

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

W.D., Appellant

and

**DEPARTMENT OF THE INTERIOR,
PACIFIC REGION, Yakima, WA, Employer**

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**Docket No. 12-1367
Issued: December 18, 2012**

Appearances:
Katherine E. Darrah, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2012 appellant, through his representative, filed a timely appeal from a December 20, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an employment-related injury and a March 15, 2012 nonmerit decision denying his request for reconsideration.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 an oral argument before the Board. By letter dated June 26, 2012, the Clerk of the Board advised him that oral arguments were only held in Washington, DC. Appellant was asked to confirm that he would attend oral argument in Washington, DC. He did not confirm his request.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 15, 2012 OWCP decision, appellant submitted new evidence. However, the Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence, together with a formal written request for reconsideration to OWCP, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a back injury in the performance of duty on May 8, 2009 as alleged; and (2) whether OWCP properly refused to reopen his case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 23, 2011 appellant, then a 57-year-old dam tender, filed a traumatic injury claim, claiming that he sustained a low back injury on May 8, 2009, in performance of his work duties. He stated that he was moving a 100-pound weight when his back gave out. Appellant also noted that he reinjured his back while working on February 22, 2010. His supervisor controverted the claim, stating that, on February 18, 2010, appellant informed him, Chuck Garner, a coworker, and Walt Larrick, a coworker, that he had hurt his back off the job. Appellant's supervisor further stated that he has no record of appellant sustaining an injury while working at the Tieton dam.

By letter dated July 11, 2011, OWCP informed appellant that additional evidence was required to establish that the incident occurred as alleged and medical evidence was necessary to establish that he sustained an injury as a result of the alleged May 8, 2009 work incident.

In a June 18, 2009 report, Dr. Soren Singel, a Board-certified neurologist, noted that appellant had a sudden onset of left leg pain and that a June 3, 2009 magnetic resonance imaging (MRI) scan revealed a large disc herniation at L5-S1.

Appellant submitted a July 5, 2011 statement in which he discussed his job duties and explained that he had been recommended to undergo surgery. He also submitted numerous medical reports dating from June 3, 2009 to June 13, 2011.

OWCP also received a January 29, 2011 statement regarding appellant's Equal Employment Opportunity Commission harassment claim, in which he asserted that his supervisor refused to acknowledge his medical limitations and planned to remove him from his job. The statement also mentioned that he was unable to complete the river measurements since September 2009 because of his back conditions.

An unsigned February 4, 2011 note, purportedly from an employing establishment official, stated that "during our conversation, you made a statement that you felt your back problem was a result of a prior work[-]related injury that you sustained while working on the Region's drill crew. This is the first I have heard that your medical condition may have been as a result of a workable injury."

In a February 11, 2011 report, Dr. Michael A. Thomas, an osteopathic physician Board-certified in neurology, stated that in 2009 appellant was diagnosed with an L5-S1 disc herniation.

OWCP received a March 28, 2011 report from Dr. Brett Quave, Board-certified in pain medicine, who diagnosed lumbalgia and diffuse disc bulge at L5-S1.

On April 8, 2011 Dr. Thomas reported that appellant had undergone a discogram which suggested that appellant would be a good candidate for an artificial disc at L5-S1.

In a report dated June 10, 2011, Dr. K. Scott Reinmuth, a family practitioner, reported that appellant was being followed for left leg neuropathy, due to nerve compression from a bulging disc.

By decision dated August 18, 2011, OWCP denied the claim on the grounds that appellant had not submitted sufficient evidence to establish that the incident occurred as alleged. It found that he had not substantiated a factual basis to the claim and therefore had not established a work-related injury.

Appellant disagreed with the decision and requested a review of the written record on September 6, 2011.

In support of his request, appellant submitted a September 6, 2011 statement. In the statement, he disputed his supervisor's February 4, 2011 account: "my employer stated on the initial report that he did not know about my injury. Enclosed you will find several statements that [appellant] did know about it..." Appellant also completed OWCP's questionnaire on September 6, 2011, again alleging that he sustained his injury on May 8, 2009 while moving a 100-pound lead weight, and that he informed Quentin Kreuter, the river operator, that he hurt his back while performing a river measurement and provided him with a doctor's note. He explained that he did not report his injury until June 23, 2011 because his supervisor did not believe he had back problems until recently.

