

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

J.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer**

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**Docket No. 18-0800
Issued: November 19, 2018**

Appearances:
*Alan J. Shapiro, Esq., for the appellant*¹
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 March 6, 2018 appellant, through counsel, filed a timely appeal from a December 14, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated December 7, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

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.

² 5 U.S.C. § 8101 *et seq.*

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 November 1, 2014 appellant, then a 42-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that, while walking her delivery route on September 26, 2014, she experienced sharp pain in her right knee and right lower extremity. She stopped work on the date of injury.

In support of her claim, appellant submitted an October 3, 2014 letter of voluntary resignation, asserting that the right lower extremity injury disabled her from performing her assigned duties. In October 25, 2014 statements, she explained that, although she began consulting with several physicians on September 27, 2014, none diagnosed her with a right femur fracture until October 19, 2014.

In a November 6, 2014 letter, the employing establishment controverted appellant's claim, asserting that she attempted to resign as she was about to be terminated for poor performance, and that the claimed injury was due to a preexisting condition.

A September 12, 2014 venous Doppler ultrasound study of the right lower extremity was negative for deep venous thrombosis.

In a report dated September 28, 2014, Dr. John Dawson, an attending Board-certified family practitioner, diagnosed unspecified joint pain and a history of restless leg syndrome.³ He related that appellant could return to work as of September 29, 2014.

In a report dated September 30, 2014, Dr. Katherine M. Malta, an attending Board-certified family practitioner, held appellant off work through October 2, 2014.

In a report dated October 3, 2014, Dr. Guangbin J. Zeng, an attending Board-certified family practitioner, diagnosed right knee pain and restless leg syndrome. He held appellant off work through October 5, 2014.

In a report dated October 27, 2014, Dr. Joshua Patt, an attending Board-certified orthopedic surgeon, diagnosed a right femur fracture with October 17, 2014 surgical repair. He held appellant off work through December 28, 2014.

By development letter dated November 18, 2014, OWCP advised that additional factual and medical evidence was necessary to establish appellant's claim. It informed appellant that she should submit a rationalized medical opinion from a treating physician which explained how that

³ A September 28, 2014 x-ray of the left foot demonstrated an accessory ossicle os naviculare with sclerosis and overlying soft tissue prominence. Appellant also provided an October 3, 2014 nurse's note, and an appointment slip for October 3 and 30, 2014 appointments.

alleged employment activity caused a diagnosed medical condition. OWCP afforded appellant 30 days to submit additional evidence.

In response, appellant submitted a November 23, 2014 statement. When the medication failed to relieve her symptoms, appellant sought care at a hospital emergency room, where she was diagnosed with a stress fracture of the right femur.

In a report dated November 4, 2014, Dr. John A. Rodriguez-Feo, an attending Board-certified orthopedic surgeon, noted that appellant was recovering well from October 17, 2014 retrograde intramedullary nailing (IMN) for a pathologic right femur fracture secondary to a Vitamin D deficiency. November 4, 2014 x-rays showed a healing fracture of the right femur with intact fixation hardware.

In a letter dated November 24, 2014, Dr. Patt reviewed a history of treatment. He diagnosed a “stress fracture of the distal femur due to significant amounts of walking and demand of her job superimposed upon low Vitamin D, which had not been previously identified.” Dr. Patt opined that, based on appellant’s history, findings on examination, and imaging studies, appellant had sustained “a fracture through her right distal femur associated with an overuse-type injury.”

By decision dated December 24, 2014, OWCP denied appellant’s claim, finding that the evidence of record was insufficient to establish causal relationship between the claimed right femur fracture and her September 26, 2014 employment activities.

On January 6, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. During the hearing, held on July 14, 2015, counsel asserted that Dr. Patt’s opinion was sufficient to meet appellant’s burden of proof to establish causal relationship. Appellant submitted copies of medical evidence previously of record.

By decision dated September 29, 2015, the hearing representative affirmed OWCP’s December 24, 2014 decision, finding that the medical evidence of record was insufficient to establish causal relationship.

