

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

_____)
B.T., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Little Rock, AR, Employer)
_____)

Docket No. 16-0785
Issued: September 21, 2016

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 9, 2016 appellant, filed a timely appeal from an October 9, 2015 merit decision and a November 5, 2015 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.³

¹ Appellant requested oral argument. However, by letter dated April 4, 2016, he withdrew his oral argument request.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that during the pendency of this appeal, OWCP issued a June 2, 2016 decision, which affirmed as modified the October 9, 2015 decision. This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. See *Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990). See also 20 C.F.R. § 501.2(c)(3).

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a July 27, 2015 injury in the performance of duty; 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).

FACTUAL HISTORY

On July 28, 2015 appellant then a 49-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on July 27, 2015 he started noticing pain in the right ankle walking on different terrain while in the performance of duty. The employing establishment checked the box marked "yes" in response to whether appellant was in the performance of duty at the time of the incident. Appellant did not initially stop work.

In a July 28, 2015 treatment note, Dr. Troy O. Moore, a family medicine physician, advised that appellant could return to work with restrictions to include: no squatting and/or kneeling, sitting 50 percent of the time, walking, occasionally, up to three hours per day, no walking on uneven terrain, no climbing stairs or ladders. He diagnosed ankle/foot pain and effusion of the ankle and foot joint. Dr. Moore recommended regular duty on July 30, 2015. He saw appellant on July 30, 2015 for a recheck and diagnosed right ankle pain with a history of ankle swelling. Dr. Moore recommended continued ice and elevation. He completed a return to work note on July 30, 2015.

An August 3, 2015 accident report from the employing establishment revealed that on July 27, 2015 appellant felt a sharp pain in his right ankle while performing his route.

In an August 6, 2015 report, Dr. Moore noted that appellant presented for a recheck of his right ankle due to a "self-reported workers' compensation" claim. He noted that appellant's history included that appellant reported a sudden onset of right ankle pain and swelling while walking his mail route. Dr. Moore indicated that there was no known injury, "however, he reports walking on uneven ground and being startled by a dog, with no prior history reported." He examined appellant and diagnosed right ankle pain. Dr. Moore indicated that appellant could return to regular duty. He saw appellant on August 13, 2015 and noted that appellant presented with complaints of pain and limping, which was not evident on examination. Dr. Moore related that the integumentary and neurological findings were negative. He diagnosed right ankle pain and recommended rest, with ice and elevation. Dr. Moore recommended regular duty and continued to treat appellant. In his August 25, 2015 report, he referred appellant for physical therapy regarding his restless legs syndrome, "as these are not causally related to his work-related injury." Dr. Moore also recommended regular duty.

OWCP received physical therapy reports and an August 3, 2015 report from Marcus W. Sims, an employing establishment health and resource management specialist, assigned to assist appellant with his recovery.

By letters dated September 2, 2015, OWCP informed appellant and the employing establishment of the type of evidence needed to support his claim and requested that he submit

such evidence within 30 days. In an accompanying questionnaire, it asked him to describe in detail how the claimed injury occurred.

By decision dated October 9, 2015, OWCP denied appellant's claim. It found that the factual component of the third basic element, fact of injury had not been established.

On October 29, 2015 OWCP received appellant's request for reconsideration.

In August 20 and 25, 2015 reports, Dr. Moore noted that appellant returned for a recheck of the right ankle. He diagnosed right ankle pain. In October 15 and 20, 2015 reports, Dr. Moore noted appellant's history and indicated the primary diagnosis was right ankle and foot pain.

In a September 23, 2015 report, Dr. Jesse Burks, a podiatrist, noted appellant's history and diagnosed Achilles insertional tendinitis, right, secondary to injury.

By decision dated November 5, 2015, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision. It noted that he did not answer the questions in the September 2, 2015 letter and did not clarify whether he was filing a traumatic injury or occupational claim. OWCP explained that without the requested narrative statement describing exactly the alleged traumatic incident, the evidence was insufficient to warrant a merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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,⁴ and that an injury was sustained in the performance of duty.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 must first be determined whether a "fact of injury" has been established. 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.⁷ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸

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).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.*

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 subsequent course of action. The employee has not met his burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established. 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.⁹

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

Appellant has alleged that on July 27, 2015 he noticed pain in his right ankle while walking on different terrain while in the performance of duty. OWCP denied the claim because of the factual component of fact of injury had not been established. It found that appellant had not submitted sufficient evidence describing how his injury occurred.

The Board finds that appellant has not established the factual component of his claim as he failed to explain how his claimed injury occurred. In letters dated September 2, 2015, OWCP requested that appellant submit clarifying information describing how his claimed injury occurred. However, appellant did not respond. As he did not respond to the request for factual information, the record lacks sufficient factual evidence to establish the details of how the claimed injury occurred. As appellant has not established the factual aspect of his claim, the medical evidence regarding causal relationship need not be addressed.¹²

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.

⁹ *D.B.*, 58 ECAB 464, 466-67 (2007).

¹⁰ *J.Z.*, 58 ECAB 529 (2007).

¹¹ *Michael E. Smith*, 50 ECAB 313 (1999).

¹² *See V.F.*, 58 ECAB 321, 327 (2007).

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹³ 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 provide 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:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁴

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.¹⁵

ANALYSIS -- ISSUE 2

Appellant disagreed with the October 9, 2015 decision and timely requested reconsideration on October 29, 2015. The underlying issue on reconsideration is factual in nature, whether he met his burden of proof to establish a traumatic injury in the performance of duty on July 27, 2015.

In his reconsideration request, appellant did not provide any information about how the claimed injury occurred. The Board also notes that, as the issue is factual in nature, the medical evidence submitted from Drs. Moore and Burks is not relevant as the factual component of appellant’s claim has not been established. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent new evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(3).

¹⁵ *Id.* at § 10.608(b).

¹⁶ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty. The Board further 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 5 and October 9, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 21, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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