Appellant submitted progress notes from Dr. Reinmuth dating from May 4 to August 5, 2011, in which he noted appellant's pain complaints and physical restrictions.

By decision dated December 20, 2011, OWCP denied appellant's claim on the grounds that he had not presented sufficient evidence to establish that the May 8, 2009 incident occurred as claimed.

On March 6, 2012 appellant requested reconsideration. Along with the request, he submitted a January 10, 2012 affidavit from Doug Call, his coworker, who indicated that appellant suffered a back injury in 2009 that limited his ability to do river measurements, and his work group held a meeting to discuss how the work should be completed in light of appellant's injury. Appellant also stated that the meeting took place at some point prior to August 7, 2009.

Appellant continued to submit progress notes from Dr. Reinmuth.

In a March 15, 2012 decision, OWCP denied appellant's request for reconsideration on the grounds that he had not submitted evidence to require a merit review of the case.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ 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 timely filed within the applicable time limitation period of FECA, that an injury⁵ 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.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. A fact of injury determination is based on two elements. 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 sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁷

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.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 cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.⁹ An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, 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 and persuasive evidence.¹⁰

⁴ 5 U.S.C. §§ 8101-8193.

⁵ OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁶ *T.H.*, 59 ECAB 388 (2008). See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ See *Mary Jo Coppolino*, 43 ECAB 988 (1992).

⁹ See *R.T.*, Docket No. 08-408 (issued December 16, 2008).

¹⁰ See *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

ANALYSIS -- ISSUE 1

The Board finds that appellant had not presented sufficient evidence establishing that the incident of May 8, 2009 occurred as claimed.

Although appellant was diagnosed with a disc herniation during the summer 2009, he has not explained why he waited until June 23, 2011 to file his claim. Furthermore, there is no evidence of record that he reported his alleged history of work-related injury to his physicians when he sought medical treatment. Dr. Singel noted on June 18, 2009 that an MRI scan confirmed the diagnosis of herniated disc and he mentioned a “sudden onset” of pain, but he did not provide any history of the alleged event. Similarly none of the other medical reports of record provided a history of the alleged May 8, 2009 event. The medical reports of record lend little support to appellant’s claim, as they did not address the May 8, 2009 work event and did not refer to an injury which occurred when appellant moved a 100-pound object.

While appellant submitted evidence suggesting that his supervisor had knowledge of his back condition, there is no evidence to support that appellant informed his supervisor or anyone else at the employing establishment that the alleged incident of May 8, 2009 occurred as alleged, and that his back condition was caused by this incident. In fact, the Board notes that appellant’s supervisor controverted the claim on the grounds that appellant had informed him that he hurt his back “off the job.”

As such, the Board finds that the evidence does not sufficiently establish a factual basis to support the claim. Appellant has not established that his allegations are consistent with the surrounding facts and circumstances and his subsequent course of action.

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 10.607.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹³

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP’s 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

¹¹ The Board notes that appellant has an outstanding claim with respect to his February 22, 2010 work injury on which OWCP had not issued a decision.

¹² 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁶

ANALYSIS -- ISSUE 2

In support of his reconsideration request, appellant submitted a January 10, 2012 affidavit from Mr. Call, a coworker, who indicated that appellant had indeed suffered a back injury in 2009, and his work group held a meeting to discuss how the work should be completed in light of his injury. He also stated that the meeting took place at some point prior to August 7, 2009.

The Board finds that Mr. Call's January 10, 2012 statement constituted relevant and pertinent new evidence not previously considered by OWCP. As it meets one of the standards for obtaining a merit review of his case, the Board finds that OWCP improperly denied appellant's request. The Board will set aside the September 2, 2011 decision denying appellant's request for reconsideration and will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not submit sufficient evidence to establish that he sustained a back injury in the performance of duty in May 2009. The Board further finds that OWCP improperly denied appellant's request for reconsideration.

¹⁴ 20 C.F.R. § 10.606(b)(2). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2011 decision of the Office of Workers' Compensation Programs is affirmed and the March 15, 2012 decision is set aside and the case remanded for further action consistent with this decision.

Issued: December 18, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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