On January 26, 2016 appellant, through counsel, requested reconsideration.

In support thereof, appellant submitted a report dated November 17, 2015 from Dr. Patt, wherein he opined that appellant’s “initial presentation was very classic for an overuse injury developing into a completed stress fracture needing surgical treatment directly associated with her activity as a mail carrier,” including “walking on level ground while at work as a mailman.” Dr. Patt noted that appellant’s right knee pain began after a fall two to three weeks before she presented to the emergency room.” He explained that, based on appellant’s medical records, history, and clinical presentation, the right femur fracture “was directly related to progression of a stress injury in her right distal femur to completion of a stress fracture.” Dr. Patt noted that he frequently saw “overuse injuries such as this in people who walk or run long distances,” such as young military recruits. He commented that appellant’s “slightly low Vitamin D level” was not in and of itself the cause of the right femur fracture. Dr. Patt concluded that based on his care of appellant, he was “100 percent certain that her fracture was caused by her regular activities and duties as a mail carrier.”

By decision dated December 7, 2016, OWCP denied modification of its prior decision, finding that the medical evidence submitted was insufficient to meet appellant's burden of proof to establish causal relationship.⁴ It found that Dr. Patt's opinion was of diminished probative value as it was predicated on an inaccurate history. Dr. Patt attributed the onset of appellant's knee pain to a fall two to three weeks before she presented for emergency room care. However, appellant had not alleged a fall.

On December 6, 2017 appellant, through counsel, requested reconsideration. He contended that OWCP should vacate and overturn its previous decision based on enclosed new evidence from Dr. Patt. Accompanying his request for reconsideration, counsel submitted physical therapy treatment notes dated January 2 to March 29, 2015. These notes were not signed or reviewed by a physician.

By decision dated December 14, 2017, OWCP denied reconsideration of the merits of the claim under 5 U.S.C. § 8128(a), finding that appellant did not submit new and relevant evidence, or legal argument sufficient to warrant reopening the merits of her claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's 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 relevant and pertinent new evidence not previously considered by OWCP.⁶ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁸

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.⁹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹⁰ When reviewing an OWCP

⁴ In a September 19, 2017 letter, counsel contended that OWCP should develop appellant's February 3, 2017 occupational disease claim as it had denied her traumatic injury claim for the same September 26, 2014 right femur fracture. By letter dated October 25, 2017, OWCP notified counsel that the only recourse for appellant was to exercise her appeal rights.

⁵ 5 U.S.C. § 8128 (a). Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ *See Mark H. Dever*, 53 ECAB 710 (2002).

decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth in section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹¹

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. Moreover, appellant did not advance a relevant legal argument. On reconsideration, appellant, through counsel, contended that OWCP should vacate its prior decision based on new evidence from Dr. Patt, an attending Board-certified orthopedic surgeon. However, counsel submitted no new evidence from Dr. Patt. This argument is irrelevant to establishing the critical issue of causal relationship. As such, counsel's argument is irrelevant to the claim and does not comprise a basis for reopening the case on its merits.¹² As appellant did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP she is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(3).

Additionally, appellant did not submit new, relevant evidence addressing the underlying issue of causal relationship. On reconsideration, counsel submitted physical therapy treatment notes dated from January 2 to March 29, 2015. As these notes were not signed or reviewed by a physician, they do not constitute competent medical evidence and are thus irrelevant to the critical issue of causal relationship.¹³ The Board has held that evidence which is irrelevant to the claim is insufficient to warrant a merit review.¹⁴

As appellant's application for review did not meet any of the three requirements enumerated under 10.606(b)(3), the Board finds that OWCP properly denied the request for reconsideration without reopening the case for a review on the merits.¹⁵

¹¹ *Annette Louise*, 54 ECAB 783 (2003).

¹² *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹³ *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (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). *C.L.*, Docket No. 17-0354 (issued July 10, 2018) (physical therapists are not considered physicians under FECA).

¹⁴ *Supra* note 11.

¹⁵ *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case 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 pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 14, 2017 is affirmed.

Issued: November 19, 2018
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