

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

G.T., Appellant

and

**DEPARTMENT OF THE NAVY, MILITARY
SEALIFT COMMAND, Norfolk, VA, Employer**

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**Docket No. 19-1307
Issued: December 6, 2019**

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 May 24, 2019 appellant filed a timely appeal from a February 22, 2019 merit decision, and a May 7, 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 appellant submitted additional evidence on appeal. 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.*

ISSUE

The issues are: (1) whether appellant has met her burden of proof to establish an injury in the performance of duty on November 2, 2017, 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 August 8, 2018 appellant, then a 54-year-old assistant storekeeper, filed a traumatic injury claim (Form CA-1) alleging that, on November 2, 2017, she sustained injury to her right arm and lower back when "getting a shot and pulling boxes" while in the performance of duty. She also noted that the alleged injury occurred onboard the USNS Matthew Perry. On the reverse side of the claim form, the employing establishment acknowledged that appellant was injured in the performance of duty, but contended that appellant had not filed the CA-1 form within 30 days of the alleged injury and had not submitted medical documentation to support the claim.

In a report dated August 8, 2018, Darla J. Clift, a physician assistant, indicated that appellant had experienced right arm pain since she received an anthrax shot in October, and that appellant had experienced low back pain since November 2017. She noted that appellant could not recall an actual injury, but that she had performed weeks/months of heavy lifting. The physician assistant diagnosed right arm and low back pain. In a duty status report (Form CA-17), she noted that the injury occurred due to "anthrax shot/lifting boxes," but she also noted that no history of injury had been provided. The physician assistant completed an attending physician's report (Form CA-20) on August 8, 2018 again noting appellant's history of receiving an anthrax shot which caused arm pain, and lifting boxes which caused back pain. She checked a box marked "no" indicating that the condition found was not caused or aggravated by the employment activity.

In a development letter dated August 21, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim, advised her of the factual and medical evidence necessary, and provided a questionnaire for her completion. Appellant was afforded 30 days to submit the necessary evidence.

OWCP received an employing establishment medical record dated August 11, 2017 which related immunization due dates. No date was listed for the anthrax series immunization. OWCP also received a November 7, 2017 employing establishment health unit record which indicated that appellant was seen by, a medical services officer, Wayne Pocza, on that day. Mr. Pocza noted that appellant complained of back pain for one day, which she believed began when she overexerted herself by moving boxes and lifting valves (approximately 15 pounds) multiple times two days prior.

In a report dated August 23, 2018, the physician assistant noted that appellant was seen again for right arm and low back pain. She indicated appellant's right arm pain stemmed from an anthrax shot 10 months ago, and her lower back pain stemmed from lifting boxes 9 months ago.

In a report dated September 4, 2018, Dr. Michael Webb, a family medicine specialist, examined appellant and diagnosed chronic lumbar pain. In a duty status report (Form CA-17) of even date, he noted that appellant could return to work with restrictions.

On September 13, 2018 appellant responded to OWCP's development questionnaire. She explained that her injury occurred in "hold 4" of her workplace while she was putting away 8 pallets of "stores." Appellant related that the boxes weighed 15 pounds each and lifting the boxes caused her back injury.

By decision dated September 25, 2018, OWCP denied appellant's claim finding that the evidence submitted was insufficient to establish that her medical condition was causally related to the accepted employment incident of lifting boxes.

In a narrative report dated October 1, 2018, Dr. Webb reported appellant's physical examination findings and again diagnosed chronic lumbar pain.

On October 22, 2018 appellant requested a review of the written record.

In a form report dated October 1, 2018, Dr. Webb diagnosed acute lumbar strain and noted work restrictions of no lifting greater than 10 pounds, no vertical ladders, no repetitive pushing or pulling, and no bending.

By decision dated February 22, 2019, an OWCP hearing representative affirmed, as modified, OWCP's September 25, 2018 decision finding that appellant had not established that an injury occurred in the performance of duty on November 2, 2017 as alleged. Therefore appellant had not established fact of injury.

On March 5, 2019 appellant requested reconsideration of the February 22, 2019 decision.

OWCP received a December 5, 2018 magnetic resonance imaging (MRI) scan of appellant's lumbar spine which noted mild multilevel degenerative changes.

In a report dated December 12, 2018, Dr. David M. Clifford, a Board-certified orthopedic surgeon, examined appellant and, based on a lumbar spine MRI scan dated December 5, 2018, diagnosed back strain, lumbar radiculopathy, and lumbar spine pain.

