



properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On August 31, 2015 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2015 his "right side gave out (leg and hand)" and he scraped his right knee and right side of his face. He stopped work on March 14, 2015 and returned on June 15, 2015.<sup>3</sup>

Appellant underwent a head computerized tomography (CT) scan by Dr. William I. Babchuk, a Board-certified diagnostic radiologist, who indicated in a March 13, 2015 report that the "patient fell." He reported that the CT scan was negative. On an x-ray scan of appellant's right knee, Dr. Babchuk noted a negative right knee study with no dislocation, fracture, or degenerative changes.

Appellant provided examination and work status notes dated March 13 and 16, 2015 from a nurse practitioner, who related that appellant had a slip and fall on March 6, 2015 provided examination findings, and diagnosed neck strain. The nurse practitioner recommended that appellant return to work on March 18, 2015 with restrictions of no lifting or carrying more than 20 pounds.

By letter dated September 30, 2015, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It requested that he respond to the attached questionnaire in order to substantiate that the March 13, 2015 incident occurred as alleged and provide medical evidence to establish a diagnosed condition causally related to the alleged incident. Appellant was afforded 30 days to submit this evidence.

Dr. Khaled Hammoud, Board-certified in psychiatry and neurology, treated appellant and in reports dated April 24 to May 15, 2015, indicated that he last examined appellant for complaints of neck pain and right-sided weakness resulting from a fall in January 2015. He related that a magnetic resonance imaging (MRI) scan showed cervical myelopathy, a large disc herniation at the C4-5 level with compression of the spinal cord, and large disc bulges at C3-4 and C4-5. Dr. Hammoud noted that appellant currently complained of worsening right-sided weakness and increased trouble walking. He reviewed appellant's history and conducted an examination. Dr. Hammoud reported sensory examination of decreased palpation and light touch in right upper and lower extremities. He diagnosed cervical myelopathy evident on MRI scan of the cervical spine resulting in worsening right-sided weakness and severe cervicogenic headache. Dr. Hammoud recommended cervical decompression surgery. On May 28, 2015 appellant underwent cervical surgery.

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<sup>3</sup> Appellant has a previously accepted traumatic injury claim under OWCP File No. xxxxxx523 due to a January 10, 2015 employment injury. The case was accepted for head and right arm contusion. Appellant was currently receiving medical treatment and physical therapy for the accepted claim at the time of the alleged March 13, 2015 employment incident. He provided physical therapy treatment notes dated February 25 to March 13, 2015.

Appellant underwent a cervical spine MRI scan by Dr. Steven Marchioni, a Board-certified diagnostic radiologist, who noted in a June 10, 2015 report that appellant had anterior plate and screw fixation of C3 through C6. Dr. Marchioni reported no fragmentation of hardware, fracture, or bone destruction. He indicated that the scan showed satisfactory postoperative findings.

In a July 8, 2015 cervical spine MRI scan, Dr. David R. Martin, a Board-certified diagnostic radiologist, related that he compared appellant's scan to the June 10, 2015 scan and noted slight ventral subluxation of C6 on C7 and slight loss of height of the disc space at C6-7. He reported no prevertebral soft tissue swelling and no fracture. Dr. Martin diagnosed a grade 1 degenerative subluxation of C6 ventral on C7.

Dr. Hammoud continued to treat appellant and in an August 14, 2015 report related that appellant no longer had right-sided weakness or abnormal gait following cervical spine surgery. He reviewed appellant's history and reported motor examination of 5/5 in the bilateral upper and lower extremities. Dr. Hammoud indicated that sensory examination showed decreased to palpation and light touch in the right upper and lower extremities and slightly reduced vibration sensation over the right side of the forehead. He diagnosed cervical myelopathy evident on MRI scan with complete resolution of right-sided weakness after cervical decompression surgery.

In an August 19, 2015 cervical spine MRI scan, Dr. Martin reported that the height of the vertebral bodies, the alignment of the cervical spine, the mineralization, and the atlantoaxial relationship appeared normal.

OWCP denied appellant's claim by decision dated November 5, 2015 finding that the evidence of record was insufficient to establish that the March 13, 2015 incident occurred as alleged. It further determined that the medical evidence submitted was insufficient to establish a diagnosed condition causally related to the employment incident.

On December 7, 2015 appellant requested a hearing before an OWCP hearing representative.

Appellant provided a November 18, 2015 cervical spine MRI scan by Dr. Martin who noted "no adverse change" when compared to the August 19, 2015 MRI scan.

In a December 1, 2015 report, Dr. Mario P. Brkaric, a Board-certified orthopedic surgeon, indicated that appellant was evaluated for a cervical spine problem. He noted that an x-ray scan showed good position of appellant's cervical fusion surgery. Dr. Brkaric related that appellant was back to work full time.

