United States Department of Labor
Employees' Compensation Appeals Board

A.O., Appellant	)	
and	)	**Docket No. 18-0558**
	)	**Issued: October 10, 2018**
DEPARTMENT OF TRANSPORTATION, U.S. MERCHANT MARINE ACADEMY, Kings Point, NY, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 19, 2018 appellant filed a timely appeal from a November 21, 2017 merit decision and a January 11, 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 claim.[2]

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty as alleged; and (2) whether OWCP abused its discretion in denying

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated May 16, 2018, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0558 (issued May 16, 2018).

appellant's request for a hearing before an OWCP hearing representative pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On May 1, 2017 appellant, then a 59-year-old security officer, filed an occupational disease claim (Form CA-2) alleging that exposure to toxic substances at the site of the World Trade Center ("Ground Zero") shortly after the September 11, 2001 terrorist attacks caused a malignant neoplasm of the right choroid. He noted that he was first diagnosed with cancer on November 25, 2014 by Dr. Paul T. Finger, a Board-certified ophthalmologist.

In a May 18, 2017 supervisor's report, the employing establishment noted that appellant was separated from employment, effective August 30, 2008. OWCP paid appellant wage-loss compensation and medical benefits on the periodic rolls under OWCP File No. xxxxxx614, which accepted for traumatic knee contusions, cervical, and lumbar strains sustained on December 3, 2004 while arresting a suspect.

By development letter dated May 31, 2017, OWCP notified appellant of the type of additional evidence needed to establish his claim, including factual evidence corroborating that he was in the performance of duty while at Ground Zero, and a medical report from his attending physician explaining how appellant's employment activities would have caused or contributed to the claimed condition. It afforded him 30 days in which to submit additional evidence.

In response, appellant submitted his June 14, 2017 statements in which he asserted that it was his duty to report to Ground Zero immediately after the September 11, 2001 attacks because he had been trained in relevant first response and law enforcement protocols. He provided an undated employing establishment award to unspecified personnel for their actions from September 11 to 19, 2001. Appellant also provided medical literature regarding cancer diagnoses following exposures to various toxins at Ground Zero. He also submitted medical evidence.

In a report dated December 1, 2014, Dr. Finger noted that he had first diagnosed appellant with a T1 right choroidal melanoma on November 25, 2014. In a June 14, 2017 report, he related that local radiation treatment had reduced the thickness of the tumor. Dr. Finger did not address the etiology of appellant's condition.

The employing establishment provided several supervisory statements. In a May 17, 2017 e-mail, Acting Foreman S.F. asserted that he did not recall seeing or working with appellant on any vessel or during operations ashore related to the September 11, 2001 attacks. In a May 19, 2017 e-mail, E.W., the officer in charge of the employing establishment's September 11, 2001 response, explained that appellant's mention in the staff list of the Outstanding Unit Award, and an enclosed October 1, 2001 timeline of the employing establishment's response activities, meant that appellant "DID NOT travel down to 'Ground Zero' or to NY Harbor as part of any [employing establishment] contingent. A separate review of the detailed personnel assignment records used to develop the list of OUA [Outstanding Unit Award] recipients further confirms this statement." (Emphasis in the original.)

Assistant Director R.C. noted in a May 22, 2017 e-mail that none of his staff who participated in September 11, 2001 operations recalled appellant being on board any employing

establishment vessel. "When the attacks happened [R.C.] was in a meeting with [appellant]. At that point [appellant] returned to [his duty station] and began securing the campus."

In letters dated June 28 and 29, 2017, the employing establishment contended that agency documentation demonstrated that appellant performed "shoreside support" activities on and after September 11, 2001 at the employing establishment's Kings Point campus. Appellant never "travelled to lower Manhattan as a first responder."[3]

By decision dated August 10, 2017, OWCP denied appellant's claim, finding that fact of injury had not been established. It determined that the factual evidence of record demonstrated that he did not travel to Ground Zero in the performance of duty as alleged. OWCP noted that the inconsistencies between appellant's assertions and employing establishment records cast serious doubt on the validity of his claim.

On August 22, 2017 appellant requested reconsideration. He contended that the employing establishment officials who provided statements in evidence were not in his chain of command and had no direct knowledge of his activities. Appellant explained that his immediate supervisor, J.J., had authorized his participation in law enforcement liaison groups and had paid for him to attend law enforcement training.

In support of his request, appellant provided an April 6, 2016 statement from K.V., an emergency management technician, who asserted that, on September 11, 2001, she spoke with appellant by telephone and he advised her that "he was currently at Ground Zero." In a September 22, 2015 affidavit, M.M., appellant's former partner in the New York Police Department (NYPD), recalled that on "a few occasions" between September 15 and October 30, 2001, appellant met him at Ground Zero "while [appellant] was present in his capacity as police chief of a federal agency. We also went to lunch on Canal Street on a few occasions."

Supervisor E.W. responded to appellant's statement on September 12, 2017. He asserted that he supervised all employing establishment personnel assigned official duties at Ground Zero. E.W. reiterated that appellant was not a part of any official waterborne or on-site support activities.

