

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

F.A., Appellant

and

**DEPARTMENT OF ARMY, INSTALLATION
MANAGEMENT COMMAND,
Fort Benning, GA, Employer**

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**Docket No. 14-1961
Issued: February 2, 2015**

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 HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 10, 2014 appellant filed a timely appeal from a March 17, 2014 Office of Workers' Compensation Programs (OWCP) merit decision and a May 22, 2014 OWCP nonmerit decision. 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 the case.²

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a right leg injury in the performance of duty; and (2) whether OWCP properly denied his request for review of the written record.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that appellant submitted new evidence following OWCP's March 17, 2014 decision. However, as OWCP did not consider this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Joseph F. McHale*, 45 ECAB 669 (1994).

FACTUAL HISTORY

On February 6, 2014 appellant, then a 63-year-old electric equipment repairer, filed a traumatic injury claim, alleging that on December 23, 2013 he tripped across a wire and landed in a bed of ants, and causing cellulitis of the right leg. His supervisor noted on the Form CA-1 that appellant allegedly injured his leg on December 23, 2013 but he did not seek medical treatment until January 10, 2014, and did not provide notice of the claimed injury until February 6, 2014. The employing establishment did not indicate that appellant stopped work at that time.

Appellant submitted a certificate from Dr. Becky Abell, a Board-certified emergency room physician, dated January 10, 2014, who noted that appellant could not return to work until January 14, 2014. In emergency department discharge instructions, Dr. Abell noted performing laboratory testing and discharged appellant with medications. Appellant submitted a January 21, 2014 certificate from a registered nurse who indicated that appellant was treated from January 16 to 21, 2014 and would be on light duty for 30 days.

On January 21, 2014 appellant was treated by Dr. Timothy R. Brown, an osteopath, who diagnosed right lower extremity cellulitis and inflammation. Dr. Brown noted that appellant's history was significant for underlying chronic anemia and liver disease. He recommended that appellant be evaluated by his primary care physician for wound care and for underlying poorly controlled diabetes. In a multidisciplinary discharge note dated January 21, 2014, prepared by a nonidentified health care provider, appellant was treated for cellulitis. He presented with right leg pain for a week and reported that he sustained a minor abrasion and fire ant bites six days ago. The health care provider indicated that appellant developed a secondary infection with pain, edema, and erythema, and was diagnosed with cellulitis, superficial phlebitis, hypertension, and kidney disease. In a January 22, 2014 emergency department discharge instructions, Dr. Michael B. Williams, a Board-certified emergency room physician, diagnosed right lower extremity cellulitis and discharged appellant with medications. On January 31, 2014 appellant was treated by Dr. Angus Phelts, a Board-certified otolaryngologist, who diagnosed cellulitis and lower leg infection. Dr. Phelts found appellant totally disabled for two weeks.

By letter dated February 10, 2014, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim. It indicated that the evidence was not sufficient to establish that he experienced the incident or employment factor alleged to have caused the injury. OWCP specifically requested that appellant substantiate the factual elements of his claim and respond to a questionnaire.

Appellant was treated by Dr. Phelts on January 31 and February 7, 2014 for right leg pain associated with an edema located on the right lower extremity. Dr. Phelts noted the edema arose from an unknown origin. He diagnosed edema, open wound of the knee, leg, and ankle, hypothyroidism, diabetes mellitus without complication, hypertension, and accidental fall into other hole or other opening surface. Dr. Phelts noted that appellant had fire ant bites that became infected several weeks ago that had not been treated. In reports dated February 14 to 28, 2014, he noted treating appellant for a pitting edema and a wound located in the right lower extremity which was thought to be related to an accident. Dr. Phelts diagnosed edema, open wound of the knee, leg, and ankle, diabetes mellitus, and accidental fall into other hole or opening in surface.

In a March 7, 2014 report, Dr. Brittony Blakey, a Board-certified dermatologist, treated appellant in the wound care clinic for evaluation of a chronic wound on his right lower leg status post injury in December 2013. Appellant reported that in December he sustained a severe reaction to fire ant bites causing severe swelling, edema, and sores, and was admitted to the hospital. Dr. Blakey diagnosed dermatology skin condition, chronic, long standing, slow to heal wound involving the entire right lower leg, wound care debridement, and nonsurgical dressing change. In a March 14, 2014 individual sick slip, a physician's assistant noted "on-the-job injury" and indicated that appellant could return to limited-duty work.

In a decision dated March 17, 2014, OWCP denied appellant's claim on the grounds that the evidence did not support that the injury or events occurred as alleged.

In an appeal request form dated and postmarked April 17, 2014, appellant requested a review of the written record. He also submitted a statement dated April 16, 2014, as well as additional medical evidence.

