

FACTUAL HISTORY

On January 7, 2015 appellant, then a 57-year-old social worker, filed a traumatic injury claim alleging an injury to his head, neck, and shoulders. He claimed that on December 9, 2014 he was rear-ended by a tractor trailer while driving his government vehicle. The employing establishment controverted the claim as no medical evidence was submitted to support a work-related injury.

By letter dated January 20, 2015, OWCP informed appellant of the evidence needed to establish his claim. It advised that he had 30 days to submit responsive evidence.

In a December 22, 2014 report, Dr. George Smith, a Board-certified diagnostic radiologist, advised that a cervical spine x-ray revealed degenerative disc space disease in the lower two cervical levels with slight encroachment of both C6 neural foramen.

In a December 10, 2014 report, Dr. Mary Shearer, Board-certified in internal medicine, advised that appellant was involved in a motor vehicle accident the day prior. She noted that appellant was hit in the rear by a trailer and indicated that appellant was able to drive his car back to the employing establishment without seeking emergency treatment. Dr. Shearer advised that appellant had muscle pain in the shoulder, pain in the upper neck, low back pain, and was unable to turn his head from side to side or flex his neck. She noted that he underwent a discectomy in 1991 and had been diagnosed with chronic back pain following a 1992 motor vehicle accident.

By decision dated February 24, 2015, OWCP accepted that the incident had occurred as alleged but denied appellant's claim as the medical evidence of record was insufficient to establish a diagnosed condition related to the accepted incident.

Appellant requested reconsideration on August 25, 2015. Multiple physical therapy reports were submitted. A December 9, 2014 Kentucky Traffic Collision Report, advised that appellant was hit in the rear by a tractor trailer.

By decision dated October 8, 2015, OWCP denied modification of its prior decision as appellant had failed to provide sufficient evidence from a physician containing a history of injury, secure diagnosis, and a statement linking a diagnosis to the December 9, 2014 accident.

On October 25, 2015 Dr. Shearer submitted a note which read "my diagnosis would be muscle spasms with reported [accident]."

On November 5, 2015 appellant requested reconsideration.

By decision dated November 30, 2015, OWCP denied appellant's request for reconsideration without merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim by the weight of reliable, probative, and substantial evidence,² including that he is an “employee” within the meaning of FECA and that he filed his claim within the applicable time limitation.³ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. 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. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁵

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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 claimant.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that on December 9, 2014 appellant was rear-ended by a tractor trailer in the performance of duty. It found, however, that the medical evidence of record was insufficient to establish an injury in connection with the December 9, 2014 accident.

In her December 10, 2014 report, Dr. Shearer advised that appellant was rear-ended in a motor vehicle accident and noted that he was experiencing pain in the shoulder, upper neck, and low back. The Board finds that Dr. Shearer failed to specifically address how the work incident caused or aggravated a diagnosed medical condition. Noting that appellant was experiencing pain in the shoulder, neck, and back, without any explanation of the condition causing the pain, is a description of a symptom rather than a firm diagnosis of a compensable medical condition.⁷ Dr. Shearer failed to address how the work incident caused or aggravated a diagnosed medical condition.

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *R.C.*, 59 ECAB 427 (2008).

⁴ *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *T.H.*, 59 ECAB 388 (2008).

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

Dr. Smith's December 22, 2014 diagnostic report is also insufficient to discharge appellant's burden of proof as it does not provide an opinion on causal relationship.⁸

Multiple physical therapy reports were submitted. A physical therapist is not a physician as defined under FECA.⁹ Thus, records from physical therapists are insufficient to establish the claim.¹⁰

Consequently, appellant has submitted insufficient medical evidence to establish his claim.

Appellant may submit new evidence or argument as part of a formal 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, 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.¹¹ 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.¹² 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.¹³

ANALYSIS -- ISSUE 2

On November 30, 2015 OWCP denied appellant's claim finding that the medical evidence did not establish a diagnosed medical condition in connection with the December 9, 2014 work incident. Appellant submitted a timely request for reconsideration and submitted new evidence.

⁸ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

⁹ A.C., Docket No. 08-1453 (issued November 18, 2008). Under FECA, a "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

¹⁰ *Allen C. Hundley*, 53 ECAB 551 (2002); *Lyle E. Dayberry*, 9 ECAB 369 (1998).

¹¹ 20 C.F.R. § 10.606(b)(3).

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.608(b).

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. In support of his reconsideration request, appellant submitted an October 25, 2015 note from Dr. Shearer. It simply stated "my diagnosis would be muscle spasm with reported MVA." The Board finds that while this report is new, it is not relevant as it does not clearly address whether the employment incident caused or aggravated a diagnosed medical condition.

Furthermore, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP. Because he failed to meet any of the three regulatory criteria for reopening a claim, he was not entitled to further merit review of his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on December 9, 2014. The Board also finds that OWCP properly refused to reopen appellant's case for further review of the merits, under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 30 and October 8, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 12, 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