United States Department of Labor
Employees' Compensation Appeals Board

K.V., Appellant	)	
and	)	**Docket No. 18-0723**
	)	**Issued: November 9, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, 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 February 20, 2018 appellant filed a timely appeal from an August 21, 2017 merit decision and a December 1, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of the last merit decision by OWCP. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from August 21, 2017, the date of OWCP's last merit decision, was Saturday, February 17, 2018. It is well established that when a time limitation expires on a nonbusiness day, the limitation is extended to include the next business day. As Monday, February 19, 2018 was a federal holiday, the time period for filing an appeal did not expire until the next business day, which was Tuesday, February 20, 2018, rendering the appeal timely filed. *See M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149-50 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000); *Gary J. Martinez*, 41 ECAB 427-28 (1990).

[2] 5 U.S.C. § 8101 *et seq.*

[3] Appellant submitted additional evidence on appeal. However, "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 evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a concussion causally related to the accepted July 10, 2017 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 10, 2017 appellant, then a 51-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that same date he sustained a concussion when he was involved in a motor vehicle accident (MVA) while in the performance of duty. He stopped work and sought emergency medical treatment.

In support of his claim, appellant submitted July 10, 2017 visit summary and discharge notes from Forbes Hospital documenting treatment for a head injury from a motor vehicle collision.

By development letter dated July 17, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. Appellant was advised of the type of medical and factual evidence needed and provided a questionnaire for his completion. OWCP afforded him 30 days to submit the necessary evidence.

In a July 10, 2017 emergency department report, Dr. Evan Miller, a physician of osteopathic medicine, reported that appellant arrived by emergency medical services following a MVA while driving his mail truck. Appellant reported that he was in the left hand lane with his turn signal on when his mail truck was rear-ended by another vehicle, causing his truck to be thrown into oncoming traffic. Dr. Miller reported no airbag deployment as the mail truck was unequipped with same. Appellant was unsure if he hit his head, but was dazed immediately following his accident. He complained of pain on the top of his head. A computerized tomography (CT) scan of the brain read by Dr. Michael Goldberg, an osteopathic physician, revealed no acute intracranial abnormality. Dr. Miller provided findings on physical examination and diagnosed head injury and motor vehicle collision.

Appellant also submitted a July 12, 2017 treatment note from Vincent Golik, a nurse practitioner, as well as chiropractic treatment notes dated July 18 through 28, 2017.

By decision dated August 21, 2017, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a firm medical diagnosis which could be attributed to the accepted July 10, 2017 employment incident.

On August 29, 2017 appellant requested reconsideration of OWCP's decision.

In a signed August 29, 2017 statement, appellant responded to OWCP's questionnaire and described the circumstances surrounding his June 10, 2017 traumatic injury. He reported that he was driving his employing establishment vehicle on his regular route and was in the left lane with his turn signal on when another vehicle rear-ended him, causing his vehicle to push into oncoming traffic. Appellant explained that the collision caused him to hit his head on the roof of his vehicle due to the severity and speed of the other vehicle. The blow to the head caused him to blackout

for several seconds and disoriented him. Appellant was thereafter transported to Forbes Hospital for treatment where he was advised that he had suffered a mild concussion.

On June 10, 2017 the employing establishment issued appellant a properly completed Form CA-16, authorization for examination, which indicated that he was authorized to seek medical treatment at Forbes Hospital for his July 10, 2017 injury of concussion and loss of consciousness from head injury.

Appellant also submitted a July 10, 2017 emergency medical service's report documenting the motor vehicle collision and transport to the hospital for his head abrasion.

Appellant also submitted a July 12, 2017 Duty Status Report (Form CA-17) which indicated that he could return to full-duty work and additional chiropractic therapy notes dated August 3 through September 6, 2016. He also resubmitted Dr. Miller's July 10, 2017 report, Dr. Goldberg's July 10, 2017 diagnostic report, and Mr. Golik's July 12, 2017 treatment report.

By decision dated December 1, 2017, OWCP denied appellant's request for reconsideration without reviewing the merits of his claim finding that he neither raised substantive legal questions nor submitted relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical

[4] *Supra* note 2.

[5] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *Elaine Pendleton*, *supra* note 5.

opinion evidence sufficient to establish such causal relationship.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of 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.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a concussion causally related to the accepted July 10, 2017 employment incident.

