work hours at 7:00 a.m., whereas [his] regularly scheduled work hours are 8:00 a.m. [to] 4:30 p.m.; and it is unclear whether you were on [employing establishment] premises at the time of the injury." The questionnaire requested that appellant submit a position description and answer various questions regarding whether he was on the employing establishment premises at the time of his claimed injury on September 7, 2015, whether he was performing regularly assigned or ancillary work duties at the time of injury, and, if he was in fact on the premises, why he was on the premises one hour prior to his regular starting time. OWCP provided him 30 days to respond.

In an October 30, 2015 letter, OWCP requested that the employing establishment answer several questions regarding appellant's claim for a September 7, 2015 injury, including whether

³ The supervisor checked a box marked "yes" indicating that appellant's claimed injury occurred in the performance of duty.

⁴ OWCP noted that it had administratively approved a limited amount of medical expenses without formally considering the merits of appellant's claim and indicated, "Your claim has now been reopened for consideration because the medical bills have exceeded \$1,500.00."

he was on the premises of the employing establishment at the time of his claimed injury and whether he was performing official duties at the time. It provided the employing establishment 30 days to respond.

Appellant submitted copies of previously submitted medical reports, but he did not submit a position description or complete the questionnaire provided by OWCP.

In a letter dated November 17, 2015, an employing establishment official noted that she was responding to OWCP's request for additional information regarding appellant's claimed September 7, 2015 work injury. She noted:

"At the time of the injury, [appellant] was on the premises owned by Calverton National Cemetery. [He] was in the Administrative Building, he was going to use the men's room in the building. The door of the men's room was being kept open by a door stop attached to the door. [Appellant] went to lift the door stop with his foot and felt a pop in his left knee."⁵

In a decision dated December 2, 2015, OWCP denied appellant's claim for a September 7, 2015 work injury. It found that he had not established an injury in the performance of duty on September 7, 2015. Regarding the reasons for this determination, OWCP noted:

"Specifically, [appellant's] case is denied because the evidence is not sufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. The reason for this finding is that [he] did not respond to our factual questions so as to establish that [he was] in the performance of duty when injured. Evidence indicates that [appellant was] injured [one hour] before [his] regularly scheduled work hours. As such, we asked that [he] explain why [he was] on [employing establishment] premises when the injury occurred and whether [he was] performing regularly assigned duties at the time of the injury. We also asked that [appellant] provide written authorization giving [him] permission to be on the premises at that time. However, [he] did not respond to our factual questions. Therefore, it is unclear whether [appellant was] in the performance of duty when injured."

In a form dated March 1, 2016 and postmarked March 1, 2016, appellant requested a review of the written record by an OWCP hearing representative.

By decision dated March 29, 2016, OWCP denied appellant's request for review of the written record with an OWCP hearing representative. It found that his request was untimely as it was not filed within 30 days of the issuance of OWCP's December 2, 2015 merit decision. OWCP indicated that, in its discretion, it had carefully considered appellant's request and had determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional evidence.

⁵ The record contains a hand-drawn map showing the location of a men's room within a building. The map contains the notation "employee" next to the location of the men's room. It is unclear who produced this map.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 was sustained 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.⁶

FECA provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”⁷ The phrase “sustained while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of “arising out of and in the course of employment.”⁸ The phrase “in the course of employment” is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master’s business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁹ This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury “arising out of the employment” must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.¹⁰

ANALYSIS -- ISSUE 1

On September 7, 2015 appellant filed a traumatic injury claim (Form CA-1) claiming that at 7:00 a.m. on Monday, September 7, 2015 he sustained injury to his left knee when he lifted a door stop with his left foot and heard a pop in his left knee. He claimed that the injury occurred at the Administrative Building of the Calverton National Cemetery. On the same form, appellant’s immediate supervisor noted that appellant’s regular work schedule was 8:00 a.m. to 4:30 p.m., Monday through Friday. In a decision dated December 2, 2015, OWCP denied his claim for a September 7, 2015 work injury. It found that appellant had failed to establish that he sustained an injury in the performance of duty on September 7, 2015.

Prior to denying appellant’s claim, OWCP advised him, in an October 30, 2015 development letter, that the current evidence of record was insufficient to support that he was injured while performing any duty of his employment. It requested that he submit a position description and answer various questions on an enclosed questionnaire regarding whether he was

⁶ C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 5 U.S.C. § 8102(a).

