

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

C.T., Appellant)	
)	
and)	Docket No. 17-0889
)	Issued: July 17, 2017
)	
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, Fort Lauderdale, FL,)	
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 March 15, 2017 appellant filed a timely appeal from a January 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of OWCP dated April 8, 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 reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant contends that he sustained a work-related injury and submitted additional medical evidence.²

FACTUAL HISTORY

On January 21, 2016 appellant, then a 38-year-old technical enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 2016 he injured his left hand, elbow, hip, and ankle and experienced pain and bruising while in the process of retrieving a tracker from the roof of a residence. He attempted to lower himself from a wet roof and lost his grip, falling approximately 10 feet to a cement sidewalk. Appellant alleged that several days later his back, neck, and hip were still sore.

In medical reports dated February 1 and 15, 2016, Dr. Mauricio F. Herrera, an attending Board-certified orthopedic surgeon, noted a history that appellant fell 10 feet off a roof. He also noted that January 14, 2016 was the onset date of appellant's left hip, left wrist, left hand, and left thumb symptoms, which included mild pain rated as 4 out of 10 by appellant. Dr. Herrera discussed findings on examination and diagnostic test results. He provided a Diagnosis Code of S73.192A for "other sprain of the left hip left," S73.101D for "unspecified sprain of the right hip left," and M70.72 for "other bursitis of the left hip." Dr. Herrera provided an impression of hip labral tear, hip contusion, and left hip sprain/strain. On February 15, 2016 he ordered therapy to treat appellant's unspecified right hip sprain and other bursitis of the left hip. In a Florida workers' compensation form dated February 15, 2016, Dr. Herrera reiterated his diagnoses and advised that physical occupational therapy was necessary. He advised that appellant had no physical restrictions.

By letter dated March 1, 2016, OWCP advised appellant that when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, since the employing establishment did not controvert continuation of pay or challenge the case, a limited amount of medical expenses were administratively approved and paid. It noted that it had reopened the claim for consideration because the medical bills had exceeded \$1,500.00. OWCP requested that appellant submit additional factual and medical evidence. It received a report and daily notes dated February 19 to March 10, 2016 from appellant's physical therapist.

In a March 14, 2016 report, Dr. Herrera examined appellant and noted that his left hip pain had resolved. In a March 14, 2016 Florida workers' compensation form, he restated that appellant had no physical limitations or restrictions.

In a February 5, 2016 left hip magnetic resonance imaging (MRI) scan report, Dr. Jonathan Luchs, a Board-certified radiologist, provided an impression of left tensor fascia lata muscle tendon junction avulsion injury to the proximal iliotibial band with adjacent soft tissue reactive edema. He also provided an impression of lateral gluteus maximus muscle strain and partial tear, left greater trochanteric bursitis, and anterosuperior labral tear.

² The Board's *Rules of Procedure* provide that the Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. Thus, the Board may not consider this new evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1).

By decision dated April 8, 2016, OWCP denied appellant's traumatic injury claim as the medical evidence of record was insufficient to establish that his diagnosed medical condition was causally related to the accepted January 14, 2016 employment-related incident.

OWCP received additional daily notes dated March 2, 11, and 14, 2016 from appellant's physical therapist.

On April 28, 2016 appellant requested reconsideration.

By decision dated January 27, 2017, OWCP denied appellant's request for reconsideration of the merits of the claim. It found that the evidence submitted in support of reconsideration was irrelevant or immaterial.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁴ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review.⁷

OWCP issued an April 8, 2016 merit decision denying appellant's traumatic injury claim, finding that the medical evidence was insufficient to establish that his diagnosed medical condition was causally related to the accepted January 14, 2016 employment-related incident. On April 28, 2016 appellant requested reconsideration. OWCP declined his request for reconsideration in a January 27, 2017 nonmerit decision.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(a).

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

⁷ *See B.D.*, Docket No. 16-1177 (issued October 27, 2016).

The Board does not have jurisdiction over the April 8, 2016 merit decision and can consider only whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issue on reconsideration is medical in nature, whether the medical evidence establishes a causal relationship between his bilateral hip condition and the accepted January 14, 2016 employment incident.

The Board finds that in his April 28, 2016 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. The new daily notes dated March 2, 11, and 14, 2016 from appellant's physical therapist are insufficient to warrant merit review as a physical therapist is not considered a physician as defined under FECA.⁸ Thus, these documents are irrelevant to the underlying medical issue.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.⁹

On appeal appellant argues the merits of his claim. The Board, as noted above, only has jurisdiction over OWCP's January 27, 2017 nonmerit decision which denied his request for reconsideration and, therefore, is precluded from conducting a merit review.

CONCLUSION

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

⁸ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

⁹ See *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 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