

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

C.F., Appellant)	
)	
and)	Docket No. 17-1611
)	Issued: December 13, 2017
U.S. POSTAL SERVICE, POST OFFICE,)	
Tuscaloosa, AL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 19, 2017 appellant filed a timely appeal from a January 30, 2017 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated November 12, 2015, 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 the claim.

ISSUE

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

FACTUAL HISTORY

On November 17, 2014 appellant, then a 38-year-old city letter carrier filed a traumatic injury claim (Form CA-1) alleging that, on November 7, 2014, she sustained injury to multiple body parts when she was assaulted at work by an acting supervisor, A.J. She did not stop work.

¹ 5 U.S.C. § 8101 *et seq.*

On the reverse side of the claim form, appellant's immediate supervisor, K.B., indicated that appellant's claims were false and noted that appellant attacked another employee, B.M., on November 7, 2014. K.B. indicated that the employing establishment was challenging appellant's claim for continuation of pay because her injury did not occur in the performance of duty.

The employing establishment submitted a statement controverting appellant's claim for an alleged November 7, 2014 work injury. It asserted that appellant was the aggressor in the altercation on November 7, 2014 and noted that A.J. only became involved in any attempt to prevent the altercation from escalating.

In a November 7, 2014 statement, A.J. denied that she assaulted appellant. She asserted that she merely attempted to calm appellant and B.M. down, who were fighting each other.

On December 8, 2014 OWCP requested additional information and evidence from both appellant and the employing establishment.

Appellant submitted an additional statement claiming that A.J. assaulted her on November 7, 2014 and also submitted medical evidence in support of her claim.

In a January 13, 2015 decision, OWCP denied appellant's claim for a November 7, 2014 work injury. It determined that she had not established that the November 7, 2014 incident occurred as alleged. Thus, fact of injury was not established.

In a February 9, 2015 letter, appellant requested reconsideration of her claim and continued to allege that A.J. assaulted her on November 7, 2014. She also submitted additional medical evidence.

In a May 6, 2015 decision, OWCP denied modification of the prior decision as appellant had not established that she was physically assaulted by her supervisor on November 7, 2014.

On July 13, 2015 appellant requested reconsideration of her claim. She submitted several statements from coworkers and supervisors, including A.J., B.M., J.T., K.K., and K.B. These individuals all indicated that on November 7, 2014 A.J. only made contact with appellant in an attempt to stop an altercation between appellant and B.M. For example, K.K. indicated that on November 7, 2014 she witnessed appellant and B.M. arguing with A.J. standing between them "trying to keep down the confusion." As the argument escalated, appellant and B.M. started reaching for each other and A.J. tried to hold appellant while J.T. held B.M. back. K.K. further noted that appellant then "started swinging on" A.J. and that, during the tussle, appellant fell backwards onto a postal float.

Appellant also submitted additional medical evidence in support of her reconsideration request.

In a December 8, 2014 investigative memorandum of the employing establishment's Postal Inspection Service, an inspector indicated that the interviews conducted suggested that appellant initiated contact with A.J. Appellant admitted to pushing A.J., but maintained that it was only after A.J. pushed her first. The inspector noted that A.J. admitted to hitting appellant but maintained that it was only after appellant struck her in the face. K.K., the only witness interviewed who saw how the incident started, noted that appellant struck A.J. first. B.M. denied

hitting anyone and the interviews conducted support her statement. The inspector noted that there were reported injuries as a result of this incident, but that the incident as described did not meet the criteria for federal prosecutorial action.

In a November 18, 2014 statement, produced in connection with the investigation by the Postal Inspection Service, appellant indicated that on November 7, 2014 she was involved in a heated discussion with B.M. about their respective mail volumes. She told B.M. to mind “your own house” to which B.M. responded “What the f--k you know about my house?” Appellant claimed that B.M. approached her as to hit her and A.J. stated “It [i]s not worth it” and pushed B.M. back. A coworker, J.T., then approached the group and pulled B.M. Appellant asserted that A.J. then started pushing her and grabbed her. She asserted that A.J. pushed her again and pounded her head on the pavement twice.

In a November 12, 2015 decision, OWCP denied modification of its May 6, 2015 decision. It found that the evidence of record, including the December 8, 2014 investigative memorandum of the Postal Inspection Service, supported that appellant’s supervisor, A.J., did not physically assault her, and therefore, fact of injury was not established with respect to the claimed November 7, 2014 incident.

On November 8, 2016 appellant requested reconsideration of OWCP’s November 12, 2015 decision. She argued that the December 8, 2014 investigative memorandum of the Postal Inspection Service established the fact of injury on November 7, 2014. Appellant also asserted that her claimed injury would be covered under the “friction and strain doctrine” discussed in Chapter 2.804.12(b) of OWCP’s procedures. She claimed that the medical evidence of record established her claim for a November 7, 2014 work injury.

In a January 30, 2017 decision, OWCP denied appellant’s request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It found that the argument she presented on reconsideration was either repetitious or irrelevant.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.³ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁴ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or

² This section provides in pertinent part: “[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).

³ 20 C.F.R. § 10.607.

⁴ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁶

The submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a claim.⁷ Moreover, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ Reopening of a case may be predicated solely on a legal premise not previously considered; however, such reopening is not required where the legal contention does not have a reasonable color of validity.⁹

ANALYSIS

Appellant timely requested reconsideration of OWCP's November 12, 2015 decision on November 8, 2016.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She also did not advance a new and relevant legal argument not previously considered by OWCP.

In her November 8, 2016 request for reconsideration, appellant argued that the Postal Inspection Service's December 8, 2014 investigative memorandum established fact of injury. However, the submission of this argument would not require reopening of appellant's claim for merit review because OWCP has already considered the December 8, 2014 investigative memorandum and found that it did not establish that appellant's supervisor physically assaulted her on November 7, 2014 as alleged. As noted above, the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁰

Appellant also claimed that the medical evidence of record established her claim for a November 7, 2014 work injury. This argument would not require reopening of appellant's claim for merit review because it is irrelevant to the main issue of the present case which is not medical in nature, but rather is factual in nature, *i.e.*, whether appellant submitted sufficient factual evidence to establish the fact of injury. As noted above, the Board has held that the submission of

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(a), (b).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁰ *See supra* note 7.

evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹

Appellant also argued that her claimed November 7, 2014 injury would be covered under the “friction and strain doctrine” discussed in Chapter 2.804.12(b) of the Federal (FECA) Procedure Manual. However, she did not explain how this argument applied to the specific facts of her case. Therefore, appellant has not presented a new argument with a reasonable color of validity. The Board has held that, while a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹²

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence or argument, but the Board finds that appellant did not submit any such evidence or argument in this case.¹³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁴

CONCLUSION

The Board finds that OWCP properly denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹¹ See *supra* note 8.

¹² See *supra* note 9.

¹³ See *supra* note 5.

¹⁴ On appeal, appellant makes arguments that are similar to those contained in her November 8, 2016 reconsideration letter. However, the Board has explained why the submission of the November 8, 2016 letter was insufficient to require reopening of appellant’s claim for merit review.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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