

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

F.B., Appellant)	
)	
and)	Docket No. 18-1039
)	Issued: December 6, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Elizabeth, NJ, Employer)	
)	

Appearances:
Samuel Tsinman, Esq., for the appellant¹
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 April 23, 2018 appellant, through counsel, filed a timely appeal from an October 25, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated July 27, 2016, to the filing of this appeal,

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

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 July 21, 2015 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on July 20, 2015, she developed mental anxiety in the performance of duty as a result of witnessing a motor vehicle accident involving a coworker, the death of a child, and injuries to other people. She stopped work on July 21, 2015 and has not returned.

A July 21, 2015 handwritten prescription note from Dr. Thressiamma M. Cholankeril, an attending Board-certified internist, was received. She advised that appellant was incapacitated from July 21 to 24, 2015.

In a July 27, 2015 letter, Leroy Minson, a licensed social worker, advised that appellant had been undergoing psychiatric treatment.

On July 28, 2015 the employing establishment issued a properly completed, authorization for examination and/or treatment (Form CA-16), which indicated that appellant was authorized to seek medical treatment with Dr. Cholankeril for her claimed July 20, 2015 injury. Dr. Cholankeril noted in the attending physician's portion of the Form CA-16 that appellant witnessed an accident during which a mail van accelerated and struck a girl. She noted clinical findings, but did not provide a diagnosis.

By development letter dated August 3, 2015, OWCP advised appellant of the deficiencies of her claim and requested that she submit additional factual and medical evidence. To establish the factual portion of her claim, it provided her with a questionnaire for her completion. OWCP also requested that the employing establishment respond to her allegations and submit treatment notes indicating whether she was treated at an employing establishment medical facility. It afforded 30 days for response.

In response, Postmaster D.A. contended, in an August 11, 2015 letter, that appellant did not witness the July 20, 2015 accident. He noted that she happened to drive past the scene on her return to the employing establishment from her nearby route. Appellant was interviewed by the employing establishment's inspection service which found that her comments and answers to questions were not credible. Postmaster D.A. maintained that there was no way that she could

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence with her appeal to the Board. However, the Board's *Rules of Procedure* provides: "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. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

have gotten close enough to see anything because the accident scene was blocked off by police and rescue personnel. He further maintained that appellant should have been driving back to the employing establishment to go to a court appointment and there was no reason for her to stop and get out of her vehicle at the accident scene. Postmaster D.A. indicated that she had difficulty, prior to her claim, with meeting minimally acceptable performance standards associated with being a letter carrier. Appellant had trouble sorting mail to minimum standards and her street time performance and pace were not acceptable at times. Postmaster D.A. submitted an official description of her letter carrier position.

OWCP received reports and letters dated July 29 and August 5 and 8, 2015 from Dr. Daniel E. Williams, Ph.D., a Board-certified clinical psychologist, who noted a date of injury as July 20, 2015, diagnosed appellant with post-traumatic stress disorder (PTSD) and depression, and advised that she was unable to work.

Appellant submitted a September 1, 2015 report from Dr. Jorge Quintana, a psychiatrist, who provided a diagnosis of major depressive affective disorder, recurrent episode, moderate, and PTSD. She also submitted a police report documenting the July 20, 2015 work incident.

On September 3, 2015 appellant responded to OWCP's development questionnaire. She related that she saw the victims as they were struck by the van and she witnessed their injuries. Appellant ran to get help from the fire department. She maintained that she was performing her regularly assigned duties, delivering mail, at the time of the accident. Appellant indicated that she had no stress outside her federal employment. She described the symptoms of her physical and emotional conditions.

By decision dated September 9, 2015, OWCP denied appellant's traumatic injury claim for an emotional condition as fact of injury had not been established. It explained that she had not submitted witness statements and/or documented evidence to establish that she witnessed the accident or ran to get help from the fire department for the accident victims. OWCP further explained that Postmaster D.A.'s statement and the police report indicated that appellant was neither present nor witnessed the accident. It also found that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the alleged employment incident.

On September 29, 2015 appellant, through counsel, timely requested a telephone hearing before an OWCP hearing representative.

