United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 17-1983**
	)	**Issued: August 17, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 25, 2017 appellant filed a timely appeal from an August 3, 2017 merit decision and a September 5, 2017 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 the claim.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a left leg and calf condition causally related to an accepted June 10, 2017 employment

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record provided the Board includes evidence received after OWCP issued its September 5, 2017 decision. The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, evidence not before OWCP at the time of the September 5, 2017 decision will not be considered by the Board for the first time on appeal. *Id.*

incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 16, 2017 appellant, then a 46-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 10, 2017 she experienced pain in her left leg and calf area while walking up stairs when delivering mail. She stopped work the next day on June 11, 2017 and was evaluated at the Boston Medical Center (BMC) Emergency Department. In a June 11, 2017 note, a nurse practitioner excused appellant from work.

In a June 15, 2017 statement, appellant related that she had informed her supervisor about her leg condition on June 10, 2017 and that she had been unable to complete her route. An undated statement from appellant's supervisor verified that appellant had reported her leg condition.

A June 15, 2017 authorization for examination and/or treatment form (Form CA-16) was completed by an employing establishment official on June 15, 2017 and purported to authorize treatment at Brigham and Women's Hospital Primary Care Clinic.

Appellant submitted June 16, 2017 attending physician's report (Form CA-20), a June 16, 2017 duty status report (Form CA-17), and June 18 and 20, 2017 work release notes from certified physician assistants. In a June 20, 2017 note, a certified physician assistant referred appellant to physical therapy for left synovial cyst of popliteal space.

By development letter dated June 26, 2017, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she respond to the attached questionnaire to establish that the June 10, 2017 incident occurred as alleged and provide additional medical evidence, including a well-rationalized medical report from a physician, to establish that she sustained a diagnosed condition as a result of the alleged incident. OWCP afforded appellant 30 days to submit the requested information.

OWCP received a June 21, 2017 statement from appellant's supervisor and a July 11, 2017 statement from appellant, which provided additional factual information.

A June 26, 2017 form report from Brigham and Woman's Hospital indicated that appellant was seen by Dr. Amy Flaster, a Board-certified internist on that day. Care instructions for a Baker's cyst were included. On June 26, 2017 Dr. Flaster countersigned a June 20, 2017 note written by the certified physician assistant, which held appellant off work until July 10, 2017.

In a July 11, 2017 note, Dr. Richard M. Wilk, a Board-certified orthopedic surgeon, held appellant off work for her left leg injury pending magnetic resonance imaging (MRI) scan and physical therapy. In a July 11, 2017 referral to physical therapy, he diagnosed a left gastrocnemius muscle strain.

By decision dated August 3, 2017, OWCP denied appellant's claim. It accepted that the June 10, 2017 employment incident occurred as alleged and that she had been diagnosed with a left gastrocnemius strain. However, OWCP denied the claim, finding that the medical evidence

of record was insufficient to establish that her diagnosed condition was causally related to the accepted June 10, 2017 employment incident.

Additional evidence was received subsequent to OWCP's decision.

In a July 11, 2017 duty status report (Form CA-17), Dr. Wilk diagnosed mass in left knee and left gastrocnemius strain due to June 10, 2017 injury. He opined that appellant was unable to work.

A July 15, 2017 left knee MRI scan indicated mild patellofemoral cartilage abnormalities and a finding consistent with patellar tendon-lateral femoral condyle friction syndrome.

In an August 1, 2017 report, Dr. Wilk reported that appellant had moderate pain in the calf and that the back of her leg tingled. He reported examination findings and reviewed her left knee MRI scan. Dr. Wilk diagnosed left gastrocnemius muscle strain, acute left-sided low back pain with left-sided sciatica, and chronic left knee pain. He also provided an August 1, 2017 Form CA-17 and an August 1, 2017 work release note.

On August 24, 2017 appellant requested reconsideration of the merits of her claim.

In an August 21, 2017 report, Dr. Flaster related that appellant had a suspected work-related injury. She explained that appellant had persistent left knee pain since a June 10, 2017 workplace injury while completing her mail route. Appellant reported that she was walking up the steps to a house on the mail route and felt a pull in her leg while going up the steps. She had persistent left knee pain since then. Dr. Flaster diagnosed synovial cyst of popliteal space, gastrocnemius muscle strain, left knee pain, and acute left-sided low back pain with left-sided sciatica. She referred appellant to physical therapy and physiatry. In an August 21, 2017 Form CA-17, Dr. Flaster diagnosed lateral peroneal condyle friction syndrome due to the June 10, 2017 employment injury. By decision dated September 5, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence to address the issue of causal relationship.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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 from work for which compensation is claimed is causally related to that employment injury.[5]

[3] *Supra* note 1.