Supervisor J.J. contended in a September 6, 2017 statement that "the only personnel authorized to be part of any of the trips to the WTC [World Trade Center] site were those [employing establishment] staff and midshipmen placed on an official record sheet of participation."

In a letter dated September 13, 2017, the employing establishment contended that there were no records which indicated that appellant participated in any official activities at or near

[3] The employing establishment also provided an unsigned log of command center activities on September 11 and 12, 2001. These records do not mention appellant.

Ground Zero. Rather, appellant performed "dockside service" on the employing establishment's grounds in King's Point.

By development letter dated September 18, 2017, OWCP requested that appellant answer the employing establishment's September 13, 2017 controversion of his claim. It afforded him 30 days to submit additional evidence or argument.

In response, appellant submitted a September 21, 2017 statement contending that he was officially authorized to visit One Police Plaza following the September 11, 2001 attacks as part of assigned intelligence gathering activities. He asserted that the employing establishment officials who controverted his claim were not in his chain of command. Appellant argued that only his immediate supervisor J.J, and institutional staff advisor V.M., who signed his official position description on January 26, 2000, were competent to comment on the scope of his official duties.

Human resources specialist R.V. replied in an October 16, 2017 e-mail that appellant was not assigned to gather or share intelligence with local police at any time after the September 11, 2001 attacks. Additionally, no employee recalled appellant "mentioning to them that he was at Ground Zero, nor does [E.W.] remember him being assigned any task that would take him there." The employing establishment also explained in an October 17, 2017 letter that as supervisor E.W. was the commanding officer in charge on September 11, 2001, it was "preposterous to believe that [E.W.] would not have been aware of any high-level meetings with any other State or Federal agencies or law enforcement [appellant] alleges [that] he attended while at Ground Zero."

By development letter dated October 18, 2017, OWCP requested that appellant respond in writing to the employing establishment's October 17, 2017 letter controverting his claim. Appellant was afforded 30 days to submit additional evidence or argument.

In response, appellant submitted letters dated October 23, 25, and November 10, 2017 alleging that he frequently communicated with state and federal law enforcement officials as part of his official duties, and that he was in charge of communicating with the governor's office to establish a federally staffed security perimeter for the employing establishment following the September 11, 2001 attacks. He alleged that R.V. had lied in his statements to OWCP, and that E.W. was not present at meetings in which appellant requested and "secured shotguns for the police department."

In a letter dated November 10, 2017, appellant's coworker J.C. asserted that commander E.W. was not in his chain of command. He contended that, on an unspecified date, he and appellant were assigned to assist in a criminal investigation on Long Island.

By decision dated November 21, 2017, OWCP denied modification of its prior decision, finding that the additional evidence submitted failed to establish that appellant was in the performance of duty when he visited Ground Zero following the September 11, 2011 attacks. It found that, while M.M.'s September 22, 2015 affidavit indicated that appellant was present at or near the World Trade Center site, it did not establish that he was there in an official capacity or

while on duty. OWCP further found that the employing establishment's multiple statements cast significant doubt on the validity of appellant's claim.

In a letter dated and received by OWCP on November 28, 2017, appellant requested an oral hearing or a review of the written record by OWCP's Branch of Hearings and Review.[4] He submitted a September 25, 2001 U.S. Marshals Service special deputation appointment "valid only while patrolling the roadways that run through the [employing establishment] or adjacent to it." Appellant also provided April 21, 2004 announcements of employing establishment law enforcement training seminars for which he was the instructor, his undated statement asserting that he responded to the World Trade Center attacks in the performance of duty, a document related to OWCP File No. xxxxxx614, a May 16, 2016 letter from a security contractor who affirmed that appellant attended a counter-terrorism seminar on Long Island in early 2002, a November 29, 2017 employing establishment statement confirming the September 25, 2001 special deputation, and a December 5, 2017 letter from coworker L.S. contending that E.W. was not in his chain of command.

By decision dated January 11, 2018, a representative of OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing as he had previously requested reconsideration. After exercising her discretion, the hearing representative further denied the request, finding that the issue could be equally well addressed through a request for reconsideration before OWCP's district office.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[5] 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 United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that the injury was sustained while 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.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[7]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which

[4] On December 5, 2017 appellant also requested reconsideration. In a letter dated and received by OWCP on December 9, 2017, he requested that OWCP subpoena J.G., an official of the employing establishment's chief counsel's office.

[5] *Supra* note 1.

[6] *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *See Irene St. John*, 50 ECAB 521 (1999).

compensation is claimed, or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[8]

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.[9] The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her 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 medical treatment may, if otherwise, unexplained, cast doubt on an employee's statement in determining whether a prima facie case has been established.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that he sustained an occupational disease in the performance of duty, as alleged.

