



## **ISSUES**

The issues are: (1) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b); (2) whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on November 22, 2017, as alleged; and (3) 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 December 15, 2017 appellant, then a 46-year-old engine utility man, filed a traumatic injury claim (Form CA-1) alleging that, on November 22, 2017, he fell onto his knee when sending a line to another ship and sustained right knee strain while in the performance of duty.

In support of his claim, appellant provided a November 30, 2017 medical record which indicated that he believed that he fell onto his right knee at work a few days prior, but he could not recall the specific incident, location, or date.

In a development letter dated December 26, 2017, OWCP notified appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of medical evidence required. OWCP afforded appellant 30 days to provide the requested evidence.

By decision dated January 29, 2018, OWCP denied appellant's traumatic injury claim, finding that he had not submitted sufficient evidence to establish that the employment incident occurred as alleged. It also noted that the medical documentation of record was insufficient to establish that a diagnosed medical condition causally related to the alleged work injury or event.

In a report dated January 24, 2018, Dr. Gabriel Dassa, an osteopath and a Board-certified orthopedic surgeon, diagnosed sprain of the medial collateral ligaments of both knees. On February 7 and March 21, 2018 he diagnosed bucket-handle tear of the lateral meniscus of the right knee. On February 9, 2018 Dr. Dassa completed a New York workers' compensation form report and listed appellant's date of injury as November 22, 2017. He reported that appellant sustained a fall while at work and sustained injury to his right knee. Dr. Dassa checked a box marked "yes" indicating that the incident that appellant described was the competent medical cause of this injury/illness.

On March 2, 2018 appellant requested an oral hearing before an OWCP hearing representative. He provided a January 21, 2018 magnetic resonance imaging (MRI) scan of his right knee and a January 23, 2018 MRI scan of his left knee.

On March 13, 2018 appellant also requested reconsideration of the denial of his claim.

By decision dated March 23, 2018, OWCP's hearing representative determined that appellant was not entitled to a hearing as a matter of right under section 8124(b) because his March 2, 2018 oral hearing request was not made within 30 days of its January 29, 2018 merit decision. She considered whether to grant a discretionary hearing, but determined that the matter could equally well be addressed by appellant requesting reconsideration and providing new evidence supporting an employment-related incident.

On May 7, 2018 OWCP informed appellant by letter that his claim was denied based on conflicting factual information regarding his alleged employment incident. It afforded him an additional 20 days to provide factual evidence.

On June 5, 2018 appellant provided a May 2, 2018 note from Dr. Dassa diagnosing tear of the lateral meniscus of the right knee.

In a June 6, 2018 note, Dr. Arnold Wilson, a Board-certified orthopedic surgeon, noted appellant's history of falling while performing his duties as a merchant marine on November 22, 2017 and sustaining injuries to both knees. Appellant was feeding a line to another ship, the receiving ship could not stay on course, and the line cut without warning causing appellant to fall on deck of his ship. Dr. Wilson diagnosed right knee lateral meniscus tear and recommended arthroscopic surgery to both knees.

By decision dated June 26, 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 submitted medical evidence in support of his request for reconsideration, but that in the absence of a statement from him describing the factual circumstances of the injury and clarifying the discrepancies in the factual accounts of the injury, medical documentation was irrelevant.

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

Section 8124 of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides that a claimant is entitled to a hearing before an OWCP representative when a request is made 30 days after issuance of an OWCP final decision.<sup>4</sup>

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.<sup>5</sup> A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.<sup>6</sup> A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.<sup>7</sup>

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<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> *Id.* at § 10.616(a); *B.H.*, Docket No. 18-0874 (issued October 10, 2018); *James Smith*, 53 ECAB 188 (2001).

