

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

M.C., Appellant)	
)	
and)	Docket No. 18-1278
)	Issued: March 7, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Spartanburg, SC, 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 June 11, 2018 appellant filed a timely appeal from a March 5, 2018 merit decision and an April 11, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹

¹ The Board notes that during the pendency of this appeal, OWCP issued a July 9, 2018 decision which modified the March 5, 2018 merit decision currently on appeal. OWCP continued to deny the claim based on causal relationship, and on November 5, 2018 it issued two separate decisions. In the first decision, it vacated its July 9, 2018 decision, and in the second decision it accepted appellant's traumatic injury claim for right elbow lateral epicondylitis. However, OWCP's July 9 and November 5, 2018 decisions are null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626; *see, e.g., Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004).

Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish an injury in the performance of duty on January 22, 2018, 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 January 22, 2018 appellant, then a 53-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her right arm when she lifted a package incorrectly. She was reportedly working at her case when the injury occurred. Appellant did not lose any time from work.

By development letter dated January 29, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It specifically noted that the evidence was insufficient to establish that the January 22, 2018 incident occurred as alleged. OWCP advised appellant of the factual and medical evidence necessary to establish her claim and provided a questionnaire for completion. It afforded her 30 days to provide the necessary factual information and medical evidence.

In a January 30, 2018 examination note, Donna V. Wright, a nurse practitioner, related that on January 22, 2018 appellant was picking up a package with both hands at work when she felt a burning feeling radiating up her arm to her elbow. She reviewed appellant's history and conducted an examination of appellant's right upper extremity. Ms. Wright diagnosed right elbow and right wrist pain.

On February 6, 2018 appellant underwent several magnetic resonance imaging (MRI) scans of her right wrist, elbow, and forearm.⁴

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. 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.*

⁴ A right wrist MRI scan report showed diffuse arthritis and degenerative changes of the scapholunate and the lunotriquetral ligaments, mild arthritic changes of the carpus, mild degenerative arthritis of the thumb carpometacarpal (CMC) joint, mild arthropathy at the pisiform-triquetral joint, and increased fluid within the flexor compartment tendon sheaths, which may indicate tenosynovitis. A right elbow MRI scan report demonstrated medial and lateral epicondylitis and nonspecific edema within the dermal fat. A right forearm MRI scan report showed no significant forearm abnormalities.

In a February 14, 2018 work status note, Dr. Elisa Katemba, a Board-certified family practitioner, indicated diagnoses of pain in the right elbow, right wrist, upper arm joint, and forearm joint.

By decision dated March 5, 2018, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the January 22, 2018 incident occurred as alleged. It explained that she failed to respond to OWCP's January 29, 2018 development letter and request for a detailed statement regarding how the alleged injury occurred. OWCP also noted that appellant failed to submit sufficient medical evidence to establish a diagnosed condition causally related to the alleged incident.

On March 26, 2018 appellant requested reconsideration.

OWCP received a March 20, 2018 work capacity evaluation (Form OWCP-5c) and work status form report by Ms. Wright. Ms. Wright indicated diagnoses of right elbow lateral epicondylitis, right wrist tenosynovitis, right wrist pain, and upper arm and forearm pain. She noted that appellant could work with restrictions.

By decision dated April 11, 2018, OWCP denied reconsideration of the merits of appellant's claim. It determined that the evidence submitted was irrelevant to the issue of whether appellant established a factual basis for her 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,⁵ 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.⁶ 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.⁷

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.⁸ There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the

⁵ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *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).

⁸ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

time, place, and in the manner alleged.⁹ Second, the employee must submit evidence, to establish that the employment incident caused a personal injury.¹⁰ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition relates to the employment incident.¹¹

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.¹² 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.¹³ 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 sufficient doubt on an employee's statement in determining whether a *prima facie* case has been established.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on January 22, 2018, as alleged.

In her Form CA-1, appellant related that on January 22, 2018 she experienced right arm pain when she picked up a package the wrong way, however, she did not submit a detailed account of the alleged injury or any additional corroborating factual evidence describing how she sustained an injury on January 22, 2018. The Board has found that such a vague recitation of facts does not support a claimant's allegation that a specific event occurred to cause a work-related injury.¹⁵

By letter dated January 29, 2018, OWCP informed appellant that the evidence it had received was insufficient to establish that she experienced the January 22, 2018 employment incident as alleged. It asked appellant to complete an attached questionnaire describing what event or incident occurred on January 22, 2018 and explain how the alleged incident caused the alleged injury. Appellant, however, did not respond to OWCP's development letter. She neither presented evidence regarding the specific mechanism of injury nor alleged that she experienced a specific

⁹ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

¹⁰ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹² *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹³ *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

¹⁴ *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁵ *See M.B.*, Docket No. 11-1785 (issued February 15, 2012).

event, incident, or exposure at a definite time, place, and manner.¹⁶ As appellant has not provided a factual statement describing in detail the January 22, 2018 incident alleged to have caused the claimed conditions, the Board finds that she has not met her burden of proof.¹⁷ As she did not establish an incident as alleged, the Board need not discuss the probative value of the medical evidence submitted.¹⁸

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 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹⁹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.²⁰

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.²¹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²² If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²³

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 did not show that OWCP erroneously applied or interpreted a specific point of law, and did not advance a relevant legal argument not previously considered by OWCP. It

¹⁶ See *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁷ *S.J.*, Docket No. 17-1798 (issued February 23, 2018).

¹⁸ *Tracey P. Spillane*, 54 ECAB 608 (2003).

¹⁹ 5 U.S.C. § 8128(a); see also *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

²⁰ 20 C.F.R. § 10.606(b)(3); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²¹ 20 C.F.R. § 10.607(a).

²² *Id.* at § 10.608(a); see also *M.S.*, 59 ECAB 231 (2007).

²³ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

therefore properly determined that her request did not warrant a review of the merits of the claim based on the first and second requirements of section 10.606(b)(3).²⁴

In support of her reconsideration request, appellant submitted a work capacity evaluation form and work status form dated March 20, 2018 by Ms. Wright, a nurse practitioner. The Board notes that OWCP denied appellant's traumatic injury claim because she failed to submit a statement describing how the alleged injury occurred on January 22, 2018. As the medical reports from Ms. Wright fail to address the alleged January 22, 2018 incident or provide other information to describe how appellant's alleged injury occurred, they are irrelevant to the issue on reconsideration. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.²⁵ Therefore, OWCP properly determined that her request did not warrant a review of the merits of the claim based on the third requirement of section 10.606(b)(3).

The Board finds that as appellant has not met any of the regulatory requirements, OWCP properly declined her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).²⁶ 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 January 22, 2018, as alleged. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²⁴ See *S.M.*, Docket No. 17-1899 (issued August 3, 2018).

²⁵ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

²⁶ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 11 and March 5, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 7, 2019
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