Appellant alleged that the claimed neoplasm of the right choroid was caused by his exposure to unspecified toxins at the World Trade Center attacks site from September 11 through November 2011 during the performance of assigned law enforcement or first responder duties. The Board has held that to establish that an injury occurred in the performance of duty the employee must provide sufficient detail to establish that an occupational exposure occurred as alleged.[11] The only evidence appellant provided corroborating his presence at the attack site was a September 22, 2015 affidavit from M.M., appellant's former partner in the NYPD, who asserted that on "a few occasions" between September 15 and October 30, 2001, he met appellant at Ground Zero and then went to lunch with him. In this case, however, appellant's assertion that his duties required his presence at Ground Zero on or after September 11, 2001 was strongly refuted by the employing establishment.

Several employing establishment officials provided detailed statements controverting appellant's account of events. E.W., the employing establishment officer in charge of the employing establishment's response to the September 11, 2001 attacks, explained that records and coworker statements confirmed that appellant did not travel to Ground Zero after the attack. Appellant had received an Outstanding Unit Award given only to personnel who performed "shoreside support" on the premises of the employing establishment at King's Point. E.W. noted that as office in charge, he would have been aware if appellant had left the employing establishment or had been assigned to do so. E.W. emphasized that appellant had not been part of any official waterborne or attack site support. Assistant Director R.C. recalled that appellant was

[8] *Id.*

[9] *E.G.*, Docket No. 17-1364 (issued April 19, 2018); *R.T.*, Docket No. 08-0408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 238, 241 (2005).

[10] *E.G.*, *id.*; *Betty J. Smith*, 54 ECAB 174 (2002).

[11] *E.G.*, *supra* note 9; *see Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

at the employing establishment securing the premises following the September 11, 2001 attacks. Supervisor J.J. noted that appellant was not listed in the official records of employing establishment personnel who participated in rescue or support activities.

The employing establishment's statements cast significant doubt on the validity of appellant's claim. There is no evidence from appellant's supervisor, coworkers, or in contemporaneous records that appellant was assigned to report to Ground Zero at any time following the September 11, 2001 terrorist attacks. OWCP provided appellant the opportunity to clarify this matter, but he did not provide sufficient evidence corroborating that his employment duties required him to be present at or near the site of the World Trade Center attacks at any time. Appellant's response to the employing establishment's assertions was to accuse the officials who provided statements of lying or of being unfamiliar with his duties. Given the serious inconsistencies in the evidence, the Board finds that appellant has not established the incident component of fact of injury.[12] Appellant has therefore failed to meet his burden of proof.[13]

On appeal appellant contends that police powers and a U.S. Marshal deputation had required him to travel to the World Trade Center site immediately after the September 11, 2001 attack, and to meetings at various locations in Manhattan through November 1, 2001. The Board notes, however, that the deputation was not conferred until September 25, 2001, and that the remainder of the employing establishment's statements and supporting documents do not demonstrate that appellant was authorized to participate in any off-site activities related to the attacks.

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 PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to hearing before an OWCP hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.[14] A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[15]

[12] *J.K.*, Docket No. 17-0300 (issued August 9, 2017).

[13] As appellant did not establish an incident as alleged, the Board need not discuss the probative value of the medical evidence. *J.K.*, *id*.

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 10.615.

A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is field within the requisite 30 days as determined by postmark or other carriers' date marking and before the claimant has requested reconsideration (whether or not reconsideration was granted).[16] Although there is no right to a review of the written record or an oral hearing as a matter of right if claimant had previously sought reconsideration, OWCP may, within tis discretionary powers, grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[17]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing before the Branch of Hearings and Review under 5 U.S.C. § 8124(b)(1).

Because appellant previously requested reconsideration on August 22, 2017 he was not entitled to a hearing as a matter of right under section 8124(b)(1) of FECA.[18]

The Board further finds that OWCP's hearing representative did not abuse her discretion in denying appellant's request for an oral hearing in her January 11, 2018 decision.[19] The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probably deduction from established facts.[20] Appellant was advised that his case could be equally well addressed by requesting reconsideration before OWCP and submitting new evidence not previously considered, that he sustained an injury in the performance of duty. In this case, the evidence of record does not indicate that OWCP's hearing representative abused her discretion in denying appellant's request for a hearing under these circumstances. Accordingly, the Board finds that OWCP properly denied his request for a hearing.

CONCLUSION

The Board finds that appellant has not established an injury in the performance of duty as alleged. The Board further finds that OWCP properly denied his request for a hearing before an OWCP hearing representative pursuant to 5 U.S.C. § 8124.

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[16] *Id.* at 10.616(a); *L.S.*, Docket No. 18-0115 (issued May 10, 2018); *S.F.*, Docket No. 17-0463 (issued September 8, 2017); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont I. Thompson*, 51 ECAB 155 (1999).

[17] 20 C.F.R. § 616(a); *L.S.*, *id*., Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

[18] *L.S.*, *supra* note 16, *S.F.*, *supra* note 16; *J.M.*, Docket No. 16-0669 (issued October 24, 2016); *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[19] *L.S.*, *supra* note 16, *S.F.*, *supra* note 16.

[20] *L.S.*, *supra* note 16. *See R.G.*, Docket No. 16-0994 (issued September 9, 2016); *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 11, 2018 and November 21, 2017 are affirmed.

Issued: October 10, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board