

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

_____)	
G.K., Appellant)	
)	
and)	Docket No. 20-1026
)	Issued: December 11, 2020
U.S. POSTAL SERVICE, MADISON)	
WISCONSIN PROCESSING & DISTRIBUTION)	
CENTER, Madison, WI, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 13, 2020 appellant filed a timely appeal from a December 4, 2019 merit decision and a March 23, 2020 nonmerit 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 traumatic injury in the performance of duty on October 18, 2019, as alleged; and (2) whether OWCP

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided to the Board includes evidence received after OWCP issued its March 23, 2020 decision. However, 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.*

properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 21, 2019 appellant, then a 59-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2019 at 8:45 p.m. he sustained a traumatic injury to his neck while in the performance of duty when a “[United Mailing Services] UMS driver parked incorrectly.” He stopped work that same day

In a development letter dated October 25, 2019, OWCP informed appellant that he submitted no evidence to establish that the claimed October 18, 2019 employment incident occurred, as alleged. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion for a detailed description of the events and circumstances surrounding the alleged October 18, 2019 employment incident. OWCP also requested a narrative medical report from appellant's treating physician, which contained a detailed description of findings and a diagnosis, explaining how the alleged employment incident caused, contributed to, or aggravated his medical condition. It afforded him 30 days to provide the necessary information.

OWCP subsequently received an October 23, 2019 note, wherein Dr. Brenda Nishizawa, Board-certified in internal medicine, indicated that appellant sustained an injury on October 18, 2019 and recommended work restrictions from October 24 to November 1, 2019. Dr. Nishizawa, in an October 31, 2019 work capacity evaluation (Form OWCP-5c), checked a box marked “Yes” to indicate her belief that appellant was unable to perform his usual job and recommended work restrictions until November 18, 2019.

In work restriction letters dated November 13 and 14, 2019, Dr. Mark Huth, Board-certified in family medicine, and Dr. Nishizawa provided weight, driving and work-time restrictions for appellant relating to his alleged October 18, 2019 injury. They diagnosed neck, back, and extremity strain.

Appellant also submitted a November 15, 2019 offer of modified assignment (limited duty) from the employing establishment.

By decision dated December 4, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as he described. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. In an October 18, 2019 medical report, Dr. Jordan Imoehl, Board-certified in emergency medicine, evaluated appellant in the emergency department for a complaint of neck pain following a fall. Appellant explained that at approximately 9:45 p.m. he was seat belted while operating a forklift at work when it fell directly backwards off the landing strip from approximately five feet in the air. He reported experiencing some whiplash and pain in his neck and back. Dr. Imoehl also made note of appellant's history of neck pain. In a computerized tomography scan of even date, Dr. Michael Tuite, a Board-certified diagnostic

radiologist, found no acute traumatic abnormality of the cervical spine. Dr. Imoehl diagnosed neck pain.

In a November 29, 2019 Form OWCP-5c, Dr. Nishizawa updated appellant's work restrictions and checked a box marked "No" to indicate her opinion that he was not capable of performing his usual job without restrictions as forklift operation would be too jarring on his neck.

Dr. Nishizawa, in a December 31, 2019 letter, explained that she had been seeing appellant for an injury he sustained on October 18, 2019. She referenced the emergency department records from the date of the alleged employment incident and explained that, on his subsequent examinations at her office, he continued to exhibit symptoms that were consistent with a diagnosis of whiplash. Dr. Nishizawa indicated that appellant would continue to participate in physical therapy to treat his condition.

Appellant also submitted an undated Form OWCP-5c in which Dr. Nishizawa indicated that he was unable to operate a forklift due to his neck pain.

On March 2, 2020 appellant requested reconsideration of OWCP's December 4, 2019 decision and submitted additional evidence.

In an October 21, 2019 progress note, Amy Wagner, a physician assistant, and Abigail Jung, a medical assistant, reported the alleged October 18, 2019 employment incident in which appellant was at work operating a forklift that fell backwards approximately six feet. They reevaluated him and recommended that he stretch and use heat to treat his injuries.

In progress notes dated October 23 and November 1, 2019, Dr. Nishizawa evaluated appellant for neck pain and a whiplash injury he experienced after falling backwards while operating a forklift. She updated his work restrictions and diagnosed neck pain.

In a November 13, 2019 progress note, Dr. Huth evaluated appellant for neck and back pain he had experienced since the alleged October 18, 2019 employment incident in which he was operating a forklift and it fell. He diagnosed a cervical and lumbar strain following a work-related injury and instructed appellant to continue his work restrictions until December 2, 2019.

In a November 29, 2019 progress note, Dr. Nishizawa indicated that appellant had not seen much improvement in his neck pain since he began physical therapy. She diagnosed neck pain and extended his work restrictions.

