

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

S.P., Appellant)	
)	
and)	Docket No. 18-0870
)	Issued: October 10, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Leesburg, FL, Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
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 19, 2018 appellant, through counsel, filed a timely appeal from a September 20, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated September 8, 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 to review 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 July 19, 2016 appellant, then a 61-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on March 18, 2016, she sustained a right shoulder tear in a motor vehicle accident while driving her car to the employing establishment.³ She did not stop work.

A magnetic resonance imaging (MRI) scan of the right shoulder, obtained on April 21, 2016, revealed distal supraspinatus tendinosis and a possible superior labral tear with an associated superior labral tear from anterior to posterior (SLAP) lesion.

On July 14, 2016 Dr. Amit Varma, a Board-certified orthopedic surgeon, found that appellant could resume work with restrictions and noted that he had referred her for physical therapy.⁴

In an undated attending physician's report (Form CA-20), received by OWCP on August 4, 2016, Dr. Varma diagnosed a glenoid labrum tear and rotator cuff tendinitis. He checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of a March 18, 2016 motor vehicle accident.

By decision dated September 8, 2016, OWCP denied appellant's traumatic injury claim. It found that the medical evidence of record was insufficient to establish that she sustained a diagnosed condition causally related to the accepted employment incident.

Subsequently, appellant submitted reports from Dr. Kenneth A. Felt, a chiropractor, dated March 31 to August 23, 2016. In a treatment note dated March 31, 2016, Dr. Felt obtained a history of her experiencing increased neck and low back pain as a result of a March 18, 2016 motor vehicle accident, noting that she had a prior history of pain in her neck and back. He diagnosed a post-traumatic injury secondary to a motor vehicle accident. Dr. Felt obtained x-rays of the cervical and lumbar spine. On April 5, 2016 he diagnosed a subluxation/fixation on the right at S1 and L4-5. Dr. Felt, on May 18, 2016, indicated that an MRI scan was suspicious for a right shoulder labral tear and referred her to an orthopedic surgeon.

Dr. Felt also treated appellant for neck pain radiating into the right upper extremity prior to her March 18, 2016 motor vehicle accident. In a treatment note dated November 10, 2015, he diagnosed cervical degenerative disc disease with radiculopathy. On January 12, 2016 Dr. Felt adjusted a subluxation at C5-6 and C6-7. In a treatment note dated March 17, 2016, he noted that

³ The employing establishment related that appellant was traveling between work sites at the time of the motor vehicle accident. It controverted the claim as she did not timely report the incident and continued to perform her assigned duties.

⁴ In an undated duty status report (Form CA-17), a physician diagnosed a torn labrum and provided work restrictions. The signature of the physician is illegible.

she had experienced a temporary aggravation in her condition from driving and working on flooring in a second home.

On September 8, 2017 appellant, through counsel, requested reconsideration. Counsel noted that she sought treatment from Dr. Felt after the accident and that he had referred her for an MRI scan study, which revealed a labral tear of the right shoulder.

By decision dated September 20, 2017, OWCP denied appellant's request for reconsideration as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review under section 8128(a). It found that evidence was cumulative and substantially similar to documentation already in the case record. Further, OWCP found that Dr. Felt had diagnosed a preexisting subluxation, but did not relate this condition to the March 18, 2016 work incident.

On appeal counsel contends that OWCP erred in denying her claim, asserting that the employing establishment accepted fact of injury and the medical evidence supported a diagnosed condition.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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

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.⁷ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS

By decision dated September 8, 2016, OWCP denied appellant's traumatic injury claim as she failed to submit medical evidence sufficient to establish a diagnosed condition causally related

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3); *see also* L.G., Docket No. 09-1517 (issued March 3, 2010).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also* M.S., 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); E.R., Docket No. 09-1655 (issued March 18, 2010).

to the accepted March 18 2016 employment incident. On September 8, 2017 appellant requested reconsideration. Her request for reconsideration was timely filed because it was received within one year of the last merit decision issued September 8, 2016.¹⁰

The issue presented on appeal is whether appellant's September 8, 2017 request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim.

The Board finds that 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 by OWCP. 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).¹¹

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request. The underlying issue in this case is whether she sustained a right shoulder tear causally related to a March 18, 2016 motor vehicle accident. As the issue is medical in nature, it can only be resolved through the submission of medical evidence.¹² On reconsideration appellant submitted reports from Dr. Felt, a chiropractor, who in a March 31, 2016 report noted that she had experienced increased neck and back pain following a motor vehicle accident. Dr. Felt obtained x-rays and diagnosed a right S1 and L4-5 subluxation. Section 8101(2) of FECA provides that 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 demonstrated by x-ray to exist.¹³ Dr. Felt diagnosed a subluxation, as such he is a physician under FECA, but he did not address whether it was related to the accepted March 18, 2016 employment incident. The Board has held that the submission of evidence which does not pertain to the particular issue involved does not constitute a basis for reopening a case.¹⁴

On May 18, 2016 Dr. Felt diagnosed a possible right labral tear by MRI scan study. Even under circumstances where a chiropractor is recognized as a physician under FECA, his opinion is still not considered competent medical evidence in the evaluation of disorders other than those of the spine, including the extremities.¹⁵ Consequently, Dr. Felt's reports do not constitute relevant and pertinent new evidence regarding appellant's claim that she sustained a shoulder injury on March 18, 2016.

¹⁰ See *supra* note 8.

¹¹ See *supra* note 6; *R.M.*, 59 ECAB 690 (2008).

¹² See *M.A.*, Docket No. 18-0395 (issued July 17, 2018).

¹³ 5 U.S.C. § 8101(2).

¹⁴ See *Ronald A. Eldridge*, 53 ECAB 218 (2001).

¹⁵ See *K.S.*, Docket No. 16-0164 (issued February 24, 2016); *Pamela K. Guesford*, 53 ECAB 726 (2002).

On appeal counsel raises arguments relevant to the merits of her claim. The only issue before the Board, however, is whether OWCP properly denied her request for reconsideration of the merits of the claim and thus these arguments are not before the Board at this time.¹⁶

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit pertinent new and relevant evidence not previously considered. The Board accordingly finds that she did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁷

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 September 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 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

¹⁶ See *C.F.*, Docket No. 18-0360 (issued July 19, 2018).

¹⁷ See *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *M.E.*, 58 ECAB 694 (2007).