

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

_____)	
O.G., Appellant)	
)	
and)	Docket No. 19-1777
)	Issued: March 25, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Miami, FL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 1, 2019 appellant filed a timely appeal from a December 18, 2018 merit decision and a March 18, 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

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a medical condition causally related to the accepted November 2, 2018 employment incident; and

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.*

(2) 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 November 3, 2018 appellant, then a 50-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on November 2, 2018 he was involved in a motor vehicle accident when his government vehicle was struck by a forklift on the left front wheel while in the performance of duty. He noted that he experienced lower back pain as a result of the accident. On the reverse side of the claim form the employing establishment contended that appellant was not injured in the performance of duty.³ Appellant did not stop work.

In a development letter dated November 8, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of medical evidence needed including a valid medical diagnosis from a qualified physician. OWCP afforded appellant 30 days to submit the necessary evidence. Appellant did not respond.

By decision dated December 18, 2018, OWCP accepted that the November 2, 2018 employment incident occurred, as alleged, but denied appellant's claim, finding that he had not submitted any medical evidence establishing a medical diagnosis in connection with the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 12, 2019 appellant requested reconsideration and submitted additional evidence.

In a November 5, 2018 authorization for examination and/or treatment (Form CA-16), the employing establishment authorized appellant to seek medical treatment from Dr. Keith Gould, an osteopathic physician, for his lower back pain. In an undated attending physician's report (Part B of the Form CA-16), Dr. Gould reported that appellant experienced pain as a result of his work vehicle being hit by a forklift. He diagnosed cervical sprain and a thoracic lumbar strain. Dr. Gould checked a box marked "yes" indicating that the diagnosed conditions were caused or aggravated by the described employment activity. He indicated that appellant was totally disabled from work from November 2 to 12, 2018 and could resume regular work on November 12, 2018.

In a November 6, 2018 note, an office manager at Valles & Associates Rehabilitation Services Inc., confirmed that appellant saw Dr. Gould for severe pain in the neck and lower back. She noted that appellant was referred for physical therapy treatment. The office manager also related that Dr. Gould recommended that appellant limit his standing activities and refrain from prolonged walking.

By decision dated March 18, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It noted that the only evidence received

³ The employing establishment also indicated that the injury had been caused by a third party. OWCP subsequently informed appellant that the third-party aspect of his claim was referred to the Office of the Solicitor in Washington, DC.

in support of the request for reconsideration was the note from the office manager at Valles & Associates Rehabilitation Services Inc.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ 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

To determine if an employee has sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁸ The second component is whether the employment incident caused a personal injury.⁹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident identified by the claimant.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted November 2, 2018 employment incident.

⁴ *Supra* note 1.

⁵ *R.S.*, Docket No. 19-1484 (issued January 13, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.L.*, Docket No. 19-1106 (issued October 18, 2019); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ 20 C.F.R. § 10.115; *M.S.*, Docket No. 19-1096 (issued November 12, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *M.H.*, Docket No. 19-0162 (issued July 3, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *J.D.*, Docket No. 19-0382 (issued January 3, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *M.H.*, Docket No. 18-0873 (issued December 18, 2019); *Leslie C. Moore*, 52 ECAB 132 (2000).

To establish that he sustained a traumatic injury in the performance of duty, appellant must submit medical evidence that shows a diagnosed medical condition that is causally related to the accepted employment incident.¹² As appellant failed to submit any medical evidence, he has not established a medical diagnosis in connection with the accepted employment incident and thus has not met his burden of proof to establish his claim.

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 10.607.¹³

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 or her own motion or on application.¹⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.¹⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ 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.¹⁸

¹² *M.H.*, *id.*

¹³ The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

¹⁴ 5 U.S.C. § 8128(a); *see S.V.*, Docket No. 18-0276 (issued December 23, 2019); *W.C.*, 59 ECAB 372 (2008).

¹⁵ 20 C.F.R. § 10.606(b)(3); *see R.C.*, Docket No. 19-0696 (issued September 25, 2019); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁶ *Id.* at § 10.607(a); *see P.R.*, Docket No. 19-0439 (issued June 25, 2019).

¹⁷ *Id.* at § 10.608(a); *see S.V.*, *supra* note 14; *M.S.*, 59 ECAB 231 (2007).

¹⁸ *Id.* at § 10.608(b); *see P.R.*, *supra* note 16; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture regarding whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In support of his request for reconsideration, appellant submitted a November 6, 2018 note from Valles & Associates Rehabilitation Services Inc. which was received by OWCP on February 12, 2019. He additionally submitted an undated attending physician's report (Part B of the November 5, 2018 Form CA-16) from Dr. Gould, which OWCP also received on February 12, 2019.

In its March 18, 2019 decision, OWCP specifically stated that only the November 6, 2018 note from Valles & Associates Rehabilitation Services Inc. had been received. In the case of *William A. Couch*,¹⁹ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by it before the final decision is issued. As OWCP did not review all of the evidence received on reconsideration prior to issuing its March 18, 2019 decision, the Board finds that the case is not in posture for decision.

For this reason, the Board will, therefore, set aside OWCP's March 18, 2019 decision and remand the case for OWCP to properly consider all the evidence submitted in support of his request for reconsideration of the merits of his claim. OWCP shall thereafter issue an appropriate decision on appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted November 2, 2018 employment incident. The Board further finds that this case is not in posture for decision regarding whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁹ 41 ECAB 548 (1990).

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed. The March 18, 2019 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 25, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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