⁸ *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

⁹ *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹⁰ *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

on the employing establishment premises at the time of his claimed injury on September 7, 2015 whether he was performing regularly assigned or ancillary work duties at the time of injury, and, if he was in fact on the premises, why he was on the premises one hour prior to his regular starting time. OWCP provided appellant 30 days to respond, but he did not submit a position description or complete the questionnaire provided by OWCP.¹¹

The Board finds that the only factual information that appellant has supplied in support of his claim is that, while at the Administrative Building of the Calverton National Cemetery at 7:00 a.m. on September 7, 2015, he sustained injury to his left knee when he lifted a door stop with his left foot.¹² The Board finds that, given the provision of such sparse details, he has failed to establish an essential factual element of his case, *i.e.*, that he sustained an injury in the performance of duty on September 7, 2015. OWCP provided appellant an opportunity to provide further essential details regarding the factual aspect of his traumatic injury claim. However, appellant did not submit a position description or complete the factual questionnaire provided by OWCP as requested. He did not provide any explanation of why he was on the premises one hour prior to his regular starting time or provide any indication that he was performing regular or ancillary work duties at the time of his claimed injury on September 7, 2015.¹³ As noted, appellant has the burden of proof to establish the essential elements of his claim, including the burden of proof to establish that the claimed injury occurred in the performance of duty.¹⁴ Under the circumstances of the present case, he failed to establish the essential elements of his claim.

On appeal, appellant asserts that his supervisor asked him to come into work at 6:30 a.m. on September 7, 2015 in order to “get orders done.” However, no such evidence was of record when OWCP issued its December 2, 2015 decision denying his claim for a September 7, 2015 work injury.¹⁵

For these reasons, the Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty on September 7, 2015. 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.

¹¹ Appellant submitted medical evidence containing descriptions of the mechanism of the claimed September 7, 2015 injury, which are similar to the description provided on his September 7, 2015 Form CA-1. However, the medical evidence did not provide any further factual information regarding the matters raised in the factual questionnaire provided by OWCP.

¹² Although the employing establishment acknowledged that appellant was on its premises on September 7, 2015 when lifting a door stop at the men’s room of the Administrative Building, it did not provide any information regarding why he was on the premises an hour before his regular starting time. It did not indicate that he was performing his regular or ancillary work duties at the time of the claimed injury. On the September 7, 2015 Form CA-1, appellant’s supervisor checked a box marked “yes” indicating that appellant’s claimed injury occurred in the performance of duty. However, she did not provide any further explanation of why she checked this box.

¹³ See *supra* notes 7 through 10 regarding the basic standards for showing an injury occurred in the performance of duty.

¹⁴ See *supra* note 6.

¹⁵ The Board’s jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that “a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”¹⁶ Section 10.615 of OWCP’s federal regulations implementing this section of FECA, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁷ Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of FECA and its implementing regulations. OWCP’s regulations and Board precedent provide that the request for an oral hearing or review of the written record must be sent within 30 days of the date of issuance of the decision (as determined by the postmark or other carrier’s date marking) of the date of the decision for which an oral hearing or review of the written record is sought.¹⁸

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record by an OWCP hearing representative of OWCP’s December 2, 2015 merit decision by submitting a form postmarked March 1, 2016. Therefore, OWCP properly found, in its decision dated March 29, 2016, that his request was untimely as it was not filed within 30 days of the issuance of OWCP’s December 2, 2015 merit decision.¹⁹

OWCP then properly exercised its discretion by noting, in its March 29, 2016 decision, that it had carefully considered appellant’s request and had determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional evidence.²⁰ For these reasons, it properly denied his request for a review of the written record.²¹

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ 20 C.F.R. § 10.615.

¹⁸ *Id.* at § 10.616(a). A request for review of the written record is subject to the same requirement as an oral hearing request that the request be sent within 30 days of OWCP’s final decision. *See J.P.*, Docket No. 15-790 (issued June 3, 2015).

¹⁹ *Supra* note 17.

²⁰ *D.P.*, Docket No. 14-308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013); *Mary B. Moss*, 40 ECAB 640, 647 (1989).

²¹ The record contains a Form CA-16 which lists the date of injury as September 7, 2015 and which indicates, “Lifting the door stop in the men’s room, felt a pop in left knee.” The Board notes that where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee’s claim for an employment-related injury, the Form CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on September 7, 2015. The Board further finds that OWCP properly denied his request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2016 and December 2, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 14, 2016
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