On July 11, 2016 a hearing was held. Appellant related that on March 13, 2015 he was delivering mail on a walking route when his leg suddenly gave out and he fell down, scraping his face and knee. He explained that he did not trip or slip on anything, but his knee just suddenly gave out causing him to fall on the right side of his body. Appellant noted that he currently had a claim for an accepted January 10, 2015 employment injury and explained that the January 10, 2015 injury did not involve any problems with his right leg or right lower extremity. He described the medical treatment he had received, including the cervical and upper spine surgery in May 2015. Appellant asserted that his physicians, Dr. Hammoud and Dr. Brkaric, had

attributed his neck condition to the fall. He further explained that he delayed filing a claim because the employing establishment was in the midst of changing postmasters.

By decision dated August 16, 2016, an OWCP hearing representative affirmed the November 5, 2015 decision. He determined that the evidence of record was insufficient to establish that appellant sustained a work-related injury on March 13, 2015. The hearing representative noted that appellant had delayed filing his claim and had not submitted any evidence to factually corroborate that the March 13, 2015 incident occurred as alleged.

On November 1, 2016 OWCP received appellant's request, through counsel, for reconsideration in a letter dated October 31, 2016. He noted that he was submitting an October 23, 2016 medical note by Dr. Hammoud. Counsel asserted that OWCP should vacate its decision based on the new evidence.

In a handwritten note dated October 23, 2016, Dr. Hammoud related that appellant reported slipping on ice and falling backwards in January 2015 and "sustaining another fall shortly afterwards." He noted appellant's complaints of right-sided weakness and neck pain. Dr. Hammoud reported examination findings of mild weakness in the right upper and lower extremities and leaning to the right side while ambulating. He indicated that a cervical spine MRI scan showed a large disc bulge from C3 through C5 and cord compression signal. Dr. Hammoud diagnosed cervical myelopathy. He signed a paragraph, which stated: "the facts of injury are the direct and proximate cause of the diagnosis that I cited above ... there may be other causes for this medical problem, but one of the causes is clearly the activities of work described."

By decision dated November 10, 2016, OWCP denied appellant's November 1, 2016 reconsideration request. It found that the new medical evidence was irrelevant or immaterial to the issue of fact of injury.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence,<sup>5</sup> including that he or she is an "employee" within the meaning of FECA<sup>6</sup> and that a claim was filed within the applicable time limitation.<sup>7</sup> An employee must also establish that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>8</sup>

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>6</sup> *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercardo)*, 4 ECAB 357, 359 (1951).

<sup>7</sup> *R.C.*, 59 ECAB 42 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954).

<sup>8</sup> *G.T.*, 59 ECAB 447 (2008); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

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.<sup>9</sup> There are two components involved in establishing fact of injury. 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.<sup>10</sup> Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.<sup>11</sup>

The employee has the burden of proof to establish the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. 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, as alleged, but the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.<sup>12</sup> An employee has not met his or her burden of proof 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. 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 statement in determining whether a *prima facie* case has been established. 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.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that on March 13, 2015 he injured his neck and scraped the right side of his body when he fell down while delivering mail at work. OWCP denied his claim, finding that the evidence of record was insufficient to establish that the March 13, 2015 incident occurred as alleged. OWCP further found that the evidence of record failed to establish a diagnosed condition causally related to the alleged incident. The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a traumatic injury on March 13, 2015.

In his Form CA-1, appellant reported that his “(right) side gave out (leg and hand)” and he scraped his right knee and right side of his face. During the July 11, 2016 hearing, he further testified that he did not trip or slip while delivering mail on his walking route, but his knee

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<sup>9</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>10</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>11</sup> *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>12</sup> *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

<sup>13</sup> *D.B.*, 58 ECAB 529 (2007).

suddenly gave out, causing him to fall down on his right knee and scrape the right side of his face.

The Board finds that there is no detailed account of the alleged injury sufficient to establish that the incident occurred in the manner alleged.<sup>14</sup> In its September 30, 2015 development letter, OWCP advised appellant of the deficiencies of his claim and requested additional evidence to establish a traumatic injury on March 13, 2015. It specifically requested that appellant respond to a questionnaire in order to establish the factual element of his claim. Appellant did not respond to the questionnaire, nor did he provide any supplemental statement or detailed information surrounding the alleged March 13, 2015 incident. The Board finds that appellant's vague description does not provide adequate detail to establish that the March 13, 2015 employment incident occurred as alleged and caused a work-related injury.<sup>15</sup>

The Board further finds that the contemporaneous medical evidence of record fails to establish fact of injury. Appellant submitted examination notes and work status notes dated March 13 and 16, 2015 with illegible signatures, which indicated that appellant had a "slip and fall" and noted a date of injury of March 6, 2015. The Board notes that these medical reports provide a different history of injury that appellant's right side suddenly gave out on March 13, 2015.<sup>16</sup>

