

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

I.V., Appellant

and

**U.S. POSTAL SERVICE, BUSHWICK POST
OFFICE, Brooklyn, NY, Employer**

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**Docket No. 21-1356
Issued: February 9, 2023**

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 14, 2021 appellant filed a timely appeal from an August 13, 2021 merit decision and a September 9, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.

¹ The Board notes that, during the pendency of this appeal, OWCP issued an October 8, 2021 nonmerit decision denying appellant's request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. It also issued a December 20, 2021 merit decision, which modified the August 13, 2021 merit decision to find that the evidence of record was sufficient to establish that the employment incident occurred as alleged, but insufficient to establish causal relationship between the diagnosed condition and the accepted employment incident. As the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s) in a case on appeal, OWCP's October 8 and December 20, 2021 decisions are null and void. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see e.g., M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004); *Arlonia B. Taylor*, 44 ECAB 591 (1993) (Groom, Alternate Member, concurring in part and dissenting in part); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on June 16, 2021, as alleged; and (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 June 22, 2021 appellant, then a 24-year-old part-time flexible carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 17, 2021 he injured his left ankle while in the performance of duty.³ He advised that a customer had pushed through the main entrance into the lobby after closing time thereby assaulting him. Appellant stopped work on June 16, 2021. On the reverse side of the claim form, C.B., an employing establishment supervisor, contended that his knowledge of the facts about the injury was inconsistent with appellant's statements and checked a box marked "No" indicating that he was not injured in the performance of duty. He asserted that video footage had not shown any action that would result in an injury.

In a June 16, 2021 note addressed to management, appellant explained that at approximately 4:44 p.m. on that date, after he had closed the gates and door to the employing establishment, an aggressive customer had approached the door and forced her way inside.

On June 17, 2021 a physician assistant indicated that appellant had received treatment in her office and could return to work after being cleared by a surgeon.

In a June 24, 2021 work note, Dr Daniel Popowitz, podiatrist, found that appellant could not work from June 24 through August 5, 2021.

The Board notes that appellant subsequently filed a second Form CA-1 on July 13, 2021, wherein an employing establishment supervisor acknowledged that appellant was injured while in the performance of duty.

In a development letter dated July 13, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

On July 13, 2021 V.P., a manager with the employing establishment, controverted the claim. He advised that surveillance video footage had shown the customer entering the building while appellant was closing and locking the front door. The footage did not show any physical contact between appellant and the customer or an injury of any kind.

³ Appellant has a previously-accepted November 20, 2019 traumatic injury claim under OWCP File No. xxxxxx865 for sprain and contusion of the left ankle, spontaneous rupture of the left peroneal brevis tendon, peroneal tenosynovitis and synovitis, and ankylosis of the left ankle. OWCP has not administratively combined that claim with the present claim.

In a response to OWCP's development questionnaire, on August 10, 2021 the employing establishment reiterated that surveillance video footage revealed a customer entering the employing establishment, but no physical contact between appellant and the customer during the incident.

By decision dated August 13, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the June 16, 2021 employment incident occurred, as alleged. It noted that appellant had not responded to its development letter. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On September 8, 2021 appellant requested reconsideration. In an accompanying statement, he related that although surveillance video footage may not have captured the June 16, 2021 employment incident, he had engaged in a physical altercation with a customer who placed her body against his, causing an injury.

Appellant submitted a June 17, 2021 note from a physician assistant.

In a report dated July 22, 2021, Dr. Popowitz diagnosed pain in the left ankle and left foot joints, and a strain of the muscles and tendons of left lower leg at the peroneal tendon. He noted that appellant had improved from an initial surgery and had resumed work with limitations. Dr. Popowitz advised that an altercation at work had increased his symptoms. He noted that a "low energy impact could have aggravated his already weakened left ankle and peroneal tendon specifically." Dr. Popowitz opined that appellant was disabled from work due to the described employment incident.

In a duty status report (Form CA-17) dated August 5, 2021, an unidentifiable health care provider indicated that appellant had sustained an employment injury on November 20, 2019 and provided work restrictions.

By decision dated September 9, 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 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 filed within the applicable time limitation of FECA,⁵ that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to

⁴ *Supra* note 2.

⁵ *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

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.⁸ Generally, 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 at the time and place, and in the manner alleged.⁹ The second component is whether the employment incident caused a personal injury.¹⁰

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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹¹ The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that 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 serious doubt on an employee's statements in determining whether a *prima facie* case has been established.¹² An employee's statements 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.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on June 16, 2021, as alleged.

In his Form CA-1, appellant alleged that he injured his left ankle on June 17, 2021 when a customer forced her way into the main lobby after closing time and assaulted him. The employing establishment controverted the claim. It advised that surveillance video footage of the incident did

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388 (2008).

⁹ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

¹⁰ *Id.*

¹¹ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

¹² *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

¹³ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

not establish physical contact between appellant and the customer or any action that could result in an injury.

OWCP, in its July 13, 2021 development letter, informed appellant of the type of factual and medical evidence needed to establish his traumatic injury claim. It requested that he complete an attached questionnaire and provide a detailed factual description of the alleged employment incident. No response was received.¹⁴

The evidence of record at the time of the August 13, 2021 merit decision was insufficient to establish that the June 17, 2021 employment incident occurred, as alleged. The Board, therefore, finds that he has not met her burden of proof.¹⁵

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 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.¹⁶

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.¹⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁹ If the request is timely, but fails to meet at least one of the

¹⁴ See *J.D.*, Docket No. 22-0286 (issued June 15, 2022); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

¹⁵ *J.D.*, *id.*; see also *H.D.*, Docket No. 15-1698 (issued May 4, 2016).

¹⁶ 5 U.S.C. § 8128(a); see *C.V.*, Docket No. 22-0078 (issued November 28, 2022); see also *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹⁷ 20 C.F.R. § 10.606(b)(3); see *K.D.*, Docket No. 22-0756 (issued November 29, 2022); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁸ *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 (February 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). *Id.* at Chapter 2.1602.4b.

¹⁹ *Id.* at § 10.608(a); see also *D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *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.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3) of OWCP's regulations.²¹

The Board finds, however, that appellant has provided relevant and pertinent new evidence not previously considered. The underlying issue is whether he has established the occurrence of the alleged June 16, 2021 employment incident. This is a factual issue, which must be addressed by pertinent new and relevant factual evidence.²² In support of his request for reconsideration, appellant submitted a September 8, 2021 statement. He related that he had engaged in a physical altercation with a customer who placed her body against his, resulting in an injury. The Board finds that this constitutes relevant and pertinent new evidence warranting further consideration of the merits of his claim. Therefore, the Board finds that appellant is entitled to a review of the merits based on the third requirement of 20 C.F.R. § 10.606(b)(3).²³ Accordingly, the Board will set aside OWCP's September 9, 2021 decision and remand the case for an appropriate merit decision.

CONCLUSION

The Board finds that the evidence of record as of the August 13, 2021 merit decision is insufficient to establish a traumatic injury in the performance of duty on June 16, 2021, as alleged. The Board further finds, however, that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

²⁰ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²¹ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

²² *See A.M.*, Docket No. 21-0603 (issued November 10, 2021); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²³ 20 C.F.R. § 10.606(b)(3); *see L.D.*, Docket No. 22-0214 (issued September 21, 2022); *M.N.*, Docket No. 22-0243 (issued June 28, 2022); *see also S.C.*, Docket No. 20-1661 (issued May 6, 2022); *J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed. The September 9, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 9, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board