United States Department of Labor
Employees' Compensation Appeals Board

P.F., Appellant	)	
and	)	**Docket No. 19-0547**
	)	**Issued: December 20, 2019**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Clayton, MO, Employer	)	

Appearances:
James E. Retter, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 2, 2019 appellant filed a timely appeal from an October 30, 2018 merit decision and a December 13, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury causally related to the accepted February 16, 2018 employment incident; (2) whether OWCP's

[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.*

hearing representative properly denied his request for the issuance of a subpoena; and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 20, 2018 appellant, then a 72-year-old field representative, filed a traumatic injury claim (Form CA-1) alleging that at 5:15 p.m. on February 16, 2018 he fractured his ribs, injured his left shoulder, sustained a cut above his left eye, and suffered a concussion when he "fell up the steps and back down the steps" while in the performance of duty. He stopped work on February 16, 2018.

In a report dated February 17, 2018, Dr. Jeffrey Evan Siegler, Board-certified in emergency medicine, evaluated appellant for a closed fracture of multiple ribs and a left eyebrow laceration after a fall.

In a development letter dated March 6, 2018, OWCP informed appellant that, when his claim was first received, it had appeared to be a minor injury that had resulted in minimal or no lost time from work. The claim was administratively approved to allow payment for limited medical expenses, but the merits of the claim had not been formally adjudicated. OWCP advised that, because appellant had not returned to full-time employment, his claim would be formally adjudicated. It requested that he submit factual and medical information, including a comprehensive report from his physician regarding how a specific work incident contributed to his claimed injury. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, OWCP received a February 17, 2018 emergency department report from Dr. Siegler. Dr. Siegler evaluated appellant for rib and shoulder pain that had begun eight hours earlier when he had fallen at home, striking the kitchen counter. He diagnosed three fractured ribs and a possible loose body in the left shoulder after a fall that had occurred eight hours earlier.

On February 19, 2018 Dr. Vishal Pankaj Kapadia, an osteopath, evaluated appellant at the emergency department for complaints of disorientation and confusion. He noted that appellant had fallen two nights earlier at home when he got up at night to go to the bathroom, striking his head and the left side of his chest. Dr. Kapadia found that appellant had symptoms of a concussion.

In a consultation report dated February 20, 2018, Dr. James E. Alonso, a Board-certified neurologist, noted that appellant had a history of hypertension, diabetes, and aortic valve replacement. He noted that appellant had sought treatment at the emergency department on February 17, 2018 after he had fallen at home in the night hitting his ribs and the left side of his face. Appellant subsequently developed disorientation.

In an e-mail dated March 29, 2018, the employing establishment controverted the claim, noting that the medical evidence failed to relate any condition to a fall at work. In an April 4, 2018 letter, it advised OWCP that it had no documentation supporting that appellant was working in the field after 5:00 p.m. on February 16, 2018.

By decision dated April 11, 2018, OWCP denied appellant's traumatic injury claim. It found that the evidence of record was insufficient to establish that the February 16, 2018

employment incident occurred as alleged. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 27, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. In an accompanying statement of even date, he advised that at 5:15 p.m. on February 16, 2018 he was attempting to contact a resident at his or her home when he fell on a flight of stairs. Appellant related that his head was bleeding so he went home without interviewing the resident. In the middle of the night he got up and fell against the kitchen counter, reopening the cut on his head.

In a letter dated May 7, 2018, appellant requested that OWCP's hearing representative issue a subpoena to compel I.S., his field supervisor, to attend his hearing.

On August 14, 2018 OWCP's hearing representative denied appellant's request for the issuance of a subpoena under 20 C.F.R. § 10.619. She found that he had not established that the only means to obtain information from I.S. was through a subpoena rather than other methods, such as a written statement. The hearing representative advised that appellant could appeal the denial of his subpoena request after the issuance of her decision if it was not favorable.

During the telephonic hearing held on September 12, 2018 appellant described the alleged February 16, 2018 employment incident. He related that he had experienced dizziness when he got home and went to sleep on the couch. Appellant had failed to recognize his daughter when she arrived home. Later that night he fell against the kitchen counter, hitting the left side of his chest, and reopening the cut on his head.

Thereafter, OWCP received a March 12, 2018 report from Dr. James Caviness, Board-certified in preventive medicine, who reviewed the medical evidence for the employing establishment. Dr. Caviness recommended that the employing establishment challenge appellant's claim as the medical evidence supported that he had fallen at home eight hours before his emergency room visit on February 17, 2018.

In a September 9, 2018 e-mail, the employing establishment advised that appellant set his own schedule as an intermittent field representative. It noted that it did not have proof that at 5:00 p.m. on February 16, 2018 he was working in the field.

By decision dated October 30, 2018, OWCP's hearing representative affirmed as modified the April 11, 2018 decision. She found that appellant had factually established the occurrence of the February 16, 2018 employment incident. The hearing representative determined, however, that the medical evidence was insufficient to support that he had sustained a diagnosed condition causally related to the accepted employment incident.

On November 13, 2018 appellant requested reconsideration. He challenged the employing establishment's contention that he was not working at the time of the February 16, 2018 employment incident. Appellant advised that he sustained two falls, the first causing a "head laceration at the work assignment, the second resulted in mental confusion, broken ribs, and shoulder bruising at home."