[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 he or she actually experienced the employment incident at the time and place, and in the manner alleged.[7] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[8] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition relates to the employment incident.[9]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[11] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she sustained a left leg and calf condition causally related to the accepted June 10, 2017 employment incident.

Medical evidence submitted to support a claim for compensation should reflect a correct history and the physician should offer a medically-sound explanation of how the claimed work event caused or aggravated the claimed condition.[13] The Board finds that no physician did so in this case.

Dr. Flaster countersigned a June 20, 2017 work release note, however, the note did not contain a history of injury, a medical diagnosis, or an opinion on causal relationship.[14] Thus, this report from Dr. Flaster was of little probative value to establish appellant's claim.

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[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] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[10] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[12] *James Mack*, 43 ECAB 321 (1991).

[13] *D.D.*, Docket No. 13-1517 (issued April 14, 2014).

[14] *Id.*

In a July 11, 2017 referral to physical therapy, Dr. Wilk diagnosed a left gastrocnemius muscle strain. While he provided a definitive diagnosis, he did not provide an opinion that the diagnosed condition was employment related.[15] As such, this report is of diminished probative value.

The remainder of the medical evidence was from certified physician assistants and physical therapists. The Board has held that treatment notes signed by physician assistants and physical therapists have no probative value as these providers are not considered physicians under FECA.[16] Thus, this evidence is insufficient to meet appellant's burden of proof.

It is appellant's burden of proof to establish that a diagnosed condition is causally related to the accepted June 10, 2017 employment incident. As the evidence of record is insufficient to establish causal relationship, she has not met her burden of proof.[17]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[18]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.[19]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[20] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[21] If the request is timely, but fails to meet at least one

[15] *See E.B.*, Docket No. 17-1862 (issued January 12, 2018).

[16] *See David P. Sawchuk*, 57 ECAB 316 (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).

[17] Where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).

[18] 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[20] *Id.* at § 10.607(a).

[21] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[22]

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

With her reconsideration request, appellant did not attempt to show 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)(3).[23]

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence from Dr. Wilk and Dr. Flaster, which addressed the relevant issue of causal relationship. Prior to the denial of her claim, she had not submitted any medical evidence which addressed causal relationship.

In his August 1, 2017 report, Dr. Wilk diagnosed left gastrocnemius muscle strain, acute left-sided low back pain with left-sided sciatica, and chronic left knee pain. He opined in July 11 and August 1, 2017 duty status reports that appellant's diagnosed conditions were due to the June 10, 2017 injury.

Likewise, Dr. Flaster, in her August 21, 2017 report, noted the specific history of the June 10, 2017 employment incident and diagnosed synovial cyst of popliteal space, gastrocnemius muscle strain, left knee pain, and acute left-sided low back pain with left-sided sciatica. She indicated that appellant had a suspect work-related injury. Dr. Flaster opined in her August 21, 2017 Form CA-17 that the diagnosed lateral peroneal condyle friction syndrome was due to the June 10, 2017 employment injury.

The Board finds that the opinions expressed in narrative reports by Dr. Wilk and Dr. Flaster constitute relevant and pertinent new evidence not previously considered by OWCP. Their opinions directly addressed the basis upon which OWCP denied appellant's claim as it addressed the issue of causal relationship between her condition and the June 10, 2017 employment incident.[24] Appellant's request for reconsideration met one of the standards for obtaining a merit review of her case.[25] Accordingly, she is entitled to a merit review.

[22] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[23] *Id.* at § 10.606(b)(3).

[24] The Board has held that, 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. He or she need only submit relevant and pertinent evidence not previously considered by OWCP. *See S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[25] *L.Y.*, Docket No. 15-1344 (issued March 10, 2016).

The Board will, therefore, set aside OWCP's September 5, 2017 decision and remand the case for an appropriate merit decision on appellant's claim. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a traumatic injury causally related to the accepted June 10, 2017 employment incident. The Board, however, finds that OWCP improperly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2017 merit decision is affirmed and the September 5, 2017 nonmerit decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 17, 2018
Washington, DC

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

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

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