United States Department of Labor
Employees' Compensation Appeals Board

N.S., Appellant	)	
	)	**Docket No. 17-0059**
and	)	**Issued: March 10, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 14, 2016 appellant filed a timely appeal from a June 1, 2016 merit decision and June 29, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a left knee injury causally related to the February 25, 2016 employment incident; and (2) whether OWCP properly refused to reopen her case for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] Following the issuance of the June 29, 2016 OWCP decision, appellant submitted new evidence to OWCP. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. *See* 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that she has a work-related left knee injury for which she received medical treatment.

FACTUAL HISTORY

On March 30, 2016 appellant, then a 23-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 25, 2016 she developed left knee effusion when her knee popped as she was descending stairs at work.

In a duty status report (Form CA-17) with an illegible date, Dr. David B. Crittenden, a Board-certified internist, provided a history of injury that on February 25, 2016 appellant's left knee popped as she was walking down steps. He indicated that she had a left knee injury due to the February 25, 2016 incident. Dr. Crittenden noted that on April 19, 2016 appellant was advised that she could return to her regular work duties, eight hours a day with restriction. In a March 30, 2016 medical report, he diagnosed left knee effusion and acute pain. Dr. Crittenden advised that appellant was totally incapacitated from employment until her follow-up appointment. In a March 30, 2016 letter, he placed appellant off work from March 29 to 31, 2016.

In a report dated March 30, 2016, David M. Kaminski, a certified physician assistant, diagnosed left knee injury and left knee effusion and acute pain. He related that appellant was totally incapacitated from employment until her next follow-up appointment.

By letter dated April 21, 2016, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment had not controverted the claim, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for consideration because the medical bills had exceeded $1,500.00. OWCP advised appellant of the type of evidence needed to establish her claim.

In an April 19, 2016 report, Dr. Michael R. Jabara, a Board-certified orthopedic surgeon, placed appellant off work through May 1, 2016. He diagnosed left knee injury and acute pain of the left knee. Dr. Jabara related that appellant could gradually return to work on May 2, 2016, four hours a day, two days a week and then she may resume her normal duty. In a duty status report (Form CA-17) dated April 21, 2016, he provided a history that on February 25, 2016 appellant's left knee popped while she was descending stairs. Dr. Jabara restated his diagnosis of left knee injury and opinion that appellant was totally incapacitated through May 1, 2016.

In a report dated April 19, 2016, Mr. Kaminski noted appellant's current status and findings.

An April 6, 2016 employing establishment accident report noted that on February 25, 2016 appellant's knee popped as she descended steps while delivering mail on her route.

In response to OWCP's queries, appellant reiterated her history of injury that on February 25, 2016 she felt her knee pop while descending steps.[3]

In a May 16, 2016 report, Dr. Jabara advised that appellant could only return to sedentary work on May 17, 2016. He further advised that she could return to work without restriction on May 30, 2016.

In a therapy referral form dated May 16, 2016, Mr. Kaminski ordered physical therapy to treat appellant's diagnosed left knee conditions. A May 17, 2016 Form CA-17 with an unknown signature provided clinical findings of left knee pain and effusion. Appellant was released to full-time work with restrictions. A plan of care report dated May 18, 2016 from Hulst Jepsen Physical Therapy addressed the treatment of appellant's diagnoses of left knee pain and left lower leg muscle wasting and atrophy, not elsewhere classified.

By decision dated June 1, 2016, OWCP denied appellant's claim as the medical evidence of record did not contain a medical diagnosis in connection with the accepted February 25, 2016 employment incident.

Appellant resubmitted Mr. Kaminski's May 16, 2016 therapy referral form and the May 18, 2016 plan of care report from Hulst Jepsen Physical Therapy.

In a May 31, 2016 report, Dr. Jabara requested that appellant be excused from work due to her appointment on that date. He advised that she could return to work without restriction on June 1, 2016. In a May 31, 2016 therapy referral form, Dr. Jabara ordered physical therapy to treat appellant's diagnosis of left knee injury.

A daily note/billing sheet dated May 23, 2016 from Hulst Jepsen Physical Therapy addressed the treatment of appellant's left knee conditions.

On June 17, 2016 appellant requested reconsideration of OWCP's June 1, 2016 decision.

In a June 29, 2016 decision, OWCP denied appellant's request for reconsideration without a review of the merits. It found that her request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[5]

[3] Appellant accepted the employing establishment's May 3, 2016 job offer for a modified city carrier position on that date.

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[6] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.[7]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury causally related to the February 25, 2016 employment incident. As appellant failed to submit sufficient medical evidence to establish that she had a left knee injury causally related to the accepted employment incident.

