United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 15-0366**
	)	**Issued: April 20, 2016**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Brooklyn, NY, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2014 appellant filed a timely appeal from a September 26, 2014 merit decision and a November 10, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 an injury in the performance of duty on August 3, 2014; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] On appeal, appellant submitted additional evidence. However, the Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

FACTUAL HISTORY

On August 3, 2014 appellant, then a 39-year-old corrections officer, filed a traumatic injury claim (Form CA-1) alleging that on that date while he was in the performance of duty a prisoner resisted hand restraints requiring appellant to use force. He sustained cuts on his hand, and blood from the prisoner, who was allegedly human immunodeficiency virus (HIV) positive and hepatitis C positive, was found "all over his uniform." Appellant advised that the prophylactic medication that he had been prescribed caused side effects, including headaches, nausea, and frequent bathroom usage. He did not stop work. The employing establishment checked a box marked "yes" on the CA-1 form as to whether the employee was in the performance of duty at the time of the injury.

By letter dated August 22, 2014, OWCP advised appellant that additional factual and medical evidence was needed, especially a physician's opinion causally relating the work incident with any diagnosed condition. Appellant was afforded 30 days to submit the requested information. No additional documentation was submitted.

By decision dated September 29, 2014, OWCP denied the claim for failure to establish the medical component of fact of injury, as it had not received any medical evidence in support of appellant's claim providing a diagnosis or opinion on causal relationship.

On October 22, 2014 appellant requested reconsideration and in an attached written statement he claimed that he worked long hours outside of the prison in different hospitals around the city and as such he may have missed information requests and would be happy to have his physician answer OWCP questions. He explained that his injury was not from massive injuries, but rather from the side effects of the medications he was taking for 30 days. Appellant indicated that he would have a physician provide a detailed explanation. No further medical evidence was submitted.

By decision dated November 10, 2014, OWCP denied appellant's request for reconsideration, finding the evidence of record insufficient to warrant review of the merits of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of establishing the essential elements of his or her claim, including the fact that the individual was 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[4] and that an injury was sustained in the performance of duty.[5] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

[3] *Supra* note 1.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[6] *Delores C. Ellyett*, 41 ECAB 992 (1990).

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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, 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 factors identified by the claimant.[8]

OWCP regulations pertaining to workplace hazard exposure explain that simple exposure to workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under FECA.[9] The regulations note that the employing establishment may be required under other statues or regulations to provide their employees with medical testing and/or other services in situations where workplace exposure has been alleged.[10]

The Board further notes that OWCP procedure manual provides special procedures for high risk employment where an employee is routinely presented with situations which may lead to infection by contact with animals, human blood, bodily secretions and other substances. Conditions such as HIV infection and hepatitis B more commonly represent a work hazard in health care facilities, correctional institutions, and drug treatment centers, among others, than in federal workplaces as a whole.[11] The procedures further provide:

> "a. Physical Injury and Prophylactic Treatment. For claims based on transmission of a communicable disease where the means of transmission and the incubation period are medically feasible, the CE [claims examiner] should do the following--
>
> > (1) If the source of infection is a known or probable carrier of the disease, the CE should accept the case for the physical injury involved and authorize prophylactic treatment (*see* FECA PM 3-400.7a).

[7] *T.H.*, 59 ECAB 388 (2008).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] 20 C.F.R. § 10.303(a).

[10] *Id*. at § 10.303(b).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *High Risk Employment*, Chapter 2.805.6 (January 2013).

(2) If the source of infection is unidentified or the source's status is unknown, the CE should accept the claim for the physical injury involved. Prophylactic treatment for the underlying disease will not be an issue, since a known carrier is not involved."[12]

ANALYSIS -- ISSUE 1

OWCP accepted that on August 3, 2014 appellant encountered a prisoner who refused to be restrained and appellant had to place the hand restraints on the prisoner by force. Appellant alleged side effects from the medication he was allegedly prescribed after this incident. However, the record does not contain any medical evidence supporting that he was prescribed the prophylactic medication or that the work incident or the medication caused an injury or illness. Thus, the Board finds that the evidence of record is insufficient to establish the second component of fact of injury, that the employment incident caused an injury.

On August 22, 2014 OWCP advised appellant of the type of factual and medical evidence needed to establish the claim, especially a physician's opinion causally relating the work incident with a diagnosed condition. Appellant, however, provided no such evidence prior to the issuance of OWCP's September 26, 2014 decision. Consequently, he failed to meet his burden of proof to establish his claim.

The Board notes that OWCP procedures contain special provisions for high risk employment.[13] In the case of *N.S.*,[14] the Board found that the employee was not required to establish with medical evidence that her exposure to hepatitis C, resulting from being struck by a contaminated needle during her employment as a nurse, caused a personal injury. Rather, because her employment was considered high risk, she only had to establish that the source of the infection was a known or probable carrier of the disease. In this case, however, although appellant's work as a corrections officer may be considered high risk, he has failed to establish the factual circumstances surrounding the incident, as to whether the prisoner was positive for HIV or hepatitis C or that he had actually been provided prophylactic medication. Thus, the Board finds that the special procedures for high risk employment are not applicable in this case. Without medical evidence, there is no reasoned explanation of how the specific employment incident on August 3, 2014 could have caused or aggravated an injury.[15]

An award of compensation may not be based on surmise, conjecture, or speculation.[16] As there was no probative medical evidence of record demonstrating that the alleged employment

[12] *Id*. at 2.805.6(a).

[13] *See supra* notes 10, 11.

[14] 59 ECAB 422 (2008).

[15] *See Lillian A. Ferraro*, Docket No. 04-1957 (issued December 17, 2004) (where the Board found that appellant, a dental hygienist, did not establish that she sustained a compensable injury due to being struck by a dirty dental instrument despite claims that she became sick from the post exposure HIV prophylactic treatment; the Board specifically held that appellant did not submit any medical evidence containing a diagnosed condition related to the incident). *See Y.H.*, Docket No. 09-181 (issued August 17, 2009).

[16] *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

incident caused or aggravated a medically diagnosed condition, appellant has not met his burden of proof.

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

Under section 8128(a) of FECA,[17] OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(2) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[18]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[19]

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his traumatic injury claim and timely requested reconsideration on October 22, 2014. The underlying issue on reconsideration is medical in nature, whether the August 3, 2014 work incident caused or contributed to an injury.

On reconsideration, appellant noted that he worked extremely long hours outside of the prison in different hospitals around the city. He indicated that he may have missed OWCP's request for information and would be happy to have his physician answer OWCP's questions. Appellant further explained that his injury was from the side effects of the medications he was taking. He indicated that he would have a physician provide a detailed explanation. However, no medical evidence accompanied appellant's claim. The Board notes that the underlying issue on reconsideration is medical in nature. OWCP denied the claim because there was no diagnosis of a medical condition and there was no medical evidence to explain how appellant sustained a condition that was caused or aggravated by specific factors of his employment. The Board has

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b).

[19] *Id*. at § 10.608(b).

held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

Appellant therefore did not meet the requirements of 20 C.F.R. § 606(b)(3) to warrant a merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty on August 3, 2014. The Board also finds that OWCP properly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 10 and September 26, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.[21]

Issued: April 20, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[20] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[21] James A, Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.