In a referral order dated February 28, 2019, Dr. Webb noted lumbar pain as the diagnosis and referred appellant to an orthopedic specialist.

By decision dated May 7, 2019, OWCP denied appellant's reconsideration request finding that it neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 an injury was sustained while in the performance of duty as alleged, and that any

³ *Supra* note 1.

disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁶ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

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.⁷ Moreover, 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 the surrounding facts and circumstances and his or her subsequent course of action.⁸ 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.⁹

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 November 2, 2017, as alleged.

Appellant has not established the factual component of her claim as she has not sufficiently explained how and when the claimed injury occurred.¹⁰ Regarding appellant's alleged right arm injury, appellant noted on her Form CA-1 that she received a "shot" on November 2, 2017 which caused a right arm injury. Appellant indicated to a physician assistant on August 8, 2018 that her right arm pain was due to an anthrax shot she received in October 2017. OWCP received appellant's employing establishment's immunization record dated August 11, 2017, which reflected due dates of various immunizations, but did not reflect a due date for appellant's anthrax immunization. The Board finds that appellant's general allegation regarding a "shot" which she

⁴ *A.R.*, Docket No. 18-0924 (issued August 13, 2019); *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *See A.R.*, *supra* note 4; *P.F.*, Docket No. 18-0973 (issued January 22, 2019); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *Gregory J. Reser*, 57 ECAB 277 (2005).

⁸ *M.L.*, Docket No. 19-0361 (issued October 24, 2019); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

⁹ *Id.*

¹⁰ *See E.C.*, Docket No. 19-0943 (issued September 23, 2019).

claimed to have received on November 2, 2017 is inconsistent with the other facts and circumstances presented in the evidence of record. Appellant has therefore not established that she received an anthrax shot on November 2, 2017 at the time, place, and in the manner alleged.¹¹

Regarding appellant's alleged back injury, her Form CA-1 initially provided a vague description of the alleged November 2, 2017 employment incident, as "pulling boxes." In a September 13, 2018 supplemental statement, she responded to OWCP's development letter and clarified that she had sustained a traumatic incident in "hold 4" while she was working with eight pallets of storage and lifting boxes weighing 15 pounds each. Appellant did not note in the supplemental statement the alleged date that she lifted boxes. OWCP also received an employing establishment health unit record dated November 7, 2017 which recorded her recitation of a one day history of back pain, which she believed began when she overexerted herself two days prior (November 5, 2017) while moving boxes and lifting valves.

The Board finds that appellant's description of the incident in her CA-1 form of pulling boxes was inconsistent with the history she related to the employing establishment medical officer on November 7, 2017 of moving boxes and lifting valves on November 5, 2017, and was also inconsistent with her September 13, 2018 supplemental statement of lifting boxes. Furthermore, appellant indicated to the physician assistant on August 8, 2018 that she could not recall an "actual injury," but that she had performed weeks/months of heavy lifting. Appellant's varying descriptions of what occurred on November 2, 2017 do not establish a singular account of the mechanism of injury.¹² The Board thus finds that the inconsistencies in the evidence of record cast serious doubt upon the validity of the claim.¹³ The evidence of record therefore does not establish that the alleged November 2, 2017 employment incident occurred at the time, place, and in the manner alleged.

As appellant has not met her burden of proof to establish the first component of fact of injury, it is unnecessary for the Board to determine whether she submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment incident, as alleged.¹⁴

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 *Supra* note 7.

¹² *See M.L., supra* note 8.

¹³ *See M.L.*, Docket No. 19-0909 (issued September 17, 2019).

¹⁴ *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

To be entitled to a merit review under FECA section 8128(a) of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹⁵ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁶ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

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).

In support of her request, appellant submitted a December 5, 2018 MRI scan, a December 12, 2018 report from Dr. Clifford, and a February 28, 2019 referral from Dr. Webb. None of these reports addressed the deficiencies of appellant claim. These reports were 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.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 November 2, 2017, as alleged. The Board also finds that OWCP properly

¹⁵ See *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

¹⁶ *A.R.*, *supra* note 4; *M.K.*, *supra* note 5; *D.K.*, 59 ECAB 141 (2007).

¹⁷ *M.K.*, *supra* note 5; *P.H.*, Docket No. 18-1020 (issued November 1, 2018); *K.H.*, 59 ECAB 495 (2008).

¹⁸ *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).

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

denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 7 and February 22, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 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