

FACTUAL HISTORY

On January 19, 2010 appellant, then a 57-year-old letter carrier, filed a claim alleging that on January 4, 2010 she slipped on ice and fell injuring her left upper thigh. She did not stop work.

On February 1, 2010 OWCP advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such evidence, particularly requesting that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

Appellant was treated by Dr. Aaron Schachter, an orthopedist, from January 20 to February 12, 2010, for left posterior thigh pain which began after a slip and fall while delivering mail. Dr. Schachter diagnosed possible medial hamstrings strain.

In a decision dated March 9, 2010, OWCP denied appellant's claim for compensation on the grounds that the evidence failed to establish that the claimed medical condition was related to the established work-related events.

Appellant requested an oral hearing which was held on June 6, 2010. She submitted reports from Dr. Schachter dated February 22 to June 25, 2010, who diagnosed sacrum, coccyx closed fracture. Dr. Schachter noted that appellant could return to work on July 6, 2010. A magnetic resonance imaging (MRI) scan of the lower extremity revealed left sided hip pain attributable to a sacral pathology. MRI scans of the pelvis dated March 19 and May 18, 2010, revealed a left sacral fracture.

In a decision dated October 22, 2010, OWCP's hearing representative affirmed the March 9, 2010 decision as modified. The hearing representative noted that appellant established the diagnosed condition of left sacral insufficiency fracture; however, failed to provide sufficient medical evidence to establish that the condition is causally related to the accepted January 4, 2010 work incident.

In a letter dated November 23, 2010, appellant requested to change physicians.

On May 10, 2011 appellant requested reconsideration. She noted that she was unaware that her treating physician, Dr. Schachter, was not a Board-certified physician. Upon learning this appellant sought a Board-certified physician, who determined that she sustained a fracture of the left sacrum as a result of her occupational injury. She indicated that on November 22, 2010, Dr. Phillip Luchini, a Board-certified orthopedic surgeon, examined her and opined that she sustained an insufficiency stress fracture of the left sacrum as a result of the occupational injury when she fell in January 2010. Appellant indicated that she enclosed the results of tests and the assessment given by Dr. Luchini. No additional evidence was received by OWCP.

By decision dated August 11, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP has the discretion to reopen a case for review on the merits. OWCP must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain 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.”⁴

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.⁵

ANALYSIS

OWCP’s most recent merit decision dated October 22, 2010 denied appellant’s claim for compensation on the grounds that she failed to provide sufficient medical evidence to establish that the diagnosed condition was causally related to the accepted January 4, 2010 work incident. It denied her reconsideration request, without a merit review, and she appealed this decision to the Board.

As noted above, the Board does not have jurisdiction over the October 22, 2010 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her request for reconsideration, she did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not identify a specific point of law or show that it was erroneously applied or interpreted. She did not advance a new and relevant legal argument.

Appellant asserted in her May 10, 2011, reconsideration request that she was unaware that her treating physician, Dr. Schachter, was not a Board-certified physician and upon learning this she sought a Board-certified physician. She indicated that Dr. Luchini examined her on November 22, 2010 and opined that she sustained an insufficiency stress fracture of the left sacrum as a result of the occupational injury when she fell in January 2010. Appellant advised

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

that she enclosed the results of the test and evaluation from him. However, no evidence was received by OWCP. These assertions do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case was whether appellant's diagnosed condition was causally related to her work incident of January 4, 2010. That is a medical issue which must be addressed by relevant medical evidence.⁶ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Although, appellant indicated that she submitted additional medical evidence, no new medical evidence was submitted to OWCP prior to its decision. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that with her May 10, 2011 reconsideration request she submitted a November 23, 2010 report from Dr. Luchini, who supported that her diagnosed condition was caused by her work-related accident on January 4, 2010. She contends that OWCP failed to consider this evidence in its August 11, 2011 decision and attached this medical document to her appeal. The Board has thoroughly reviewed the case file and finds that the November 23, 2010 report was not in the case record before OWCP at the time of the August 11, 2011 decision and therefore was not considered by OWCP in its decision. The only submission was appellant's May 10, 2011 reconsideration request which was insufficient to warrant a merit review of her decision. As explained, appellant did not submit any evidence or argument in support of her reconsideration request that warrants reopening of her claim for a merit review under 20 C.F.R. § 10.606(b)(2).⁷

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

⁶ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ On appeal, appellant submitted new evidence. However, the Board may not consider new evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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