

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

M.S., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Ann Arbor, MI, Employer**)

**Docket No. 15-1708
Issued: November 9, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 11, 2015 appellant, through counsel, filed a timely appeal of a July 29, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated June 9, 2014, and 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 case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 35-year-old cook, filed a claim for traumatic injury (Form CA-1) on January 15, 2014, alleging that she injured her knees and right hand on January 13, 2014 at 3:30 a.m. when she fell while walking through a parking lot adjacent to her worksite. Her supervisor noted on the claim form that appellant's tour of duty was from 5:00 a.m. until 1:30 p.m. and that the alleged injury had not occurred in the performance of duty.

On January 21, 2014 OWCP advised appellant that it required factual and medical evidence to determine whether she was eligible for compensation benefits. Appellant was requested to complete a questionnaire which queried whether the injury occurred on the premises, while performing employment duties. OWCP requested that she submit this evidence within 30 days.

A January 13, 2014 treatment note revealed that appellant had sustained an injury on January 13, 2014. Appellant was restricted from pushing, pulling, twisting of her torso, and lifting more than 20 pounds until January 21, 2014.²

In reports dated January 20, 22, and 28, 2014, Dr. Susan Blitz, Board-certified in internal medicine, was noted that appellant had slipped and fallen on ice on January 13, 2014, resulting in her experiencing pain in her left buttock radiating into her left posterior thigh. She rated appellant's pain as a 6 or 7 on a scale of 1 to 10. Dr. Blitz diagnosed a lumbar strain with radiculopathy and recommended a course of physical therapy.

In reports dated January 29, February 13, March 18, and April 24, 2014, Dr. Blitz reiterated her previous findings and conclusions.

By decision dated June 9, 2014, OWCP denied appellant's claim, finding that she had failed to submit sufficient medical evidence to establish an injury in the performance of duty on January 13, 2014. It found that she had not established that her injury occurred on the premises of the employing establishment at a reasonable time before her scheduled work hours. Therefore appellant had not established that her alleged injury occurred in the course of her federal employment.

By letter dated May 22, 2015, received on May 26, 2015, counsel requested reconsideration and submitted additional medical reports.

In an August 12, 2013 magnetic resonance imaging (MRI) scan report, Dr. Joon K. Kim, a Board-certified diagnostic radiologist, reported thoracic or lumbosacral neuritis or radiculitis, a small central disc protrusion at L3-4 and L4-5, small central disc protrusion at L5-S1, and diffuse degenerative facet joint changes with no significant spinal canal stenosis or disc protrusion.

In a lumbar MRI scan report dated May 29, 2014, Dr. Ivan S. Katty, a Board-certified diagnostic radiologist, found thoracic or lumbosacral neuritis or radiculitis, unspecified,

² The signature on the note is illegible, but appears to be that of a physician assistant at the employing establishment.

numbness weakness. The results were compared to the MRI scan appellant underwent on August 12, 2013 and found no acute compression deformity, no anterolisthesis, with mild disc desiccation, and mild facet arthropathy at L3-4, L4-5, and L5-S1. The tests also showed diffuse bulging disc with probable annular tear at L4-5 and L5-S1 and degenerative disease.

By decision dated July 29, 2015, OWCP denied appellant's application for review because it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ its regulations under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.⁴

ANALYSIS

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor has she advanced a relevant legal argument not previously considered by OWCP. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁵ The evidence appellant submitted in connection with her May 26, 2015 reconsideration request, however, is not pertinent to the issue on appeal; *i.e.*, whether her claimed January 13, 2014 injury occurred on the premises of the employing establishment, at a reasonable time before she was to begin work, and that therefore the alleged injury arose in the performance of her federal employment.

Appellant submitted the August 12, 2013 and May 29, 2014 MRI scan reports with her request. These reports, however, did not provide any evidence showing that her claimed January 13, 2014 injury occurred on the premises of the employing establishment, in the performance of her federal employment.⁶ As appellant's reconsideration request failed to meet any of the requirements, the Board finds that OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits in its July 29, 2015 decision.

³ *Supra* note 1 at § 8128(a). Under section 8128(a) of FECA, "[t]he 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).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *See David J. McDonald*, 50 ECAB 185 (1998).

⁶ *See Patricia G. Aiken*, 57 ECAB 441 (2006).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board