In a decision dated May 22, 2014, OWCP denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing 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, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury."³ 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.⁴

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. Generally, 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.⁵ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁶

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

⁵ *Supra* note 3.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁷ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁸ 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁹ Although 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,¹⁰ an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.¹¹

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.¹²

ANALYSIS -- ISSUE 1

In the present case, appellant, an electric equipment repairer, filed a traumatic injury claim, alleging that on December 23, 2013 he tripped across a wire and landed in a bed of ants at work, causing developed cellulitis to the right leg. However, he did not stop work at the time of the alleged injury and did not seek treatment until January 10, 2014, nearly 18 days later. Once appellant did seek medical treatment, the initial treatment notes make no mention of an employment-related condition. Additionally, he did not file a traumatic injury claim or otherwise provide notice to the employer for more than one month following the alleged incident. On February 10, 2014 OWCP informed appellant that the evidence was not sufficient to establish that the incident occurred as alleged and it specifically requested that he substantiate the factual elements of his claim and respond to a questionnaire. Appellant did not respond prior to the March 17, 2014 OWCP decision. These circumstances of late notification, lack of confirmation, and failure to report his injury as work related to health care professionals cast serious doubt on appellant's claim of injury.

⁷ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁸ *Id.* at 255-56.

⁹ *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

¹⁰ *Robert A. Gregory*, 40 ECAB 478 (1989).

¹¹ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

¹² *See Richard A. Weiss*, 47 ECAB 182 (1995); *John M. Tornello*, 35 ECAB 234 (1983).

The history of injury provided in the medical evidence submitted by appellant also does not sufficiently support that the incident of December 23, 2013 occurred as alleged. The medical records submitted most contemporaneously with the date of the alleged injury, including a certificate from Dr. Abell dated January 10, 2014 and emergency department discharge instructions, noted that appellant was treated and discharged with no specific mention of the December 23, 2013 incident. On January 21, 2014 appellant was treated by Dr. Brown who diagnosed right lower extremity cellulitis and inflammation improved and poorly controlled diabetes, and a discharge note of the same date related that he had a minor abrasion, and fire ant bites six days earlier.¹³ Similarly, Dr. Williams in a January 22, 2014 discharge instruction made no mention of a December 23, 2013 work incident. Although, the medical records submitted most contemporaneously with the date of the alleged injury indicated that appellant was being evaluated for a right leg injury they did not mention a work-related injury or incident.¹⁴ The January 21, 2014 discharge document mentioned ant bites six days earlier, but did not indicate that this happened at work. Furthermore, six days prior to the beginning of appellant's hospitalization would have been about January 10, 2014, still significantly later than December 23, 2013, the date of injury he stated on his traumatic injury claim form. The histories provided in subsequent medical documents do not specifically support that any fire ant bites occurred on December 23, 2013 at work.

As noted above, there were no witnesses to the alleged injury and no contemporaneous statements from persons present at the employing establishment supporting that the incident occurred as alleged. While an injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, the employee's statement must be consistent with the surrounding facts and circumstances, and his subsequent course of action. These notes do not relate a consistent history of injury.

The lack of witness to the claimed incident and inconsistencies about the manner in which the injury occurred cast serious doubt upon the validity of the claim. For these reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. As appellant has not established that the December 23, 2013 incident occurred as alleged, it is not necessary for the Board to consider the medical evidence regarding causal relationship.¹⁵ Consequently, appellant has not met his burden of proof in establishing his claim.

¹³ Appellant's hospitalization began on January 16, 2014.

¹⁴ The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence; see *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

¹⁵ See *S.P.*, 59 ECAB 184 (2007).

On appeal, appellant asserts that he was misdirected by management as to how to properly submit documentation in support of his claim for compensation. As noted above, the circumstances of lack of confirmation of the claimed incident, the fact that he did not stop work at the time of the alleged injury and did not seek treatment until January 10, 2014, nearly 18 days later and once he did seek medical treatment, and the initial treatment notes make no mention of an employment-related incident cast serious doubt upon the validity of the claim. For these reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that “a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.”¹⁶ Section 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁷ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by the postmark or other carrier’s date marking and before the claimant has requested reconsideration.¹⁸ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.¹⁹

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in a request dated and postmarked on April 17, 2014. However, 30 days from the date of the March 17, 2014 decision is April 16, 2014. Thus, appellant’s request, postmarked on April 17, 2014, was made after the 30-day time period had elapsed.²⁰ As the request for a review of the written record was made more than 30 days after issuance of the March 17, 2014 OWCP decision, appellant’s request for a review of the written record was untimely filed and he is not entitled to an oral hearing as a matter of right.

OWCP also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing a means to achieve its

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ 20 C.F.R. §§ 10.616, 10.617.

¹⁸ *Id.* at § 10.616(a).

¹⁹ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

²⁰ The 30th day from Monday, March 17, 2014 was Wednesday, April 16, 2014. The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. *John B. Montoya*, 43 ECAB 1148 (1992).

general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.²¹ There is no indication that OWCP abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

Consequently, OWCP properly denied appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury on December 23, 2013 in the performance of duty, causally related to factors of his federal employment. The Board further finds that OWCP properly denied appellant's request for review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the May 22 and March 17, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 2, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²¹ *Samuel R. Johnson*, 51 ECAB 612 (2000).