Dr. Ira Segal, Board-certified in family medicine, in a December 24, 2019 progress note, indicated that appellant had been participating in physical therapy for his neck and back pain and noted that he would continue to be seen by them for the time being.

In a December 31, 2019 progress note, appellant informed Dr. Nishizawa that he felt he had made improvement with his physical therapy treatment related to his neck pain. Dr. Nishizawa diagnosed a whiplash injury to the neck and extended his work restrictions to March 4, 2020.

Appellant submitted physical therapy notes dated from November 19, 2019 to February 4, 2020 in which Pranali Mhadolkar, a physical therapist, provided treatment updates and indicated

that his injuries were caused by an October 18, 2019 incident at work where his forklift fell off the loading dock.

By decision dated March 23, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim.

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 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 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 must first be determined whether fact of injury has been established.⁷ Generally, fact of injury consists of two components that must be considered in conjunction with one another. 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.⁸ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.⁹

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 October 18, 2019, as alleged.

On his Form CA-1 appellant noted that on October 18, 2019 at 8:45 p.m. he sustained an injury when a UMS driver parked incorrectly. No other information or statement clarifying what employment duties were involved to have caused his claimed injury on October 18, 2019 was

³ *Supra* note 1.

⁴ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁸ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

provided by appellant. Appellant did not identify specific employment factors alleged to have caused his injury and failed to provide any description or details of the alleged October 18, 2019 incident sufficient to determine the circumstances surrounding his injury.¹⁰

In a development letter dated October 25, 2019, OWCP informed appellant that the evidence of record was insufficient as he had not sufficiently described the October 18, 2019 employment incident alleged to have caused his injury. It asked him to describe the alleged incident in detail, but he did not respond to the request for additional specific factual information. Accordingly, as appellant failed to present a clear factual statement describing the October 18, 2019 employment incident alleged to have caused or contributed to his claimed medical condition, the Board finds that he has not met his burden of proof.¹¹

On appeal appellant contends that he either overlooked OWCP's October 25, 2019 questionnaire or never received it and had since submitted his response. However, the Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.¹² Accordingly, without evidence to the contrary, the October 25, 2019 questionnaire is presumed to have arrived at appellant's mailing address.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of the Board's 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 FECA¹³ 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 payment of compensation at any time on his own motion or on application.¹⁴

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁵

¹⁰ *K.S.*, Docket No. 17-2001 (issued March 9, 2018).

¹¹ *See D.C.*, Docket No. 18-0082 (issued July 12, 2018); *D.D.*, 57 ECAB 734 (2006).

¹² *See A.J.*, Docket No. 18-0830 (issued January 10, 2019); *see also R.M.*, Docket No. 14-1512 (issued October 15, 2014); *V.M.*, Docket No. 06-0403 (issued December 15, 2006).

¹³ *Supra* note 1.

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of its 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 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 improperly denied appellant's request for reconsideration of the merits of his claim.

The underlying issue in this case was whether appellant had established the factual component of fact of injury. OWCP denied his claim, finding that the evidence of record submitted was insufficient to establish that the October 18, 2019 employment incident occurred as he described.

On reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. As such, appellant 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).¹⁹

Appellant submitted a series of medical reports which made note of the October 18, 2019 employment incident. Specifically, he provided an October 18, 2019 medical report wherein Dr. Imoehl of the emergency department recounted the history of appellant experiencing neck pain that day following a fall in which he was operating a forklift at work that fell approximately five feet off of a landing strip. Dr. Imoehl also made note of appellant experiencing whiplash as well as neck and back pain. The Board finds that Dr. Imoehl's October 18, 2019 report is new and relevant to the underlying issue of fact of injury because he includes a detailed contemporaneous account of the factual basis of the alleged injury and; therefore, the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim constituted an abuse of discretion.²⁰

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁹ *Id.* at § 10.606(b)(3); *D.T.*, Docket No. 20-0456 (issued September 1, 2020); *M.S.*, *supra* note 17.

²⁰ *See S.C.*, 19-0479 (issued August 8, 2019) (OWCP denied that the employment incident occurred as alleged because the claimant did not respond to the questionnaire. The Board found that the medical evidence appellant submitted in support of his reconsideration request before OWCP was relevant because it provided a detailed account of the factual basis of the alleged injury); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.6 (September 2010) (to obtain merit review, a claimant need not submit all evidence that may be necessary to discharge his burden of proof); *Helen E. Tschantz*, 39 ECAB 1382 (1988); *V.B.*, Docket No. 12-1057 (issued October 23, 2012).

Thus, the Board will set aside OWCP's March 23, 2020 decision and remand the case for merit review of appellant's claim. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on October 18, 2019, as alleged. The Board further finds that OWCP improperly denied his request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2020 decision of the Office of Workers' Compensation Programs is reversed and the December 4, 2019 decision is affirmed.

Issued: December 11, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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