United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 18-0648**
	)	**Issued: October 15, 2018**
U.S. POSTAL SERVICE, LOS ANGELES PROCESSING & DISTRIBUTION CENTER, Los Angeles, CA, 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 5, 2018 appellant filed a timely appeal from a July 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 18, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant timely requested oral argument pursuant to the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated June 18, 2018, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0648 (issued June 18, 2018). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

ISSUE

The issue is 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 June 30, 2016 appellant, then a 41-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that at 6:50 a.m., while at work, he slipped and fell on oil and debris on the floor of the "CU-3 pit" area, injuring his right knee and the right side of his body. He did not stop work.

In support of his claim, appellant submitted a report dated June 30, 2016 from Dr. Frank Chow, an attending osteopathic physician Board-certified in family practice, who diagnosed right knee and right upper arm strains, and contusions of the right knee and right shoulder. Dr. Chow returned appellant to restricted duty effective June 30, 2016.

The employing establishment provided a June 30, 2016 supervisory statement from J.S., who contended that although he did not witness the alleged incident, appellant was not at the CU-3 pit from 5:30 to 6:30 a.m. on June 20, 2016. J.S. asserted that, after 6:30 a.m. on June 20, 2016, he saw appellant by the maintenance office. Appellant related to J.S. that he had injured his leg and wanted to go to the health clinic. J.S. and appellant then walked together to the maintenance office. Appellant then rode his bicycle to the union office.

By development letter dated July 15, 2016, OWCP explained the deficiencies in appellant's claim and the type of factual and medical evidence necessary to meet his burden of proof. It noted that he had not yet established the factual component of fact of injury. OWCP afforded appellant 30 days to submit additional evidence.

In response, appellant submitted reports dated July 7, 2016 from Dr. Phillip McKinley, an attending physician specializing in emergency medicine. Dr. McKinley related appellant's account of "stepping off a machine and stepped down onto some oil and debris that was on the floor." Appellant's right knee buckled and he fell onto his right side. On examination, Dr. McKinley found a positive grind test in the right knee. He diagnosed a right knee strain, industrially related by history. Dr. McKinley prescribed physical therapy treatments.[3]

By decision dated August 18, 2016, OWCP denied the claim, finding that the evidence of record was insufficient to establish the claimed June 30, 2016 incident occurred as alleged. It noted that the supervisory statement from J.S. tended to contradict appellant's version of events and his own lack of response was noted.

On November 29, 2016 appellant requested reconsideration. He submitted a statement dated August 4, 2016 in which he asserted that the injury occurred in the CU-3 area "around 6

[3] Appellant participated in physical therapy treatment from July 11 to 22, 2016. He also provided a report of a July 25, 2016 magnetic resonance imaging scan of the right knee which demonstrated a small retropatellar effusion without meniscal or ligament tears.

a.m." on June 30, 2016, witnessed by "some mail handlers and maintenance employees." Appellant contended that Supervisor J.S. saw him prior to the June 30, 2016 incident.

Appellant submitted reports dated August 10 and October 25, 2016 from Dr. Christopher P. DeCarlo, an attending physiatrist. Dr. DeCarlo related appellant's account that, on June 30, 2016, he "slipped on an absorbent being used to soak up an oil slick, while dismounting a machine and fell to the ground." He opined that by history, the June 30, 2016 incident caused a right knee contusion with retropatellar effusion. Dr. DeCarlo explained that appellant believed "that he did at some point twist his knee" when he lost his footing. He returned appellant to modified duty.

In a report dated June 30, 2016, Dr. Chow related appellant's account that, while working on a machine, he slipped on oil, twisted his right leg and felt pain in his "whole right side."

Appellant also submitted copies of medical reports related to an October 22, 2015 right elbow injury, and medical evidence previously of record in the present claim.

By decision dated December 9, 2016, OWCP denied reconsideration 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 his claim. It found that his August 4, 2016 assertion that he was injured at 6:00 a.m. contradicted his prior account of an incident at 6:50 a.m.

On May 3, 2017 appellant again requested reconsideration. He contended that he considered 6:00 a.m. and 6:50 a.m. to be "practically the same" time, and that his injury "was the most important factor. Appellant asserted that it was expected that Supervisor J.S. did not see him in the CU-3 area prior to the injury because the facility was extremely large, "over 500,000 square feet with at least 15 mechanics" on duty. He contended that other mechanics must have witnessed the incident.

Appellant provided an undated statement from coworker D.J., who asserted that he observed appellant on June 30, 2016 "working on CU-3." Later, D.J. found out that appellant "was injured while working on CU-3 that same day."

In letters dated February 15 and May 16, 2017, the employing establishment requested an updated list of work restrictions.

In a report dated March 28, 2017, Dr. DeCarlo noted appellant's complaints of continued right knee pain, with mild swelling and a positive grind test on examination. He renewed prior work restrictions.

Appellant also submitted duplicate copies of medical evidence previously of record.

By decision dated July 27, 2017, OWCP denied reconsideration 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 his claim. It found that D.J's undated statement demonstrated that he was not a witness to the claimed injury. OWCP further found that, although appellant argued that his coworkers must have seen him slip and fall, he did not provide any witness statements which corroborated appellant's version of events. It also found that the additional medical

evidence submitted was repetitive or cumulative in nature and did not warrant reopening the merits of appellant's claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[4] 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.[5] To be entitled to a merit review of its decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.[6] 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.[7]

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.[8] He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.[9] When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.[10]

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his 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, he contended that the time of the claimed injury was immaterial and that his coworkers must have witnessed the claimed slip and fall. These contentions are not legal arguments addressing the underlying issue of fact of injury. As such, appellant's opinions are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.[11] As

[4] 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."

[5] 20 C.F.R. § 10.606(b)(3).

[6] *Id*. at § 10.607(a).

[7] *Id*. at § 10.608(b).

[8] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[9] *See Mark H. Dever*, 53 ECAB 710 (2002).

[10] *Annette Louise*, 54 ECAB 783 (2003).

[11] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

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 he is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(3).

Additionally, appellant did not submit new, relevant evidence addressing fact of injury. The submission of D.J.'s undated statement did not support that appellant was working in the CU-3 pit area at either 6:00 a.m. or 6:50 a.m., or that he slipped and fell at any time. The employing establishment's requests for updated work restrictions, and the medical evidence provided, are not probative evidence on the issue at hand, whether the June 30, 2016 incident occurred at the time, place, and in the manner alleged. The Board has held that evidence which is irrelevant to the claim does not warrant a merit review.[12]

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.[13]

On appeal appellant contends that he made an unintentional error in his claim form and subsequent statements as to the precise time of the claimed June 30, 2016 incident. He contends that coworker D.J.'s statement and the medical evidence of record were sufficient to corroborate that he was injured in the performance of duty as alleged. The Board notes that these arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

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).

[12] *Id*.

[13] *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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 27, 2017 is affirmed.

Issued: October 15, 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