A telephone hearing was held on June 1, 2016. By decision dated July 27, 2016, OWCP's hearing representative affirmed the September 9, 2015 decision, finding that appellant had not submitted witness statements to corroborate that she witnessed the July 20, 2015 motor vehicle accident.

On July 27, 2017 appellant, through counsel, requested reconsideration of the July 27, 2016 decision. Counsel submitted a June 28, 2017 letter from Dr. Edward H. Tobe, a Board-certified psychiatrist, who related appellant's account of witnessing the July 20, 2015 work incident, in which a two-year-old child died and another child and a grandmother were injured, and that she had sought help by dialing 911 for rescue personnel. Dr. Tobe opined that appellant had PTSD,

for which she had received treatment, and 30 percent permanent total psychiatric disability as a result of her work injury.

Counsel also submitted his letters of correspondence dated July 19 and 21, 2017 with the employing establishment. These letters addressed his notification of his representation of appellant in her workers' compensation claim and request for a copy of her personnel file and the employing establishment's global positioning system (GPS) log for the vehicle she used on July 20, 2015, and the employing establishment's refusal to comply with his subpoena requiring testimony from its employees regarding her claim.

By decision dated October 25, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a), finding that she failed to submit relevant and pertinent new evidence or advance a relevant legal argument.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right. OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

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.⁶ 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).⁷ 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.⁸ 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.⁹

⁴ 20 C.F.R. § 10.607.

⁵ *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.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.608(a).

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. section 8128(a).

On July 27, 2017 appellant, through counsel, timely requested reconsideration of OWCP's denial of her traumatic injury claim for an emotional condition. The underlying issue on reconsideration is factual in nature -- whether she has established that, on July 20, 2015, she witnessed a motor vehicle accident involving her coworker that resulted in the death of a child and injuries to two other people.

The Board finds that, in her July 27, 2017 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 her 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. Dr. Tobe's June 28, 2017 report found that she had PTSD and 30 percent permanent total psychiatric disability caused by the July 20, 2015 employment injury. This evidence, while new, is not relevant or pertinent to the underlying factual issue of whether appellant witnessed the July 20, 2015 motor vehicle accident. As the underlying issue in the September 9, 2015 decision was factual in nature, the submission of medical evidence is not relevant to the issue for which OWCP denied her claim.¹⁰ Furthermore, while Dr. Tobe described appellant's version of events on July 20, 2015 in his report, this history is not based on personal knowledge.¹¹ For the stated reasons, the Board finds that this evidence is insufficient to warrant reopening appellant's claim for further merit review.

The July 19 and 21, 2017 correspondence between counsel and the employing establishment addressed appellant's representation by counsel in her workers' compensation claim and request for a copy of her personnel and GPS log records, and the employing establishment's refusal to comply with counsel's subpoena requiring testimony from its employees concerning her claim. This evidence, while new, is not relevant to the underlying issue in this case as it does not address whether appellant witnessed a motor vehicle accident at work on July 20, 2015. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.¹² As such, the Board finds that the correspondence is insufficient to warrant reopening appellant's claim for further merit review.

¹⁰ See *M.M.*, Docket No. 15-1622 (issued September 27, 2016); *Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

¹¹ *M.M.*, *id.*; see also *T.E.*, Docket No. 14-1047 (issued October 9, 2014).

¹² See *S.J.*, Docket No. 17-1798 (issued February 23, 2018).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) in her July 27, 2017 request for reconsideration. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

On appeal, counsel contends that OWCP's October 25, 2017 decision is factually inaccurate as witness statements were sent to the examiner at the time of the hearing. While a transcript of appellant's June 1, 2016 telephone hearing notes that counsel stated that he had faxed additional evidence, including two witness statements, to OWCP's hearing representative's office prior to the hearing, such statements were not part of the record at the time of the July 27, 2016 decision. OWCP did not err by failing to consider evidence that was not of record in this case.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).

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 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

¹³ See *L.H.*, 59 ECAB 253 (2007).

¹⁴ See *R.H.*, Docket No. 17-1069 (issued June 6, 2018); *N.T.*, Docket No. 14-1895 (issued March 4, 2015).