

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

S.G., Appellant)	
)	
and)	Docket No. 22-0016
)	Issued: October 31, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL PROTECTIVE SERVICE,)	
San Francisco, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 4, 2021 appellant filed timely appeals from a May 17, 2021 merit decision and an August 19, 2021 non-merit 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 left hand or thumb condition causally related to the accepted December 31, 2020 employment incident; and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 19, 2021 decision, OWCP received additional evidence. 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 December 31, 2020 appellant, then a 53-year-old general investigation and compliance inspector, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left hand and thumb when apprehending a suspect while in the performance of duty. He did not stop work.

An emergency department form report dated December 31, 2020 by a medical provider, whose signature is illegible, noted that appellant could return to modified duty, as tolerated.

In a letter dated December 31, 2020, S.H., an employing establishment district commander, advised that appellant was injured while assisting local police in apprehending a grand theft automobile suspect. He further noted that he had provided appellant with a light-duty assignment, which included various administrative duties.

In a work status progress report dated January 5, 2021, Dr. Lisa Zacharewicz, an internist, noted a date of injury of December 31, 2020 and diagnosed left thumb sprain. She released appellant to return to full-duty work.

In a January 11, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP thereafter received a medical report dated December 31, 2020 by Dr. Joanne Sun, an emergency medicine specialist, who noted that appellant related complaints of left thumb pain, which he attributed to rolling around on the ground with a suspect that he was attempting to apprehend. Dr. Sun performed a physical examination, which revealed tenderness to palpation, swelling, and ecchymosis of the left thumb. She diagnosed left thumb pain and recommended x-rays and light-duty work.

An x-ray report of even date noted a history of pain after a fall and revealed no evidence of fracture or joint subluxation.

By decision dated February 11, 2021, OWCP accepted that the December 31, 2020 employment incident occurred, as alleged. However, it denied the claim, finding that the medical evidence of record was insufficient to establish 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 March 1, 2021 appellant requested reconsideration of OWCP's February 11, 2021 decision.

OWCP thereafter received emergency medical service (EMS) records dated December 31, 2020 indicating that appellant reported left thumb pain after being involved in a scuffle with a suspect. Appellant was provided with an ice pack and transported to the hospital in an ambulance.

In a medical report dated January 5, 2021, Dr. Zacharewicz diagnosed an unspecified sprain of the left thumb.

In a statement dated February 17, 2021, appellant indicated that on December 31, 2020 he was assisting local police to apprehend a suspect and, during a struggle, he sprained his left thumb. He related that he immediately sought emergency treatment and was placed on light duty. Appellant further noted that, the following morning, he could not bend his left thumb due to significant swelling, and that the thumb appeared black and blue.

On March 7, 2021 OWCP received an undated photograph of appellant's left thumb and wrist wrapped in a bandage.

By decision dated May 17, 2021, OWCP modified its February 11, 2021 decision to find that appellant had established a medical diagnosis. The claim remained denied, however, as causal relationship had not been established.

On August 2, 2021 appellant requested reconsideration of OWCP's May 17, 2021 decision. In connection with his request, he submitted a letter, which indicated that he had enclosed a July 15, 2021 addendum report by Dr. Sun. However, no additional evidence was received.

By decision dated August 19, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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 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 of FECA,⁴ 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.⁵ 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.⁶

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. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is

³ *Supra* note 1.

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

whether the employment incident caused a personal injury and can be established only by medical evidence.⁷

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.⁸ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment incident identified by the employee.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has met his burden of proof to establish swelling and ecchymosis of the left thumb causally related to the accepted December 31, 2020 employment incident.

OWCP found that the December 31, 2020 employment incident in which appellant was involved in a struggle on the ground with a suspect, had occurred as alleged. In an emergency room note of even date, Dr. Sun indicated that she examined his left thumb and observed swelling and ecchymosis. OWCP's procedures provide that, if a condition reported is a minor one, such as a burn, laceration, insect sting, or animal bite, which can be identified on visual inspection by a lay person, a case may be accepted without a medical report.¹⁰ As the evidence of record established visible injuries, the Board finds that appellant has met his burden of proof to establish swelling and ecchymosis of the left thumb.¹¹ Therefore, the Board will reverse, in part, the May 17, 2021 decision and remand the case for payment of medical costs and wage-loss compensation for disability, if any.

The Board further finds, however, that appellant has not met his burden of proof to establish additional medical conditions as causally related to the accepted December 31, 2020 employment injury.

In her notes dated January 5, 2021, Dr. Zacharewicz diagnosed a left thumb sprain and identified a date of injury of December 31, 2020. However, she did not provide a pathophysiological explanation as to how the accepted incident either caused or contributed to

⁷ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *P.C.*, Docket No. 20-0855 (issued November 23, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.6(a) (June 2011); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(c) (January 2013). See also *R.H.*, Docket No. 20-1684 (issued August 27, 2021); *A.J.*, Docket No. 20-0484 (issued September 2, 2020).

¹¹ See *R.H.*, *id.*; *A.J.*, *id.*; see also *W.R.*, Docket No. 20-1101 (issued January 26, 2021); *S.K.*, Docket No. 18-1411 (issued July 22, 2020).

appellant's diagnosed condition.¹² Therefore, this evidence is insufficient to meet his burden of proof to establish additional medical conditions causally related to the accepted December 31, 2020 employment injury.

In her December 31, 2020 emergency room report, Dr. Sun documented swelling and ecchymosis of the left thumb and also noted a diagnosis of left thumb pain. The Board has held that pain is a description of a symptom, not a clear diagnosis of a medical condition.¹³ As such, Dr. Sun's report is insufficient to establish additional medical conditions causally related to the accepted December 31, 2020 employment injury.

The Board, therefore, finds that appellant has submitted insufficient medical evidence to establish additional conditions causally related to the accepted employment injury.

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 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 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

¹² *J.G.*, Docket No. 20-0009 (issued September 28, 2020); *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹³ *D.R.*, Docket No. 18-1408 (issued March 1, 2019); *D.A.*, Docket No. 18-0783 (issued November 8, 2018).

¹⁴ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

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

¹⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

¹⁷ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁸

ANALYSIS -- ISSUE 2

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), with regard to OWCP's denial of additional conditions as causally related to the accepted employment incident.

Appellant's September 23, 2021 timely request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁹

In support of his request for reconsideration, appellant submitted a letter, which referenced a July 15, 2021 addendum report by Dr. Sun. The Board notes, however, that the record does not contain a July 15, 2021 addendum report by Dr. Sun, and he did not otherwise submit any pertinent new and relevant medical evidence not previously considered by OWCP. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

Accordingly, the Board finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).²⁰ Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review with regard to OWCP's denial of additional conditions.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish swelling and ecchymosis of the left thumb causally related to the accepted December 31, 2020 employment incident. The Board further finds, however, that he has not met his burden of proof to establish additional medical conditions as causally related to the accepted December 31, 2020 employment injury. 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), with regard to OWCP's denial of additional conditions.

¹⁸ *Id.* at § 10.608(b); *J.V.*, Docket No. 21-0252 (issued September 23, 2021); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁹ *See J.V., id.*; *C.C.*, Docket No. 19-1622 (issued May 28, 2020); *M.S.*, Docket No. 18-1041 (issued October 25, 2018).

²⁰ *R.R.*, Docket No. 20-0378 (issued March 9, 2021); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2021 decision of the Office of Workers' Compensation Programs is reversed in part and affirmed in part. The case is remanded for further proceedings consistent with this decision of the Board.

IT IS HEREBY FURTHER ORDERED THAT the August 19, 2021 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: October 31, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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