United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 18-1623**
	)	**Issued: April 10, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Hartford, CT, 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 August 24, 2018 appellant filed a timely appeal from an April 9, 2018 merit decision and a May 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury causally related to the accepted February 6, 2018 employment incident; and (2) whether OWCP

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the May 16, 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.*

properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 7, 2018 appellant, then a 53-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on February 6, 2018 he sustained a left knee injury while in the performance of duty.[3] He reported that the cause of the injury was unknown. Appellant stopped work on the date of the alleged injury, and first notified his supervisor and sought medical treatment on February 7, 2018.

In a February 7, 2018 duty status report (Form CA-17), a physician assistant reported that on February 6, 2018 appellant was walking when his knee swelled up. She noted tenderness over the left medial knee joint and diagnosed internal knee injury, knee effusion.

By development letter dated March 5, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. Appellant was advised of the type of factual and medical evidence needed to establish his claim and was provided a questionnaire for completion regarding the February 6, 2018 employment incident and prior history of left knee conditions. OWCP afforded him 30 days to submit the necessary evidence.

Appellant responded to OWCP's questionnaire on March 27, 2018. He reported that on February 6, 2018 he was working as a mail handler power equipment operator when he suffered a pulled hamstring of the left leg. Appellant explained that he was on and off power equipment all day and had just stepped off a machine when he took about five to six steps and felt a weird pull in his left leg. He grabbed his knee area and could visibly see swelling taking place. Appellant reported that a coworker witnessed his injury and he immediately notified his supervisor since he could no longer stand on that leg. He returned to work the following day and realized he could not perform his employment duties, prompting him to file a Form CA-1 and seek emergency medical treatment. Appellant reported that he was examined by a physician assistant who he believed misdiagnosed his injury and speculated that he could have a possible internal knee tear. He went to his treating physician the following week and he suggested a pulled hamstring and recommended referral to an orthopedic physician. Appellant reported that he had previously undergone left knee surgery in 2004, but had no other injuries to the left knee.

A February 7, 2018 emergency department note by Dr. Ann Cooper-Ciccarelli, an osteopathic emergency medicine specialist, related that appellant complained of left knee pain, swelling, and loss of mobility which began one day prior. Appellant reported that his employment duties required him to climb in and out of machinery at work. On the previous day, he reported climbing more than usual and after walking, felt a sudden onset of pain and swelling to his left medial knee. Appellant's physical examination findings revealed mild-to-moderate left medial knee tenderness without signs of laxity or acute trauma. Dr. Cooper-Ciccarelli reported that

[3] The record reflects that appellant has seven prior traumatic injury claims and three prior occupational disease claims with dates of injury ranging from June 21, 1995 through January 3, 2017. The record before the Board contains no other information pertaining to these prior claims.

appellant likely had a knee effusion secondary to an internal knee injury. She diagnosed left knee effusion, provided work restrictions, and recommended follow-up with an orthopedist.

In a February 14, 2018 report, Theresa Anne Lind, a nurse practitioner, reported that appellant complained of left knee pain from eight days prior. Appellant reported that, while he was at work, he stepped off of some power equipment, took five to six steps, and developed pain in his left knee, which felt like something snapped. He also developed immediate left knee swelling. Ms. Lind diagnosed left knee pain.

In a February 23 and 27, 2018 medical reports, Dr. Khaled A. Instrum, a Board-certified orthopedic surgeon, reported that appellant presented with complaints to the left knee following a February 6, 2018 injury. Appellant reported driving power equipment all day at work and explained that he had reached over to help a coworker when he felt a sharp pain along the inside of his knee with immediate swelling and bruising. Dr. Instrum noted findings on physical examination pertaining to the left knee. He reported that an x-ray of the knee revealed mild degenerative changes. Dr. Instrum diagnosed "right" knee pain, noting that appellant suffered "right" knee pain with no specific sequela.[4]

In an April 3, 2018 medical report, Dr. Instrum noted physical examination findings pertaining to the left knee and diagnosed "right knee sprain and strain of right hamstring." In an April 3, 2018 addendum to the report, he reported that appellant suffered a strain of the medial side of his knee which was felt to be a strain of his medial hamstring with tenderness.

By decision dated April 9, 2018, OWCP denied appellant's claim, finding that the medical evidence of record did not provide a firm medical diagnosis which could be reasonably attributed to the accepted February 6, 2018 employment incident.

On May 7, 2018 appellant requested reconsideration of OWCP's decision. In support of his claim, he resubmitted Dr. Instrum's April 3, 2018 medical report. Appellant also submitted an undated witness statement from J.W., a coworker. J.W. reported that on February 6, 2018 he witnessed appellant step off his tow motor machine and take a few steps when his leg suddenly buckled. He reported that appellant's knee was visibly swollen and that he appeared to be in a lot of pain.