Dr. Hammoud further noted in various reports that appellant began to experience symptoms after a fall in January 2015. As these reports attributed appellant's symptoms to a January 2015 fall, and not the alleged March 13, 2015 employment incident, they are insufficient to establish fact of injury. Dr. Hammoud's report failed to provide a sufficient explanation as to the mechanism of injury pertaining to this traumatic injury claim, namely, how walking would have caused appellant's leg to give out resulting in an injury.<sup>17</sup> He provided no specific details describing the incident of March 13, 2015, which could have caused appellant's alleged injury.

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<sup>14</sup> See *S.R.*, Docket No. 15-1274 (issued August 25, 2015); *M.B.*, Docket No. 11-1785 (issued February 15, 2012); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

<sup>15</sup> See *Paul Foster*, 56 ECAB 1943 (2004); *Betty J. Smith*, 54 ECAB 174 (2002); 5 U.S.C. § 8101(5).

<sup>16</sup> *James Mack*, 43 ECAB 321 (1991). The opinion of the physician must be based on a complete factual and medical background of the claimant, 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.

<sup>17</sup> *L.S.*, Docket No. 16-0036 (issued May 23, 2016). See also *L.R.*, Docket No. 16-736 (September 2, 2016) wherein the Board found that appellant's treating physician had described the mechanism of injury due to walking. He explained that hard surfaces impact forces to the medial and lateral joint compartments to the knee that incites the inflammatory response, and results in synovitis of the knee. This resulting synovitis is the basis of the inflammatory response and it produced microscopic cartilaginous wear debris; thinning of the medial and lateral compartment articular cartilage. This cartilaginous wear debris produces the stimulus to the inflammatory response that, while metabolizing the debris also damages the cartilage of the femoral condyles, producing the current fragmentation and fissuring of the patellar cartilage damage.

The various CT and MRI scan reports and Dr. Brkaric's reports are also insufficient to establish fact of injury as none of the medical reports mention or provide any description of the alleged March 13, 2015 employment incident.<sup>18</sup>

Neither appellant, nor any of the medical providers who treated him, provided a consistent, detailed history of injury describing the time, place, and manner in which the alleged March 13, 2015 injury occurred.<sup>19</sup> Accordingly, the evidence of record is insufficient to establish that the incident occurred as alleged.

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. §§ 10.606 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>20</sup> OWCP regulations provide that it may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district office.<sup>21</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>22</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>23</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>24</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>25</sup>

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<sup>18</sup> See *T.C.*, Docket No. 17-353 (issued March 22, 2017).

<sup>19</sup> *Supra* note 13.

<sup>20</sup> 5 U.S.C. § 8128(a); see also *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>21</sup> 20 C.F.R. § 10.605; see also *R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>22</sup> 20 C.F.R. § 10.606(b); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>23</sup> 20 C.F.R. § 10.607(a).

<sup>24</sup> *Id.* at § 10.608(a); see also *M.S.*, 59 ECAB 231 (2007).

<sup>25</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

## **ANALYSIS -- ISSUE 2**

By decisions dated November 5, 2015 and August 16, 2016, OWCP denied appellant's traumatic injury claim, finding that the evidence of record did not establish fact of injury. On November 1, 2016 it received appellant's request for reconsideration. OWCP denied further merit review in a decision dated November 10, 2016, finding that the evidence submitted on reconsideration neither raised a substantive legal question, nor constituted relevant and pertinent new evidence sufficient to warrant merit review.

The Board finds that appellant did not submit any evidence along with his request for reconsideration to show that OWCP erroneously applied or interpreted a specific point of law.

Along with his reconsideration request, appellant submitted an October 23, 2015 report by Dr. Hammoud who related that appellant had two falls, provided physical examination findings, and offered an affirmative opinion on causal relationship. This medical report, however, is not relevant and pertinent to the issue in this case and is insufficient to require OWCP to reopen his claim for consideration of the merits.<sup>26</sup> Because Dr. Hammoud failed to address the specific issue of describing the time, place, and manner in which the alleged March 13, 2015 injury occurred, his report is irrelevant and does not constitute a basis for reopening a case.<sup>27</sup>

The Board further finds that appellant did not submit any evidence along with his request for reconsideration to show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Because appellant did not meet any of the necessary requirements under 20 C.F.R. § 10.606(b)(3), he is not entitled to further merit review. Therefore, OWCP properly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128.

## **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on March 13, 2015 as alleged. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>26</sup> See *James W. Scott*, 55 ECAB 606 (2004).

<sup>27</sup> See *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 10 and August 16, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 22, 2017  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board