By decision dated December 13, 2018, OWCP denied appellant's request for reconsideration, finding that he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[6] Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[7]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. 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.[8]

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 16, 2018 employment incident.

In support of his claim, appellant submitted medical evidence regarding his treatment on February 17, 2018 at the emergency department after he fell at home, striking the kitchen counter. On February 17, 2018 Dr. Siegler diagnosed a closed fracture of multiple ribs and a laceration of the left eyebrow after he fell at home onto the kitchen counter. In a report dated February 19, 2018, Dr. Kapadia evaluated appellant for confusion and noted his history of falling at home two

[3] *Id*.

[4] *See E.B.*, Docket No. 17-0164 (issued June 14, 2018); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[5] *See P.S.*, Docket No. 17-0939 (issued June 15, 2018); *Ellen L. Noble*, 55 ECAB 530 (2004).

[6] *See V.J.*, Docket No. 18-0452 (issued July 3, 2018); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[7] *Id*.

[8] *See H.B.*, Docket No. 18-0781 (issued September 5, 2018).

days earlier hitting the left side of his chest and his head. On February 20, 2018 Dr. Alonso indicated that appellant had received treatment at the emergency department on February 17, 2018 after falling at night at home. None of the medical evidence of record contains a history of the accepted February 16, 2018 employment incident. Instead, it attributes appellant's condition to a subsequent fall at home. Medical evidence submitted to support a claim for compensation should reflect a correct history, and the physician should offer a medically sound explanation of how the accepted employment incident caused or aggravated a claimed condition.[9] As the medical evidence fails to discuss the accepted employment incident, appellant has failed to meet his burden of proof.[10]

On appeal appellant argues that his supervisor confirmed that he was at work at the time of his February 16, 2018 fall. As discussed, however, OWCP accepted the occurrence of the February 16, 2018 employment incident. The issue is whether the medical evidence of record is sufficient to establish that appellant sustained a medical condition causally related to the February 16, 2018 employment incident. He failed to submit evidence establishing that he sustained a diagnosed condition causally related to the accepted employment incident and thus has not met his burden of proof.[11]

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

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[12] The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.[13] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.[14]

ANALYSIS -- ISSUE 2

The Board finds that OWCP's hearing representative properly denied appellant's request for the issuance of subpoena.

[9] *See R.C.*, Docket No. 17-0372 (issued May 3, 2018).

[10] *See B.P.*, Docket No. 19-1054 (issued November 14, 2019).

[11] *See R.J.*, Docket No. 19-0593 (issued September 9, 2019).

[12] 20 C.F.R. § 10.619; *E.C.*, Docket No. 18-1808 (issued May 16, 2019).

[13] *Id*.

[14] *B.M.*, Docket No. 17-1157 (issued May 22, 2018).

Appellant requested that OWCP's hearing representative issue a subpoena to obtain testimony from I.S., his field supervisor. She denied his request, noting that he had not demonstrated that the evidence from I.S. could not be obtained through other methods, including the submission of a written statement. Appellant has insufficiently explained why a subpoena was the best method to obtain this evidence or shown that there was no other method to obtain the information. The Board finds that OWCP's hearing representative did not abuse her discretion when denying the subpoena request.[15]

LEGAL PRECEDENT -- ISSUE 3

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.[16]

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.[17]

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.[18] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[19] 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.[20]

ANALYSIS -- ISSUE 3

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).

The Board finds that, on reconsideration, appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. He argued that the employing

[15] *See E.C.*, *supra* note 12; *L.M.*, Docket No. 17-0159 (issued September 27, 2017).

[16] 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

[18] *Id.* at § 10.607(a). 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). *Id.* at Chapter 2.1602.4b.

[19] *Id.* at § 10.608(a); *see also A.P.*, Docket No. 19-0224 (issued July 11, 2019).

[20] *Id.* at § 10.608(b); *A.G.*, Docket No. 19-0113 (issued July 12, 2019).

establishment erred in advising that he was not at work at the time that the February 16, 2018 incident occurred. Appellant maintained that he fell twice, once at work and once at home. OWCP, however, accepted that the February 16, 2018 employment incident occurred, as alleged. The underlying issue in this case is whether the medical evidence of record established a causal relationship between a diagnosed condition and the February 16, 2018 accepted employment incident. This is a medical issue that must be addressed by relevant medical evidence.[21] Appellant's arguments, consequently, are not relevant to the issue at hand. The Board has held that the submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.[22] Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).[23]

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence with a request for reconsideration. The Board finds, however, that appellant has not provided any relevant and pertinent new evidence not previously considered relevant to the issue of whether he has established an injury causally related to the February 16, 2018 employment incident. As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under section 10.606(b)(3).[24]

The Board, accordingly, finds that appellant did not meet 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.[25]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury causally related to the accepted February 16, 2018 employment incident. The Board further finds that OWCP's hearing representative properly denied his request for the issuance of a subpoena and that OWCP properly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

[21] *M.C.*, Docket No. 18-0841 (issued September 13, 2019).

[22] *L.E.*, Docket No. 19-0470 (issued August 12, 2019).

[23] *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

[24] *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

[25] *See L.A.*, Docket No. 18-1226 (issue December 28, 2018) (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 December 13 and October 30, 2018 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 20, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board