

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

_____)	
B.M., Appellant)	
)	
and)	Docket No. 18-1287
)	Issued: December 28, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, West Palm Beach, FL, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2018 appellant, through counsel, filed a timely appeal from a March 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated December 4, 2017, 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 under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 19, 2017 appellant, then a 60-year-old food service worker supervisor, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2017 she sustained head, neck, back, and knee injuries when she tripped and fell over a co-employee's walker. On the reverse side of the claim form she indicated that there was a "correction" to her claim indicating the following: "hit my head on walker/chair." Appellant stopped work on October 17, 2017.

Appellant submitted a medical report dated October 17, 2017 from the employee health unit in which Dr. Brad Gurney, Board-certified in family practice and osteopathic manipulative therapy, noted that appellant was examined on that date for a work-related injury sustained on October 14, 2017. Dr. Gurney advised that she could return to work with restrictions as of the date of his examination.

OWCP subsequently received a copy of an undated job offer to appellant from the employing establishment for a light-duty position.

In an October 19, 2017 report of contact, G.G., Chief of the Veterans Canteen Service, indicated that on October 17, 2017 appellant informed him that she had fallen down in a front office on October 14, 2017 and that she was feeling a little sore. He granted her request to get checked out at the employee health unit. Appellant returned a short time later with a report that released her to return to work with restrictions. Chief G.G. asked her what happened and she responded that she tripped over a walker and fell, hitting her head on a cart. Appellant described the exact location of the cart. She went back to her duties, but later decided that she had worked enough and went home. Chief G.G. related that appellant left work without informing him and also left her cash drawer in a register at the coffee shop. Appellant did not report to work on October 18, 2017. On October 19, 2017 she returned to the employee health unit complaining about dizziness. Chief G.G. related that he subsequently completed an incident report and reviewed a video taken on the date of injury. He noted that the cart appellant described to him was in the office, but it was removed several minutes prior to her fall and, thus, it would have been impossible for her to hit her head on it. Chief G.G. further noted that when she signed the printed Form CA-1, she manually corrected parts 13, 14, 35, and 36 of the form stating, "Correction, hit

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the March 28, 2018 decision, OWCP received additional evidence. 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.*

my head on the walker/chair.” He maintained that the walker was not visible in the video and appellant clearly did not hit her head on a chair. Chief G.G concluded that for these reasons, he controverted her claim.

In an October 23, 2017 letter, M.R., an employing establishment case manager, also controverted appellant’s claim. She contended that no medical evidence had been received that established a diagnosed medical condition related to the claimed incident.

OWCP, by development letter dated October 25, 2017, notified appellant of the deficiencies of her claim. It advised that further factual and medical evidence was necessary to establish her claim. Appellant was also provided a questionnaire for her completion regarding the factual circumstances of her injury. OWCP afforded her 30 days to submit the necessary evidence. The development letter was mailed to appellant’s last known address. Appellant did not respond.

OWCP received additional medical records from the employee health unit which noted a date of injury as October 14, 2017 and addressed appellant’s head, cervical, and lumbosacral spine, and left knee conditions along with her work capacity and history of medical treatment.

A November 8, 2017 duty status report (Form CA-17) with an unknown signature indicated the date of injury as October 14, 2017. The report further indicated that appellant tripped and fell over a walker, injuring her head, neck, lower back, and left knee. Appellant was diagnosed with various lumbar and cervical conditions. She was excused from work on November 6 and 7, 2017 and advised to resume work with restrictions on November 9, 2017.

By decision dated December 4, 2017, OWCP denied appellant’s traumatic injury claim because she failed to establish that the October 14, 2017 employment incident occurred as alleged. It noted that she failed to respond to the questionnaire that was sent with the October 25, 2017 development letter.

On December 21 and 22, 2017 appellant informed OWCP that she did not receive the development letter and, thus, contended that she did not know about the questionnaire. In response, OWCP advised her that it would resend a copy of the development letter to her if she submitted a signed written request for a copy. It also advised appellant to exercise her appeal rights that accompanied the December 4, 2017 decision.

On March 21, 2018 appellant requested reconsideration of the December 4, 2017 decision. She did not submit additional evidence.

By decision dated March 28, 2018, OWCP denied further merit review of appellant’s claim. It found that her request for reconsideration neither raised substantive legal questions, nor included new and relevant evidence.

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.⁴ 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).⁵ 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.⁶ 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.⁷

ANALYSIS

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

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Appellant contended that she had not received OWCP's October 25, 2017 development letter and, thus, she did not know about the questionnaire. However, the record reveals that the development letter and questionnaire were sent to appellant's last known address. The Board has found that, absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.⁸ Appellant did not submit sufficient evidence to rebut the presumption of receipt.⁹ For the reasons provided, the Board finds that appellant's contention is insufficient to warrant reopening her claim for further merit review. Moreover, OWCP subsequently indicated that, if she submitted a signed written request for a copy, they would resend the development letter. No further correspondence was received.

The Board further finds that appellant has failed to submit relevant and pertinent new evidence not previously considered by OWCP in support of her request for reconsideration. The underlying issue in this case is whether appellant submitted sufficient factual evidence to establish that an employment incident occurred on October 14, 2017, as alleged. Appellant did not submit factual evidence in support of her request for reconsideration.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

⁸ *James A. Gray*, 54 ECAB 277 (2002).

⁹ *See J.W.*, Docket No. 16-0773 (issued August 24, 2016); *D.D.*, Docket No. 15-291 (issued May 22, 2015); *D.S.*, Docket No. 07-0841 (issued July 16, 2007).

The Board accordingly finds that appellant has not met 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.¹⁰

On appeal counsel contends that OWCP's March 28, 2018 decision is contrary to fact and law. However, for the reasons explained herein, OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2018
Washington, DC

Christopher J. Godfrey, 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

¹⁰ See *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).