United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 17-1214**
	)	**Issued: April 16, 2018**
DEPARTMENT OF HOMELAND SECURITY. BORDER & CUSTOMS PROTECTION, Imperial, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 11, 2017 appellant filed a timely appeal from a February 16, 2017 merit decision and a March 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has not met his burden of proof to establish an injury causally related to the accepted November 2, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 2, 2016 appellant, then a 33-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on November 2, 2016 he injured his neck while changing a tire on his assigned work vehicle.[2] He stopped work on November 2, 2016 and received continuation of pay for lost time from work.[3]

Appellant initially received medical treatment in a hospital emergency room on November 2, 2016. Dr. Donald Bennett, a Board-certified emergency medicine physician, noted in a November 2, 2016 report that he obtained a computerized tomography scan of appellant's cervical spine which yielded normal results.[4] Appellant was also seen on November 2, 2016 by Dr. Nathan Watson, a Board-certified emergency medicine physician. Dr. Watson noted that appellant reported feeling neck spasms while loosening a lug nut on November 2, 2016 and he diagnosed acute cervical strain. He checked a box marked "Yes" to indicate that the diagnosis was consistent with appellant's account of the injury. Appellant returned to the hospital the next day and underwent a magnetic resonance imaging scan of his cervical spine which also showed normal results.

In a November 7, 2016 report, Dr. Frederick Arbenz, an attending Board-certified occupational medicine physician, noted that appellant reported that he injured his neck and upper shoulder girdle area on November 2, 2016 while attempting to remove lug nuts from a tire on his work vehicle. Appellant further reported that he had some irritability/tingling sensation in the C6 nerve distribution of his right upper extremity. Dr. Arbenz detailed physical examination findings, noting that appellant had tightness in the paracervical and trapezius muscles bilaterally, but that Spurling's test was negative for any radiculopathy. Strength and sensation of the upper extremities were normal. Dr. Arbenz diagnosed cervical strain and cervical radiculopathy.

Dr. Arbenz continued to see appellant for follow-up care. In a November 8, 2016 report, he indicated that appellant should remain off work until his unspecified next appointment. On November 10, 2016 Dr. Arbenz again noted that appellant should remain off work until his unspecified next appointment. In a November 15, 2016 report, he advised that appellant could return to modified duty on November 16, 2016[5] and, on November 21, 2016, he released appellant to full-duty work, effective that date. Dr. Arbenz continued to diagnose cervical strain and cervical radiculopathy in these reports.

[2] Appellant did not sign the Form CA-1 and it appears that a management official completed it on his behalf.

[3] OWCP administratively accepted appellant's claim and authorized the payment of a limited amount of medical expenses.

[4] In a November 2, 2016 report, Mark Simpson, an attending physician assistant, indicated that appellant reported that he experienced neck pain and pain radiating down his left upper extremity after loosening lug nuts on a tire while at work. He diagnosed acute cervical strain.

[5] In the November 15, 2016 report, Dr. Arbenz indicated that appellant had decreased range of motion of his cervical spine, but that no radiculopathy was observed.

In a December 12, 2016 report, Dr. Arbenz noted that appellant reported that he still had intermittent neck pain and that he had attempted to perform his regular duties.[6] He noted that the physical examination showed paraspinal muscle tightness and diffuse tenderness, but that there were no radicular symptoms. Dr. Arbenz indicated that appellant would continue with his normal work duties.

In a January 11, 2017 development letter, OWCP advised appellant that, while it had initially handled his claim administratively and authorized payment of a limited amount of medical expenses, it was now reopening his claim because his medical bills had exceeded $1,500.00. It further advised him that the merits of his claim needed to be formally considered and it requested that he submit an attending physician's opinion supported by a medical explanation of how the reported work incident caused or aggravated a medical condition. OWCP advised appellant that it would hold the case open for 30 days to afford him the opportunity to submit such evidence.

Appellant submitted a January 9, 2017 report in which Dr. Arbenz reported physical examination findings from that date. Dr. Arbenz noted that appellant reported that he had returned to performing his regular duties and that he had good and bad days at work with respect to neck pain. He indicated that appellant could continue performing his full-duty work.

By decision dated February 16, 2017, OWCP denied appellant's claim for a November 2, 2016 employment injury. It accepted that he experienced an employment incident on November 2, 2016 in the form of changing a tire on his assigned work vehicle. However, OWCP further found that appellant's claim was denied because he failed to submit medical evidence sufficient to establish an injury causally related to the accepted November 2, 2016 employment incident.

By appeal request form received on March 17, 2017, appellant requested reconsideration of the February 16, 2017 decision.

In support of his reconsideration request, appellant submitted an undated statement in which he asserted that he never attributed his neck problems to anything other than the November 2, 2016 work incident. He further discussed the circumstances of the November 2, 2016 employment incident and indicated that Dr. Arbenz placed him off work after diagnosing him with a cervical strain.

By decision dated March 21, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence he submitted in support of his timely reconsideration request was cumulative or irrelevant/immaterial to the underlying issue of his case.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the

[6] It is unclear from the record precisely when appellant returned to work.

[7] *See supra* note 1.

United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[8] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[9]

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.[10] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[11]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish an injury causally related to the accepted November 2, 2016 employment incident.

