

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

S.C., Appellant)	
)	
and)	Docket No. 19-0479
)	Issued: August 8, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Cincinnati, OH, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 27, 2018 appellant filed a timely appeal from a July 26, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 16, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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 evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On February 20, 2018 appellant, then a 66-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 16, 2017 she injured her left hip when pushing loaded all-purpose containers (APCs), some with bad wheels, into dumpers while in the performance of duty. She noted that Supervisor D.S., an operations support specialist, saw her leave the work area in tears because of the pain. On December 18, 2017 appellant resigned from the employing establishment.

OWCP received a March 2, 2018 letter from the employing establishment challenging the claim. No other information was received.

In a development letter dated March 6, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It noted that the evidence did not establish that the December 16, 2017 incident occurred as alleged. OWCP advised appellant of the factual and medical evidence necessary to establish her claim and provided a questionnaire for completion. It also requested that she clarify whether she was claiming an occupational disease or a traumatic injury. OWCP afforded appellant 30 days to provide the necessary factual information and medical evidence.

OWCP received a March 19, 2018 statement from the employing establishment along with a March 2, 2018 statement from D.S., who had walked appellant to the time clock on the date of the incident. D.S. indicated that appellant had complained that she was sore due to her age and the physical aspects of her job, but that she had not mentioned that she was injured. He also noted that appellant indicated that she might resign as the job was too much for her.

In support of her claim, appellant submitted a December 17, 2017 emergency department note from Dr. Justin L. Benoit, a Board-certified emergency medical specialist. Dr. Benoit reported that appellant had been performing a new job pushing large heavy crates and that certain movements worsened her pain, but that she had no significant trauma. He provided an impression of left hip pain.

Appellant also submitted a December 17, 2017 left hip x-ray which showed mild arthrosis of the pubic symphysis and bilateral S1 joints, but no acute osseous abnormality.

By decision dated April 16, 2018, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the December 16, 2017 incident occurred as alleged. It explained that she had not responded to its March 6, 2018 questionnaire regarding how the alleged injury occurred. OWCP also noted that appellant had not submitted sufficient medical evidence to establish a diagnosed condition causally related to the alleged incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a January 9, 2018 report, Dr. Clyde E. Henderson, a Board-certified orthopedic surgeon, noted that appellant reported injuring her left groin/hip region while pushing carts of mail and packages while working as a seasonal worker for the employing establishment. He indicated that this happened after she worked for 17 days and that she had resigned after the pain became worse. Dr. Henderson noted left hip examination findings, reviewed x-ray findings, and provided an

assessment of left hip strain. In a March 15, 2018 report, he again diagnosed a left hip strain. Dr. Henderson indicated that he had discussed with appellant the etiology of her pain and how it related to her employment activity. He ordered a left hip magnetic resonance imaging (MRI) scan, noting that he would have expected a soft-tissue injury to have resolved by now.

An April 4, 2018 MRI scan of the left hip revealed gluteus medius/minimus tendinosis without evidence of a focal tear and mild diffuse degenerative chondral thinning of the left hip.

In an April 17, 2018 report, Dr. Nicholas Mirkopoulos, a Board-certified orthopedic surgeon, noted that appellant, a patient of Dr. Henderson, had a work-related injury in December 2017 and retired. He reported the results of the x-rays and the MRI scan and noted examination findings. Dr. Mirkopoulos opined that the gluteus medius injury was directly related to the December 2017 employment-related injury.

OWCP also received February 23 and March 8, 2018 physical therapy notes and other medical evidence pertaining to a left elbow condition.

On April 30, 2018 appellant requested reconsideration. In an April 26, 2018 statement, she discussed the medical evidence submitted and her symptoms.

By decision dated July 26, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It determined that the evidence submitted was irrelevant to the issue of whether she established a factual basis for her claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously

³ This section provides in pertinent part: 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 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

considered by OWCP.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, it will deny the request for reconsideration without reopening the case for a 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 improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).¹¹

The underlying issue in this case was whether appellant had established the factual component of fact of injury. OWCP denied her claim finding that she had not submitted a statement describing how the alleged injury occurred on December 16, 2017. It also found that the medical evidence was insufficient to establish a diagnosed condition casually related to the alleged incident.

On reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹²

Along with her reconsideration request, appellant submitted physical therapy notes, an April 4, 2018 MRI scan of the left hip, and medical reports from Dr. Henderson and Dr. Mirkopoulos. Dr. Henderson, in his January 9, 2018 report, provided a history of injury of appellant injuring her left groin/hip region while pushing carts of mail and packages after working 17 days for the employing establishment. He also provided an assessment of left hip strain. The Board finds that Dr. Henderson's report is new and relevant to the underlying issue of fact of injury because he includes a detailed account of the factual basis of the alleged injury and therefore the

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *See S.A.*, Docket No. 18-1638 (issued April 5, 2019); *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹⁰ *P.L.*, *supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

¹¹ *See A.G.*, Docket No. 18-1720 (issued May 7, 2019); *C.F.*, Docket No. 18-0583 (issued October 16, 2018).

¹² *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion.¹³

Thus, the Board will set aside OWCP's July 26, 2018 decision and remand the case for merit review of appellant's claim. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 8, 2019
Washington, DC

Christopher J. Godfrey, 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

¹³ See *A.G.*, *supra* note 11; *L.N.*, Docket No. 12-1326 (issued November 21, 2012); see also Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.810.6 (September 2010) (to obtain merit review, a claimant need not submit all evidence that may be necessary to discharge his burden of proof); *Helen E. Tschantz*, 39 ECAB 1382 (1988); *V.B.*, Docket No. 12-1057 (issued October 23, 2012).