On the date of injury, appellant sought emergency medical treatment with Dr. Miller.[10] While Dr. Miller's report documents immediate treatment for appellant's injury, the physician failed to provide a firm medical diagnosis as he only diagnosed head injury and motor vehicle collision. He also documented appellant's complaints of head pain. The Board has consistently held that pain is a symptom, not a compensable medical diagnosis.[11] Moreover, Dr. Miller reported that a CT scan of the head revealed no acute intracranial abnormality. As he related that appellant's diagnostic testing revealed normal findings, his report is insufficient to establish that appellant sustained a traumatic injury.[12]

The remaining medical evidence of record is also insufficient to establish a diagnosed medical condition causally related to the July 10, 2017 MVA. Dr. Goldberg's July 10, 2017 report interpreted diagnostic findings and related no acute intracranial abnormality. The Board has held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between appellant's employment duties and a diagnosed condition.[13]

OWCP also received chiropractic treatment notes documenting therapy. The evidence, however, does not reflect that the treating chiropractors diagnosed subluxation based on the results

[8] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

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

[10] In its August 21, 2017 decision, OWCP found that the July 10, 2017 report was signed by a physician assistant. The Board notes that contrary to OWCP's finding, the report was cosigned by Dr. Miller, a qualified physician.

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

[12] *J.P.*, Docket No. 14-87 (issued March 14, 2014).

[13] *See S.G.*, Docket No. 17-1054 (issued September 14, 2017).

of an x-ray.[14] Therefore, these reports do not constitute probative medical evidence as the chiropractors do not meet the statutory definition of a physician.[15]

The July 12, 2017 report from Mr. Golik, a nurse practitioner, is also insufficient to establish appellant's claim. Reports from a nurse practitioner lack probative value as healthcare providers such as physician assistants, physical therapists, or nurse practitioners, are not considered physicians as defined under FECA.[16]

Appellant's honest belief that the July 10, 2017 motor vehicle collision caused injury, however, sincerely held, does not constitute medical evidence sufficient to establish a firm medical diagnosis causally related to the accepted work event(s).[17] In the instant case, the record lacks rationalized medical evidence establishing a diagnosed medical condition causally related to the accepted July 10, 2017 employment incident. Thus, appellant has not met his burden of proof to establish his claim.[18]

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.[19]

LEGAL PRECEDENT -- ISSUE 2

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. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits. To require it to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute

[14] 5 U.S.C. § 8102(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[15] *L.S.*, Docket No. 07-560 (issued June 22, 2007).

[16] *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also M.M.*, Docket No. 16-1617 (issued January 24, 2017).

[17] *D.D.*, 57 ECAB 734 (2006).

[18] *T.O.*, Docket No. 18-0139 (issued May 24, 2018).

[19] The record contains a Form CA-16 signed by the employing establishment official on July 10, 2017. When the employing establishment properly executes a CA-16 form which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a CA-16 form is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003). The record is silent as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

relevant and pertinent new evidence not previously considered by OWCP.[20] Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

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).

With his timely request for reconsideration, appellant submitted his completed factual development questionnaire which provided further details regarding the June 10, 2017 motor vehicle incident. However, as OWCP previously accepted that the June 10, 2017 incident occurred as alleged, this evidence did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered.[22] Consequently, appellant is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board notes that the underlying issue in this case is whether appellant sustained a diagnosed medical condition causally related to the July 10, 2017 motor vehicle collision. That is a medical issue which must be addressed by relevant medical evidence not previously considered.[23] Appellant resubmitted Dr. Miller's July 10, 2017 report, Dr. Goldberg's July 10, 2017 diagnostic report, and Mr. Golik's July 12, 2017 treatment report. The Board notes that these reports were previously addressed and evaluated by OWCP in its August 21, 2017 merit decision. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[24]

The Board notes that appellant also submitted new evidence in the form of an emergency medical services report dated July 10, 2017 documenting the motor vehicle collision and transport to the hospital for his head abrasion, a July 12, 2017 Form CA-17, and chiropractic therapy notes dated August 3 through September 6, 2017. While this evidence was new, it did not constitute relevant and pertinent medical evidence as none of the reports were signed by a physician and did not provide a firm medical diagnosis in connection to the July 10, 2017 injury.[25] The Board has

[20] *D.K.*, 59 ECAB 141 (2007).

[21] *K.H.*, 59 ECAB 495 (2008).

[22] *Sherry A. Hunt*, 49 ECAB 467 (1998).

[23] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[24] *See L.R.*, Docket No. 18-0400 (issued August 24, 2018).

[25] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989) (material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case).

held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[26]

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a concussion causally related to the accepted July 10, 2017 employment incident. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 1 and August 21, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 9, 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

[26] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).