Appellant claimed that he sustained injury on November 2, 2016 due to loosening lug nuts from a tire on his work vehicle. OWCP accepted that he experienced an employment incident on November 2, 2016, as alleged. However, it further found that appellant's claim was denied because he failed to submit medical evidence sufficient to establish an injury causally related to the accepted November 2, 2016 employment incident.

Appellant submitted a November 2, 2016 report of Dr. Watson, a physician he saw on an emergency basis. Dr. Watson noted that appellant reported feeling neck spasms while loosening a lug nut on November 2, 2016 and he diagnosed acute cervical strain. He checked a box marked "Yes" to indicate that the diagnosis was consistent with appellant's account of the injury.

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

[9] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

[10] *Julie B. Hawkins*, 38 ECAB 393 (1987).

[11] *John J. Carlone*, 41 ECAB 354 (1989).

[12] *See I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

While Dr. Watson suggested causal relationship between a diagnosed condition and the November 2, 2016 employment incident, his report fails to establish appellant's claim. The Board has held that when a physician's opinion on causal relationship consists only of checking "Yes" to a form question, without more by the way of medical rationale, that opinion has little probative value and is insufficient to establish causal relationship. Appellant's burden includes the necessity of furnishing an affirmative opinion from a physician who supports his or her conclusion with sound medical reasoning.[13] As Dr. Watson did no more than check "Yes" to a form question, his opinion on causal relationship is of little probative value and is insufficient to discharge appellant's burden of proof. He did not describe the November 2, 2016 employment incident in any detail or explain how it could have caused the diagnosed condition.

Appellant also received treatment from Dr. Arbenz who provided a history of the November 2, 2016 employment incident. In several reports dated in early-November 2, 2016, Dr. Arbenz diagnosed cervical strain and cervical radiculopathy and found that appellant was totally or partially disabled. However, his reports fail to establish appellant's claim because he did not provide a clear opinion on the cause of the diagnosed condition or on the cause of appellant's disability. Dr. Arbenz also did not describe the November 2, 2016 employment incident in any detail or explain how it could have caused the diagnosed condition. The Board has held that medical evidence which does not offer a clear opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[14]

Appellant was seen by other physicians, including Dr. Bennett, but he did not submit any medical report which contained a rationalized medical opinion relating a diagnosed condition to the accepted November 2, 2016 employment incident.[15] The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.[16] OWCP provided appellant an opportunity to submit medical evidence sufficient to establish his claim for an employment-related November 2, 2016 injury, but he failed to do so and thus has failed to meet his burden of proof.

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.

[13] *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

[14] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[15] In a November 2, 2016 report, Mr. Simpson, an attending physician assistant, indicated that appellant reported that he experienced neck pain and pain radiating down his left upper extremity after loosening lug nuts on a tire while at work. He diagnosed acute cervical strain. However, under FECA, the report of a nonphysician, including a physician assistant, does not constitute probative medical evidence. *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-0829 (issued August 20, 2013). *See* 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[16] *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

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. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.[17]

A claimant seeking reconsideration of a final decision must present arguments or provide evidence 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.[18] If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.[19] If the request is timely, but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.[20]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.[21] For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System ([i]FECS).[22] If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.[23]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[24] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[25]

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[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(3); *see also L.G.,* Docket No. 09-1517 (issued March 3, 2010); *C.N.,* Docket No. 08-1569 (issued December 9, 2008).

[19] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[20] *Id.* at § 10.608(b); *E.R.,* Docket No. 09-1655 (issued March 18, 2010).

[21] *Id.* at § 10.607(a).

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also C.B.,* Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987 there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP's decision for which review is sought.

[23] *Id.* at Chapter 2.1602.4 (February 2016). *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

[24] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[25] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

ANALYSIS -- ISSUE

OWCP issued a decision on February 16, 2017, and it received appellant's request for reconsideration on March 17, 2017. Appellant's request was timely filed because it was received within one year of OWCP's February 16, 2017 decision.[26]

The issue presented on appeal is whether appellant's March 17, 2017 request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim.

The Board finds that appellant's request for reconsideration 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 by OWCP.

The underlying issue in this case is whether appellant submitted medical evidence sufficient to establish a November 2, 2016 employment injury and this is a medical issue which must be addressed by relevant medical evidence.[27] A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit such evidence in this case. The Board notes that he did not submit any additional medical evidence in support of his reconsideration request.

In support of his reconsideration request, appellant submitted an undated statement in which he asserted that he never attributed his neck problems to anything other than the November 2, 2016 work incident. He also discussed other factual aspects of his claim, including providing further details of the November 2, 2016 employment incident. However, this statement is not relevant to the underlying issue of this case because it relates to factual matters, whereas the underlying issue is medical in nature and must be resolved by the submission of medical evidence.[28] The Board finds that submission of this statement would not require OWCP to reopen appellant's case for further review of the merits of the claim because the Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[29]

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

[26] *See supra* notes 21 through 23.

[27] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[28] OWCP has accepted the occurrence of the November 2, 2016 employment incident as alleged.

[29] *See supra* note 25.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury causally related to the November 2, 2016 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 21 and February 16, 2017 decisions of the Office of Workers' Compensation Program are affirmed.

Issued: April 16, 2018
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