United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 18-0553**
	)	**Issued: November 5, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Millbrae, 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 January 19, 2018 appellant filed a timely appeal from two December 5, 2017 merit decisions and a January 3, 2018 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 the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on November 11, 2014, as alleged, and if so, whether he is entitled to continuation of pay (COP); 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).

FACTUAL HISTORY

On October 20, 2017 appellant, then a 54-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 11, 2014 he injured his left knee while in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of his federal employment "at a tree root" in front of a house … while delivering mail weather raining and dark." The employing establishment controverted the claim alleging that appellant's supervisor was not aware of the incident. It also controverted continuation of pay as the injury was not reported on a Form CA-1 within 30 days following the injury.

By development letter dated October 26, 2017, OWCP notified appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence required and attached a questionnaire for his completion. OWCP afforded him 30 days to provide the necessary information.

The employing establishment submitted a statement confirming that appellant had delivered mail on November 11, 2014.

On March 13, 2015 Dr. Alberto Bolanos, a Board-certified orthopedic surgeon, related that a left knee magnetic resonance imaging (MRI) scan, taken on February 17, 2015, showed a tear of the posterior horn of the medial meniscus and grade 4 chondromalacia of the trochlea. He noted that a right knee MRI scan of the same day showed grade 2-3 chondromalacia of the trochlea, but no meniscal tear. Dr. Bolanos diagnosed left knee medial meniscal tear and chondromalacia of the trochlea, right knee chondromalacia on MRI scan, mild left hip arthritis with moderate symptoms, and lumbar spondylosis with chronic low back pain and possible radiculopathy, recently severe.

On April 13, 2015 Dr. Bolanos performed a left knee arthroscopy with resection of the posterior horn and the medial meniscus, and resection of the free edge tear of the mid body of the lateral meniscus. He noted that grade 3-4 chondromalacia of the trochlea was found and a chondroplasty was performed. Dr. Bolanos followed up with appellant after the surgery on April 30 and June 11, 2015. He noted in his June 11, 2015 report that appellant was still having some pain in his left knee, but less than previously.

The record also contains disability notes signed by Dr. Bolanos indicating that appellant was seen on December 16, 2014, and February 13 and June 11, 2015.

By decision dated December 5, 2017, OWCP determined that appellant was not entitled to continuation of pay for the period November 12 to December 26, 2014 as his injury was not reported on a form approved by OWCP within 30 days following the alleged injury.

In a separate decision dated December 5, 2017, OWCP denied appellant's claim, finding that he had not submitted sufficient evidence to establish that the incident occurred as alleged. It also noted that the medical documentation was insufficient to establish that a diagnosed medical condition was causally related to the alleged work injury or event.

On December 19, 2017 appellant requested reconsideration. He noted that he immediately reported his injury to his supervisor, who asked him to continue working and finish delivering the mail. Appellant noted that he had no choice, but to continue to work, and did not go to the doctor that day because he had to pick up his children at school. He noted that he started having severe pain, but his supervisor rejected his request for days off. Appellant alleged that his supervisor did not document his injury when he reported it to him.

By decision dated January 3, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review. It noted that he had not submitted a statement describing how the incident occurred. OWCP further noted that appellant had not submitted medical evidence establishing a diagnosed medical condition causally related to the alleged employment incident.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA[2] 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, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[3]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether the fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[4] The second component is whether the employment incident caused a personal injury.[5] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[6]

An employee's statement 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.[7] Moreover, an injury does not have to be confirmed by eyewitnesses.[8] The employee's statement, however, must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain

[2] *Id.*

[3] *S.S.*, Docket No. 16-1760 (issued January 23, 2018).

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

[6] *Shirley Temple*, 48 ECAB 404, 407 (1997).

[7] *D.P.*, Docket No. 18-0190 (issued May 22, 2018).

[8] *S.B.*, Docket No. 17-1779 (issued February 7, 2018).

medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statement in determining whether a *prima facie* case has been established.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on November 11, 2014, as alleged.

