

FACTUAL HISTORY

On September 10, 2013 appellant, then a 49-year-old rural mail carrier, filed a traumatic injury claim alleging that she injured her tailbone and lower back when she fell in the performance of duty on September 5, 2013. In a letter dated September 27, 2013, OWCP requested that she provide additional factual and medical evidence in support of her claim. Appellant did not respond and, by decision dated November 5, 2013, OWCP denied her claim finding that she failed to submit any evidence supporting that she sustained a traumatic injury on the date alleged.

Appellant requested reconsideration on November 27, 2013 and submitted an x-ray report dated September 10, 2013 from Dr. Jason K. Roth, a Board-certified radiologist, which demonstrated no acute osseous injury to the sacrum or coccyx. She also submitted a duty status report dated September 19, 2013 from a family practitioner² noting her history of falling while in the performance of duty. Dr. Roth made a finding of coccyx pain and tenderness and a diagnosis of coccyx pain.

By decision dated December 11, 2013, OWCP declined to reopen appellant's claim for review of the merits on the grounds that the evidence was "irrelevant or immaterial and thus has no bearing on the issue..." It went on to explain that the report by the physician whose signature was illegible provided an accurate history but only diagnosed "coccyx pain" which, it noted, "is a symptom not a diagnosis." Additionally, OWCP found, "The diagnostic report indicates that there was no acute identifiable injury to the sacrum or coccyx."

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ 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.⁵

OWCP defines 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."⁶ To determine

² The physician's signature is illegible.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ 20 C.F.R. § 10.5(ee).

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. 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.⁷ Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.⁸

Where the claimant files a request for reconsideration, OWCP has the discretion to conduct a nonmerit review and, if justified, a merit review of the evidence presented by the claimant in support of a change in a prior OWCP decision.⁹ The distinction is that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence or argument that meets at least one of the standards enumerated under the applicable regulation.¹⁰ If the reconsideration is granted, the case is reopened and reviewed on its merits.¹¹ Where the request is timely but fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹² The Board has recognized that on occasion OWCP considers or discusses the substantive evidence offered in support of a claimant’s request for reconsideration (in effect, a merit review) but states that it has conducted only a nonmerit review.¹³ When this occurs the Board will also conduct a merit review.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to submit the necessary medical evidence to establish a traumatic injury.

Appellant alleged that she fell in the performance of duty and injured her coccyx and low back. In support of her initial claim, she did not submit any evidence other than her claim form. Appellant then requested reconsideration and submitted medical evidence. In the December 11, 2013 decision, OWCP stated that it had not reviewed the merits of her claim. However, because the December 11, 2013 decision was a merit review, the Board may review the merits of this

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *J.Z.*, 58 ECAB 529 (2007).

⁹ 20 C.F.R. § 10.608. *W.C.*, 59 ECAB 372 (2008).

¹⁰ *Id.* at § 10.606.

¹¹ *D’Wayne Avila*, 57 ECAB 642 (2006).

¹² *M.S.*, 59 ECAB 690 (2008).

¹³ *C.V.*, Docket No. 13-912 (issued July 29, 2013) (where ECAB finds that OWCP has conducted a merit review of the evidence presented by claimant, the Board will assume merit jurisdiction over the claim even if OWCP identifies its decision as the result of a nonmerit review).

¹⁴ *D.R.*, Docket No. 12-617 (issued May 9, 2012) (where OWCP, in a purportedly nonmerit decision, evaluated the reasons offered by claimant for a refusal of a job offer, the Board determined that OWCP had conducted a merit review and, on appeal, decided that OWCP had incorrectly terminated appellant’s benefits.)

evidence on appeal.¹⁵ Upon further examination, the Board finds that OWCP did in fact review the merits of appellant's claim.¹⁶ OWCP discussed and evaluated the weight of the medical evidence rather than merely determining whether the evidence was new or relevant.¹⁷

In support of her request for reconsideration, appellant submitted medical documentation including an x-ray report and a form report providing a diagnosis. Dr. Roth examined appellant's sacrum and coccyx by x-ray on September 10, 2013 and found no acute osseous injury. This report is not sufficient to establish a traumatic injury as Dr. Roth did not provide a diagnosed condition, instead noting the lack of medical findings in support of appellant's claim.

Appellant also submitted a medical report containing an illegible signature indicating that it was authored by a family practitioner dated September 19, 2013. However, as the author of the report cannot be identified as a physician, said report is of no probative value and is thus insufficient to establish her claim.¹⁸

As appellant has not provided medical evidence diagnosing a medical condition which can constitute the basis for payment of compensation as resulting from her September 5, 2013 employment incident, she has not met her burden of proof.

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 appellant has not submitted the necessary medical evidence to establish a traumatic injury sustained in the performance of duty on September 5, 2013, as alleged. The Board also finds that OWCP's decision of December 11, 2013 was a merit, rather than a nonmerit, decision.

¹⁵ *E.F.*, Docket No. 12-34 (issued August 3, 2012) (the Board stated: "Although OWCP's June 2, 2011 decision purported not to review the merits of appellant's claim, it finds that this was a decision on the merits. OWCP did more than provide a background summary of its May 25, 2010 denial, it augmented its previous findings.... As it addressed the merits of appellant's claim, the Board has jurisdiction to review the merits.") *D.C.*, 58 ECAB 620 (2007).

¹⁶ OWCP's Procedure Manual outlines the practical distinction between a substantive merit review and a nonmerit review which determines whether the request itself is sufficient and provides examples of statements which involve evaluation of the evidence and are therefore inappropriate to a nonmerit review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(b)(1) (October 2011).

¹⁷ The second issue in this case is moot because the Board finds that a merit review was afforded to appellant.

¹⁸ *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

ORDER

IT IS HEREBY ORDERED THAT December 11 and November 5, 2013 decisions of the Office of Workers' Compensation Programs are affirmed as modified.¹⁹

Issued: June 17, 2014
Washington, DC

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

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

¹⁹ Richard J. Daschbach participated in the preparation of the decision but was no longer a member of the Board after May 16, 2014.