<sup>7</sup> *B.H.*, *id.*

OWCP has discretion to grant or deny a request that is made after the 30-day period for requesting an oral hearing or review of the written record and must properly exercise such discretion.<sup>8</sup>

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

The Board finds that OWCP properly determined that appellant's request for an oral hearing was untimely filed. OWCP's regulations provide that the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought.<sup>9</sup> As his request was dated March 2, 2018, more than 30 days after OWCP's January 29, 2018 decision, it was untimely filed and he was therefore not entitled to an oral hearing as a matter of right.<sup>10</sup>

The Board further finds that OWCP's hearing representative properly exercised her discretion in denying appellant's request for an oral hearing by determining that the issue in the case could be addressed equally well through a request for reconsideration and the submission of new evidence relevant to the issue at hand.<sup>11</sup> 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 probable deduction from established facts.<sup>12</sup> In this case, the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his oral hearing request.<sup>13</sup>

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

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA,<sup>14</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>15</sup> These are the essential elements of each and every

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<sup>8</sup> 20 C.F.R. § 10.616(b); *Id.*

<sup>9</sup> *See supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; *Teresa M. Valle*, 57 ECAB 542 (2006).

<sup>13</sup> *See supra* note 7.

<sup>14</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>15</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>16</sup> 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. 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.<sup>17</sup> The second component is whether the employment incident caused a personal injury.<sup>18</sup>

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.<sup>19</sup> Moreover, an injury does not have to be confirmed by eyewitnesses.<sup>20</sup> 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 medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statement in determining whether a *prima facie* case has been established.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on November 22, 2017, as alleged.

On his December 15, 2017 traumatic injury claim form, appellant indicated that he fell on his right knee while sending a line to another ship on November 22, 2017 while in the performance of duty. He also submitted a medical report dated November 30, 2017 which indicated that he believed that he fell onto his right knee a few days before at work, but he could not recall the specific incident, location, or date. By letter dated December 26, 2017, OWCP asked appellant to provide a more detailed description as to how the injury occurred. He did not provide additional factual evidence in response to this letter.

The Board finds that appellant has not provided sufficient detail to establish that a traumatic incident occurred as alleged. Appellant's statement on his claim form does not comport with the history of injury provided by his medical examiner on November 30, 2017. He also failed to

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<sup>16</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>17</sup> *M.E.*, Docket No. 18-0553 (issued November 5, 2018).

<sup>18</sup> *Id.*; *John J. Carlone*, 41 ECAB 354 (1989).

<sup>19</sup> *M.E.*, *supra* note 17.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

provide a narrative statement detailing the traumatic incident prior to the issuance of OWCP's denial of his claim on January 29, 2018. 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 22, 2017 as alleged.

As such, it is unnecessary to address the medical evidence regarding causal relationship.<sup>22</sup>

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 3**

Section 8128(a) of FECA<sup>23</sup> vests OWCP with discretionary authority to determine whether to review an award for or against compensation either under its own authority or on application by a claimant. Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determined that the claimant has present evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).<sup>24</sup> 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.<sup>25</sup> Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of the requirements, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>26</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>27</sup> For its 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 (iFECS).<sup>28</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>24</sup> 20 C.F.R. § 10.608(b).

<sup>25</sup> *Id.* at § 10.606(b)(3).

<sup>26</sup> *Id.* at § 10.608(b).

<sup>27</sup> *Id.* at § 10.607(a).

<sup>28</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also R.R.*, Docket No. 18-1044 (issued October 24, 2018); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

### **ANALYSIS -- ISSUE 3**

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

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 not established that the employment incident occurred as alleged. On reconsideration appellant provided a series of medical reports, which cannot alone establish the factual basis for appellant's claim. 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.<sup>29</sup> Thus appellant he is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).

The Board finds that, as appellant has not satisfied 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 OWCP properly determined that appellant's request for an oral hearing was untimely filed. The Board further finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on November 22, 2017, as alleged. 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).

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<sup>29</sup> *M.E.*, *supra* note 17.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 26, March 23, and January 29, 2018 decisions the Office of Workers' Compensation Programs are affirmed.

Issued: April 23, 2019  
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