On his traumatic injury claim form, appellant indicated that he injured his left knee "at a tree root in front of a house ... while delivering mail weather raining and dark." By letter dated October 26, 2017, OWCP asked appellant to provide a more detailed description as to how the injury occurred. OWCP also asked appellant to explain why he did not report the injury to his supervisor within 30 days. He did not respond to this letter.

The Board finds that appellant has not provided sufficient detail to establish that a traumatic incident occurred as alleged.[10] Appellant's description of the traumatic incident is vague and fails to provide any specific detail to determine the manner in which he sustained his claimed injury.[11] He did not respond to the questionnaire and he failed to provide a narrative statement detailing the traumatic incident prior to the issuance of OWCP's denial of his claim on December 15, 2017. By failing to describe the employment incident and circumstances surrounding his alleged injury, the Board finds that the evidence of record is insufficient to establish that the traumatic injury occurred on November 11, 2014 as alleged.[12]

Furthermore, while an injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[13] Appellant alleged that the incident occurred on November 11, 2014, but he did not file a claim until almost three years later on October 20, 2017. Furthermore, the first indication that appellant sought treatment for a left knee condition was not until he sought treatment on March 13, 2015 with Dr. Bolanos. The Board also notes that the employing establishment indicated on the claim form that it was not aware of the incident. As there are significant inconsistencies in the record that cast doubt on appellant's claim, appellant has not established that the November 11, 2014 incident occurred, as alleged. As such, it is unnecessary to address the medical evidence regarding causal relationship.[14]

[9] *D.C.*, Docket No. 17-0993 (issued November 20, 2017).

[10] *A.E.*, Docket No. 17-0522 (issued April 13, 2018).

[11] *Id.*

[12] *G.L.*, Docket No. 17-1635 (issued December 5, 2017).

[13] *R.B.*, Docket No. 18-0007 (issued April 2, 2018).

[14] *See T.N.*, Docket No. 15-1099 (issued December 16, 2016).

The Board also finds that because appellant's traumatic injury claim is denied he is not eligible for continuation of pay (COP). To be eligible for COP an employee must have an established traumatic injury which is employment related.[15]

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 PRCEDENT -- ISSUE 2

Section 8128 of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation either under its own authority or on application by a claimant.[16] Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).[17] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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] Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. As such, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

OWCP denied appellant's claim as it determined that he had failed to establish that the employment incident occurred as alleged. The only evidence submitted on reconsideration was his statement. In his undated statement, received by OWCP on November 11, 2017, appellant again indicated that he was injured on November 11, 2017 [sic], and that he immediately reported the injury to the supervisor. He still did not address how the employment incident occurred. The Board has held that the submission of evidence or argument which repeats or duplicates evidence

[15] *See* 20 C.F.R. § 10.205(a)(1); *see also C.B.*, Docket No. 13-0760 (issued June 20, 2013).

[16] 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.608(b).

[18] *Id*. at § 10.606(b)(3).

[19] *Id.* at § 10.608(b).

or argument already in the case record does not constitute a basis for reopening a claim.[20] Appellant's statement indicated that he sustained pain at work, but does not discuss how the injury occurred. His statement is general in nature and does not constitute relevant and pertinent new evidence sufficient to reopen his claim for merit review. As noted, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a claim.[21]

The Board finds that, as appellant did not satisfy any of the three requirements under section 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a traumatic injury on November 11, 2014 in the performance of duty, as alleged and, thus, he was not entitled to COP. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 3, 2018 and December 5, 2017 regarding denial of

[20] *See J.H.*, Docket No. 17-0826 (issued August 22, 2018).

[21] *S.T.*, Docket No. 17-0790 (issued May 22, 2018).

reconsideration and performance of duty, respectively, are affirmed. The December 5, 2017 decision regarding COP is affirmed as modified.

Issued: November 5, 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