Dr. Crittenden's Form CA-17 with an illegible date found that appellant had a left knee injury due to the accepted February 25, 2016 employment incident and that she was able return to her full-time regular work duties with restriction. However, he did not provide a firm diagnosis of a particular medical condition[11] or explain how descending steps caused or aggravated the diagnosed medical condition and prior disability from work. As Dr. Crittenden's report does not provide rationale linking a medical diagnosis to the accepted employment incident, it is of limited probative value.[12] His remaining reports are also of limited probative value as this evidence failed to provide a history of injury,[13] examination findings, or a specific

[6] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[7] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[8] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[9] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[10] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[11] *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that in the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet her burden of proof).

[12] *F.T.*, Docket No. 09-919 (issued December 7, 2009) (medical opinions not fortified by rationale are of diminished probative value); *Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

[13] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

opinion as to whether the February 25, 2016 employment incident caused or aggravated appellant's left knee conditions and resultant disability.[14]

Similarly, Dr. Jabara's reports are of diminished probative value. He found that appellant had a left knee injury and acute pain of the left knee. In addition, Dr. Jabara addressed her work capacity. However, he did not provide a specific medical diagnosis indicating that a medical condition was caused or aggravated by the February 25, 2016 employment incident. The Board notes that pain is a description of a symptom rather than a firm diagnosis of a compensable medical condition.[15] Dr. Jabara failed to address how the work incident caused or aggravated a diagnosed medical condition.[16]

Evidence from Mr. Kaminski, a physician's assistant, and a report presumably from a physical therapist at Hulst Jepsen Physical Therapy do not constitute competent medical evidence because neither physician assistants nor physical therapists are considered physicians as defined under FECA.[17] As such, this evidence is also insufficient to meet appellant's burden of proof. The May 17, 2016 Form CA-17 was not legibly signed and, thus, has no probative medical value as it cannot be established that the author is a physician.[18]

The Board finds that appellant has failed to submit rationalized probative medical evidence to establish that she sustained a left knee injury causally related to the February 25, 2016 employment incident. Appellant, therefore, failed to meet her burden of proof.

On appeal appellant contends that she has a work-related left knee injury for which she received medical treatment. For the reasons stated above, the Board finds that the weight of the medical evidence does not establish that appellant sustained a left knee condition causally related to the accepted February 25, 2016 work incident.

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.

LEGAL PRECEDENT -- ISSUE 2

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

[14] *See J.F.*, Docket No. 09-1061 (issued November 17, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[15] *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[16] *See supra* note 14.

[17] 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004) (physician assistants); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[18] *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

application by a claimant.[19] 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).[20] 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.[21] 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.[22]

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.

With her June 13, 2016 reconsideration request, appellant did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b).[23]

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted Dr. Jabara's May 31, 2016 report and physical therapy records.

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.[24] Section 10.126 of Title 20 of the Code of Federal Regulations provides that the decision shall contain findings of fact and a statement of reasons.[25] Moreover, OWCP procedures provide that, if the evidence submitted is not sufficient to require a merit review, OWCP should issue a decision which discusses the evidence submitted, or lack thereof, and explicitly state the basis for the finding of insufficiency.[26]

In its June 29, 2016 decision, OWCP did not discharge its responsibility to provide appellant a statement explaining the disposition so that appellant could understand the basis for the decision, as well as, the precise defect and the evidence needed to overcome the denial of her

[19] 5 U.S.C. § 8128(a).

[20] 20 C.F.R. § 10.608(a).

[21] *Id.* at § 10.606(b)(3).

[22] *Id.* at § 10.608(b).

[23] *Id.* at § 10.606(b)(3).

[24] 5 U.S.C. § 8124(a); *see Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

[25] 20 C.F.R. § 10.126; *see also O.R.*, 59 ECAB 432 (2008).

[26] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(b) (October 2011).

claim. The Board notes that OWCP denied appellant's June 13, 2016 request for reconsideration because it neither raised substantive legal questions nor included new and relevant evidence, but failed to provide any discussion of the evidence she submitted in support of her reconsideration request and to explain how the evidence was insufficient to warrant a merit review of her claim.

Accordingly, the case must be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding appellant's request for reconsideration on the denial of her traumatic injury claim or why she is not entitled to further reconsideration. Following this and such further development as OWCP deems necessary, it shall issue an appropriate decision.[27]

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish a left knee injury causally related to the February 25, 2016 employment incident. The Board further finds that the case is not in posture for decision as to whether OWCP improperly refused to reopen her case for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board. The June 1, 2016 decision is affirmed.

Issued: March 10, 2017
Washington, DC

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

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

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

[27] *See J.Y.*, Docket No. 13-0471 (issued January 2, 2014).