United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Asheville, NC, Employer	)	**Docket No. 15-93** **Issued: May 26, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 16, 2014 appellant filed a timely appeal from an August 1, 2014 merit decision and an August 25, 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.

ISSUES

The issues are: (1) whether appellant has established a traumatic right foot injury in the performance of duty; and (2) whether OWCP properly denied reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 6, 2014 appellant, then a 32-year-old supply clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 22, 2014 he sustained a crush injury to his right foot when four bottles of frozen soda fell from the top shelf of a vending machine he was servicing and landed on his right foot. Appellant's supervisor controverted the claim, asserting that the vending machine did not freeze the bottles. Also, appellant had been involved in an "incident prior where he said product had fallen and video showed this was not the case." The supervisor noted that appellant did not report the injury until after his termination. Appellant was "counseled many times on performance issues and was aware of management's knowledge of theft of product and probability of his removal."

In a March 10, 2014 letter, OWCP advised appellant to submit factual evidence corroborating the January 22, 2014 incident, and medical evidence diagnosing a right foot injury caused by that incident. It afforded him 30 days to submit such evidence. Appellant did not timely provide additional evidence.

By decision dated April 15, 2014, OWCP denied the claim finding that fact of injury had not been established. It found that the factual record did not support that the January 22, 2014 incident occurred at the time, place, and in the manner alleged. OWCP also noted that appellant failed to provide any medical evidence.

Appellant requested reconsideration on May 21, 2014, asserting that he was still under medical treatment but had not received a diagnosis. He provided an April 11, 2014 patient intake form and reports dated from April 28 to June 9, 2014 from a physician assistant. Appellant also submitted a July 7, 2014 report from Dr. Mark R. Hedrick, an attending Board-certified orthopedic surgeon, who related appellant's account of a "large frozen bottle type object" falling on appellant's right foot on January 22, 2014. Dr. Hedrick noted appellant's vague pain complaints in the absence of any objective findings. He opined that appellant would recover fully six to twelve months from the date of injury.

By decision dated August 1, 2014, OWCP denied modification of its prior decision, finding that, although Dr. Hedrick had established the presence of a crush injury of the right foot, his opinion did not overcome the factual inconsistencies in the claim or its controversion.

Appellant again requested reconsideration on April 19, 2014, asking that OWCP call him. He did not submit additional evidence.

By decision dated August 25, 2014, OWCP denied to review the merits of his claim as appellant's April 19, 2014 letter, the only evidence submitted in support of the request, did not contain new, relevant evidence or raise a substantive legal question.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] 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

[2] 5 U.S.C. §§ 8101-8193.

States" within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are 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 on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee sustained a traumatic 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 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 that is alleged to have occurred.[5] An employee has not met his or her burden of proof in 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.[6] 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.[7]

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a crush injury of the right foot when frozen bottles of soda fell from a vending machine. He did not submit factual corroboration of this incident, or explain why he waited from January 22 to March 6, 2014 to file his claim. The employing establishment controverted the claim, contending that the bottles could not have been frozen, that appellant falsified a similar incident, and that he did not file the claim until after his termination for misconduct. The Board finds that appellant's statements are insufficient to establish fact of injury due to the conflicting evidence regarding the time, place, and manner in which the alleged incident occurred.[8]

Dr. Hedrick, an attending Board-certified orthopedic surgeon, diagnosed a crush injury of the right foot related to a frozen bottle falling on appellant's foot on January 22, 2014. However, as appellant failed to establish the threshold issue of fact of injury, it is premature to address the secondary issue of causal relationship by reviewing the medical evidence in this case.

On appeal, appellant contends that he was injured at work and that the employing establishment intended to send him to a specialist. He asserts that for various reasons a "situation happened," he sought medical care on his own from a physician. As stated above, the evidence submitted was insufficient to prove that the claimed January 22, 2014 incident occurred as alleged. The Board notes that there is no evidence of record that the employing establishment

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

[4] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *S.N.*, Docket No. 12-1222 (issued August 23, 2013); *Tia L. Love*, 40 ECAB 586, 590 (1989).

[7] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[8] *See Caroline Thomas*, 51 ECAB 451, 455 (2000).

authorized any medical treatment related to this claim or that appellant received medical treatment contemporaneous to January 22, 2014.

Appellant may submit new evidence or argument as part of a formal 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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[9] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that 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.[10] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[11]

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[12] He or she need only submit relevant, pertinent evidence not previously considered by OWCP.[13] When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[14]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration by an April 19, 2014 letter, asking that OWCP telephone him. He did not provide additional evidence or argument.

The Board finds that OWCP appropriately denied reconsideration as appellant failed to submit any new, relevant evidence or argument. Appellant's April 19, 2014 letter did not address the critical issue of fact of injury. Therefore, it is not a basis for reopening the case.[15]

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

[11] *Id.* at § 10.608(b). *See also D.E.*., 59 ECAB 438 (2008).

[12] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[13] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[14] *Annette Louise*, 54 ECAB 783 (2003).

[15] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has failed to establish a traumatic right foot injury in the performance of duty. The Board further finds that OWCP properly denied reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 25 and 1, 2014 are affirmed.

Issued: May 26, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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