In a May 1, 2018 attending physician's report (Form CA-20), Dr. Instrum reported that on February 6, 2018 appellant was driving power equipment all day and walked over to help a coworker when he felt a sharp pain along the inside of his knee which resulted in immediate swelling and bruising. He reported that x-rays of the knees revealed mild degenerative changes, noting a previous 2004 left knee anterior cruciate ligament (ACL) reconstruction. Dr. Instrum diagnosed a knee sprain and strain of right hamstring. He checked the box marked "yes" when asked if the condition had been caused or aggravated by the employment incident, noting that appellant had no prior pain or swelling before he walked down to help a coworker.

[4] Dr. Instrum's reference to the right knee is likely a typographical error as the claim only implicates a left knee condition. He also indicated that appellant sought treatment for his left knee injury and the history provided only concerned the left knee.

By decision dated May 16, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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.

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[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. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish an injury causally related to the accepted February 6, 2018 employment incident.

[5] *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

[6] 20 C.F.R. § 10.115(e); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

[7] *See P.F.*, Docket No. 18-0973 (issued January 22, 2019); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *C.P.*, Docket No. 18-1645 (issued March 8, 2019).

[9] *C.C.*, Docket No. 18-1099 (issued December 21, 2018).

On February 7, 2018 appellant sought emergency medical treatment. Dr. Cooper-Ciccarelli noted appellant's history of injury, physical findings of mild-to-moderate left medial knee tenderness without signs of laxity or acute trauma. She diagnosed left knee effusion secondary to internal knee injury. However, Dr. Cooper-Ciccarelli did not provide an opinion as to whether the diagnosed condition was causally related to the accepted employment incident. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[10] This report, therefore, is insufficient to establish appellant's claim.

Dr. Instrum's February 23 and 27 and April 3, 2018 medical reports are also insufficient to establish a left knee condition causally related to the accepted February 6, 2018 employment incident. He provided a diagnosis of right knee pain[11] and strain of right hamstring. As set forth above, medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[12] These reports, therefore, are also insufficient to establish appellant's claim.

The reports from a physician assistant and a nurse practitioner are also insufficient to establish appellant's claim as these providers are not considered physicians as defined under FECA, and their opinions therefore have no probative medical value.[13]

As appellant has not submitted a physician's report which describes how the accepted employment incident on February 6, 2018 caused or aggravated a left knee condition, he has not met his burden of proof.[14]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review under FECA section 8128(a) of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of

[10] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[11] The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *See B.P.*, Docket No. 12-1345 (issued November 13, 2012) (regarding pain); *C.F.*, Docket No. 08-1102 (issued October 10, 2008) (regarding pain); *J.S.*, Docket No. 07-881 (issued August 1, 2007) (regarding spasm).

[12] *Supra* note 10.

[13] *See M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants and nurse practitioners 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).

[14] *See D.T.*, Docket No. 17-1734 (issued January 18, 2018).

the date of that decision.[15] 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.[16] 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 application for reconsideration without reopening the case for a review on the merits.[17]

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).

In his timely application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he did not advance a new and relevant legal argument not previously considered.[18] 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 underlying issue in this case was whether appellant sustained a diagnosed medical condition causally related to the accepted February 6, 2018 employment incident. That is a medical issue which must be addressed by relevant medical evidence not previously considered.[19] In support of his claim, appellant resubmitted Dr. Instrum's April 3, 2018 report. However, this report was previously addressed and evaluated by OWCP in its April 9, 2018 merit decision. As the report is duplicative and repeats evidence already in the case record, it does not constitute a basis for reopening the case as it is not new evidence. Appellant also submitted new evidence in the form of a May 1, 2018 Form CA-20 from Dr. Instrum. While this evidence was new, the Form CA-20 was duplicative and cumulative of his prior reports. Dr. Instrum merely repeated his prior findings and diagnoses pertaining to the right knee, while appellant's claim is for a left knee injury.[20] The witness statement provided by J.W. is also insufficient to warrant merit review as lay persons are not competent to render a medical opinion.[21] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a

[15] *See H.H.*, Docket No. 18-1660 (issued March 14, 2019).

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

[17] *P.H.*, Docket No. 18-1020 (issued November 1, 2018); *K.H.*, 59 ECAB 495 (2008).

[18] *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *Sherry A. Hunt*, 49 ECAB 467 (1998).

[19] *See A.M.*, Docket No. 18-1033 (issued January 8, 2019); *see also Bobbie F. Cowart*, 55 ECAB 746 (2004).

[20] *See T.T.*, Docket No. 18-1682 (issued February 22, 2019).

[21] *See B.R.*, Docket No. 17-1661 (issued January 4, 2018); *James A. Long*, 40 ECAB 538 (1989).

basis for reopening a case.[22] Consequently, appellant is not entitled to review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

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 an injury causally related to the accepted February 6, 2018 employment incident. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 16 and April 9, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 10, 2019
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

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