

**United States Department of Labor
Employees' Compensation Appeals Board**

M.B., Appellant)	
)	
and)	Docket No. 19-0596
)	Issued: August 6, 2019
DEPARTMENT OF THE ARMY, PUEBLO)	
CHEMICAL DEPOT, Pueblo, CO, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 22, 2019 appellant filed a timely appeal from a September 10, 2018 merit decision and a January 3, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 3, 2019 decision, OWCP received additional evidence. Appellant also submitted new evidence accompanying her request for appeal to the Board. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury in the performance of duty as alleged; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 9, 2018 appellant, then a 52-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on May 8, 2018 she sustained a right knee condition performing lunges at the employing establishment's gymnasium while in the performance of duty. The employing establishment acknowledged that the claimed injury occurred during appellant's scheduled work shift from 7:00 p.m. to 7:00 a.m.

In support of her claim, appellant submitted medical reports dated from May 9 to July 10, 2018 from Dr. Daniel Olson, an occupational medicine specialist, who noted appellant's account of feeling her knee crack while performing lunges on May 8, 2018. She also submitted a May 23, 2018 right knee magnetic resonance imaging (MRI) scan and physical therapy treatment notes.

In a development letter dated August 7, 2018, OWCP informed appellant that the evidence submitted was insufficient to establish that the claimed May 8, 2018 employment incident occurred as alleged or that she had been injured within the performance of duty. It notified her of the type of additional factual and medical evidence needed to establish her traumatic injury claim. OWCP attached a questionnaire for appellant's completion. It afforded her 30 days to provide the necessary information.

In response, appellant submitted additional physical therapy treatment notes and copies of medical documents previously of record.

By decision dated September 10, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the May 8, 2018 incident occurred as alleged. As appellant had not established the factual element of her claim, it found that she had not met the requirements for establishing an injury as defined by FECA.

On December 4, 2018 appellant requested reconsideration. In a November 27, 2018 statement, she contended that she had been "injured at work on May 8, 2018" and had immediately completed a Form CA-1 online. In support of her claim, appellant provided copies of medical evidence previously of record as well as additional physical therapy notes.

By decision dated January 3, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), finding that the medical reports, imaging studies, and physical therapy treatment notes were irrelevant to the underlying factual issue in the claim.

LEGAL PRECEDENT -- ISSUE 1

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,³ 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.⁴ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁶ 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.⁷ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.⁸

An employee has the burden of establishing 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 surrounding facts and circumstances and his or her subsequent course of action.⁹ The employee has not met her burden of proof of 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 statements in determining whether fact of injury 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.¹⁰

³ *C.B.*, Docket No. 18-0071 (issued May 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (issued 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *C.B.*, *supra* note 3; *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁷ *C.B.*, *supra* note 3; *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *D.R.*, Docket No. 19-0072 (issued June 24, 2019); *T.M.*, Docket No. 17-1194 (issued February 4, 2019).

¹⁰ *M.S.*, Docket No. 18-0059 (issued June 12, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on May 8, 2018, as alleged.

Appellant has not established the factual component of her claim as she failed to explain how and when the claimed injury occurred. On her Form CA-1 she alleged that she sustained an injury to her right knee in the performance of duty on May 8, 2018 when she performed lunges in the employing establishment's gymnasium during her scheduled work shift. In a development letter dated August 7, 2018, OWCP advised appellant of the need for additional factual information and provided a questionnaire for her completion. In response, appellant submitted physical therapy treatment notes and copies of medical documents previously of record. However, she did not complete and return the questionnaire.¹¹

In support of her claim, appellant submitted medical reports from Dr. Olson dated from May 9 to July 10, 2018 relating that she had felt her knee crack while performing lunges at the employing establishment's gymnasium on May 8, 2018. The Board finds that these medical reports are insufficiently detailed to meet her burden of proof to establish the factual basis of her claim.

As appellant has not responded to the request for factual information, the Board finds that the record lacks sufficient factual evidence to establish specific details of how the claimed injury occurred.¹²

The Board notes that, because appellant failed to establish the first component of fact of injury, it is unnecessary to discuss whether she submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment factors as alleged.¹³

On appeal appellant contends that the employing establishment encouraged security guards to attend the gymnasium to maintain physical fitness and agility required for the position. As set forth above, she failed to submit sufficient factual evidence to establish that the claimed May 8, 2018 injury 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. §§ 10.605 through 10.607.

¹¹ *Id.*

¹² *Id.*, *John R. Black*, 49 ECAB 624 (1998); *Judy Bryant*, 40 ECAB 207 (1988); *Martha G. List*, 26 ECAB 200 (1974).

¹³ *M.S.*, *supra* note 10; *see R.L.*, Docket No. 17-1670 (issued December 14, 2018); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997) (as appellant failed to establish that the claimed event occurred as alleged, it is unnecessary to discuss the probative value of medical evidence).

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁵

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁶

ANALYSIS -- ISSUE 2

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

Appellant’s timely 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. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The chart notes, imaging studies, and physical therapy treatment notes submitted on reconsideration are irrelevant to the underlying merit issue of whether appellant established that the claimed injury occurred at the time, place, and in the manner alleged. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷ Additionally, the copies of evidence previously submitted would not require reopening appellant’s case for merit review as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record

¹⁴ *Id.* at § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b).

¹⁶ *Id.* at § 10.608.

¹⁷ *M.B.*, Docket No. 17-1980 (issued May 14,2019); *see E.G.*, Docket No. 18-0270 (issued August 24, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

does not constitute a basis for reopening the case.¹⁸ Thus, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹⁹

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on May 8, 2018, as alleged. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2019 and September 10, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2019
Washington, DC

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

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

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

¹⁸ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁹ *See H.H.*, Docket No. 18-1660 (issued March 14, 2019).