

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

F.T., Appellant

and

DEPARTMENT OF THE ARMY, SIERRA
ARMY DEPOT, Herlong, CA, Employer

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**Docket No. 16-1501
Issued: January 5, 2017**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 14, 2016 appellant filed a timely appeal from a June 3, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated July 14, 2016, 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 to review the merits of this case.

ISSUE

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

FACTUAL HISTORY

On December 29, 2014 appellant, then a 51-year-old senior business development specialist, filed a traumatic injury claim (Form CA-1) claiming that he sustained left knee, low back, neck, and head injuries on December 16, 2014 when his boot heel caught on a rubber stair

¹ 5 U.S.C. § 8101 *et seq.*

edging, causing him to fall down the stairs. Two coworkers confirmed that on December 16, 2014 they heard a loud thumping noise from the stairwell. They went to investigate, and found appellant standing at the lower level stairwell entrance. Appellant stated that he had slipped and almost fallen.

On December 21, 2014 Dr. R. Russ, a physician specializing in occupational health, released appellant to full, unrestricted duty as of that day. Appellant also provided physical therapy reports and notes from physician assistants.

In a June 9, 2015 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including a report from his attending physician diagnosing an injury related to the December 16, 2014 incident, and explaining how slipping on stairs could cause the diagnosed conditions. Appellant was afforded 30 days to submit such evidence.

In response, appellant submitted a June 25, 2015 statement, contending that he had already fallen down eight steps and was getting up by the time the two witnesses arrived. He asserted that the sound of his body hitting the landing was the loud thump described by the two witnesses. Appellant noted that he had undergone spine surgeries in 2012 and 2013, but that the December 16, 2014 incident caused a new injury to a different area of his spine. He contended that enclosed reports from Dr. James J. Lynch, an attending Board-certified spinal neurosurgeon, were sufficient to establish his claim.

In a November 24, 2014 report, Dr. Lynch noted having performed anterior discectomy and fusions at C4-5, C5-6, and C6-7 on July 17, 2014. Appellant was also noted to be recovering well.

In a March 13, 2015 report, Dr. Lynch noted that appellant underwent L4 to S1 decompression with L5-S1 fusion in May 2013 and had been doing well until a fall at work “a month ago.” Since that time, appellant related lumbar pain with bilateral L5 radiculopathy. X-rays showed a stable lumbar fusion with the L5-S1 cage in place. Dr. Lynch diagnosed “[g]round level fall at work one month ago” with secondary acute low back pain and new L5 radicular symptoms, status post L4 to S1 decompression and fixation, and an L4-5 spondylolisthesis with facet joint arthropathy.

By decision dated July 14, 2015, OWCP denied the claim, finding that appellant failed to establish that the December 16, 2014 work incident occurred as alleged. It noted that the witness statements asserting that he almost fell were inconsistent with his claim that he fell down eight steps to a landing. OWCP also questioned why appellant waited until January 14, 2015 to consult the office of his spine surgeon.

In a letter received on April 12, 2016, appellant requested reconsideration. He asserted that on December 16, 2014 he “wrestled with the handrail as [he] came down the stairs,” but could not regain his balance, causing him to “hit the wall at the bottom of the stairwell very hard.” Appellant noted that he had undergone total knee arthroplasty on November 16, 2015 and had not worked since that date. He also had lumbar surgery in February 2016. Appellant submitted a September 24, 2015 statement, asserting that he fell from the stairs to the floor on December 16, 2014.

Appellant provided additional medical evidence.² He submitted reports from Dr. Lynch and Dr. Jonathan Burns, an attending Board-certified physiatrist, dated from May 10, 2013 to March 25, 2014, prior to the claimed December 16, 2014 incident. A March 3, 2015 lumbar imaging study showed new mild central canal narrowing at L3-4 and worsening L4-5 facet arthropathy. On October 5, 2015 Dr. James Murphy, an attending Board-certified orthopedic surgeon, diagnosed left L4-5 radiculopathy. Dr. Richard C. Mullins, an attending Board-certified orthopedic surgeon, held appellant off work from November 16, 2015 to March 16, 2016. Appellant also provided April 22 and 23, 2016 emergency room reports regarding lumbar pain.

By nonmerit decision dated June 3, 2016, OWCP denied reconsideration, finding that the evidence submitted was irrelevant or cumulative. It further found that appellant's statements were repetitive of his prior descriptions of the claimed injury and that the medical evidence was irrelevant as the incident was not established.

LEGAL PRECEDENT

To require the office to reopen a case for merit review under section 8128(a) of FECA,³ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show 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.⁴ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁶ He or she need only submit relevant, pertinent evidence not previously considered by OWCP.⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁸

² Appellant also submitted additional reports from a physician assistant.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

Appellant claimed that he sustained left knee, low back, neck, and head injuries on December 16, 2014 when he fell down stairs at work. OWCP denied the claim by decision dated July 14, 2015, finding that appellant had not established the incident component of fact of injury due to inconsistencies between his account of events and witness statements.

Appellant requested reconsideration on April 12, 2016. OWCP denied reconsideration by decision dated June 3, 2016, finding that appellant's statements and the new medical evidence were either irrelevant or cumulative.

The Board finds that OWCP appropriately denied reconsideration. The critical issue in the July 14, 2016 merit decision was whether appellant had established that the December 16, 2014 incident occurred as alleged. To be relevant, the evidence submitted on reconsideration must address that issue. Medical evidence is irrelevant to establishing the incident component of fact of injury in this claim. Therefore, it does not comprise a basis for reopening the case.⁹

Appellant also submitted his September 24, 2015 statement asserting that he fell to the landing, and his statement received on April 12, 2016 contending that he hit the stairwell wall. These divergent accounts of events are highly similar to his remarks in his December 29, 2014 claim form and June 25, 2015 statement previously of record. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.¹⁰ Appellant's additional statements are therefore insufficient to warrant consideration on the merits.

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that his Equal Employment Opportunity grievance alleging discrimination for filing a FECA claim is pending in court. The Board notes that this contention is irrelevant to the issue of whether OWCP properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

⁹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁰ *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2016 is affirmed.

Issued: January 5, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board