

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

Y.N., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
LYONS CAMPUS OF VANJHCS, Lyons, NJ,
Employer**

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**Docket No. 14-705
Issued: July 2, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2014 appellant filed a timely appeal from an October 9, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for further merit review. As more than 180 days elapsed from the last merit decision of July 5, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim and only has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 16, 2011 appellant, then a 47-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on December 2, 2011 she hurt her left shoulder and arm while lifting soiled trays. She indicated that she sought medical treatment from Dr. Bin Yang, MPH on December 2, 2011. The employing establishment noted that it received notice of appellant's claim on December 16, 2011. No documentation was received with the claim.

By letter dated May 30, 2013, OWCP advised appellant of the deficiencies in her claim and was provided 30 days to submit additional evidence. Appellant was specifically asked to submit a narrative report from her treating physician which contained a well-rationalized opinion supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition.

In response, OWCP received employee health notes dated November 1, 2011 through April 24, 2013, which contained a description of appellant's work injury in a November 5, 2011 entry; and May 16, 2013 physical therapy instructions, which indicated a diagnosis of left shoulder tendinopathy.

By decision dated July 5, 2013, OWCP denied the claim. It found that, while the evidence supports that the injury and/or event(s) occurred as described, the medical component of fact of injury had not been met as there was no medical evidence containing a medical diagnosis in connection with the injury and/or event(s). It further noted that, even if appellant submitted medical evidence which contained a diagnosis, she must also submit evidence that establishes a diagnosed medical condition causally related to the work injury or event.

On August 19, 2013 OWCP received an August 5, 2013 request for reconsideration from appellant. In an undated letter, appellant stated that it was not her fault that the employing establishment did not create the case file when her injury occurred. She indicated that she went to her primary care physician after seeking medical attention at the employing establishment's health unit. Appellant indicated that the employing establishment told her not to worry as they would take care of this since they failed to do the initial occurrence paper work.

By decision dated October 9, 2013, OWCP denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² 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 relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.³ To be entitled to a merit review

² Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

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.⁴ 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.⁵

ANALYSIS

Appellant disagreed with OWCP's July 5, 2013 decision, finding that she did not establish that a medical condition had been diagnosed in connection with the December 2, 2011 employment incident. She requested reconsideration.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, she did not advance a relevant legal argument not previously considered. In her undated request for reconsideration, which OWCP received on August 19, 2013, appellant contended that the employing establishment delayed in creating her workers' compensation case file, which led to the denial of her case. This, however, is not a relevant legal argument as the July 5, 2013 decision clearly found that appellant had filed a timely claim and that the claimed employment incident of December 2, 2011 had occurred in the manner alleged. OWCP denied the claim on the basis that the evidence of record failed to establish that a medical condition had been diagnosed in connection with the December 2, 2011 employment incident. This medical component of fact of injury must be established by a medical report from a qualified physician who provides a valid diagnosis of a medical condition in connection to the December 2, 2011 employment incident. Thus, appellant's argument has no bearing on the issue of whether the medical component of fact of injury had been established and does not establish a legal error by OWCP. Appellant bears the burden of proof to establish her claim, not the employing establishment. Medical opinions are needed to establish the medical component of fact of injury and causal relationship. Lay individuals such as appellant are not competent to render a medical opinion.⁶ Thus, appellant's contention does not establish a legal error by OWCP and she has not submitted a new and relevant legal argument not previously considered by OWCP.

The Board further finds that appellant also did not submit relevant and pertinent new evidence not previously considered.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to the requirements under section 10.606(b)(2). OWCP properly denied her request for reconsideration.⁷

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *Gloria J. McPherson*, 51 ECAB 441 (2000).

⁷ *Robert E. Cullison*, 55 ECAB 570 (2004); *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration 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).

On appeal appellant argued her claim has been established. However, the current medical evidence of file, as discussed above, fails to establish the medical component of fact of injury. Appellant also provided new evidence on appeal. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final decision.⁸ Because this evidence was not before OWCP at the time it issued its October 9, 2013 decision, the Board may not consider this evidence for the first time on appeal.

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.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

⁸ 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).