

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

S.W., Appellant)	
)	
and)	Docket No. 18-1261
)	Issued: February 22, 2019
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Laguna Niguel, 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 June 4, 2018 appellant filed a timely appeal from a February 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated December 14, 2017, 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 over the merits of this case.²

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 additional evidence for the first time on appeal. *Id.*

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 October 25, 2017 appellant, then a 73-year-old tax examiner, filed a traumatic injury claim (Form CA-1) alleging that on September 27, 2017 while walking to her desk after renewing her "smartcard" while in the performance of duty, she experienced left lumbar muscle cramps. Minutes later, while walking to the exit, she experienced severe left-sided lumbar pain which caused her to double over suddenly, resulting in left paraspinal muscle tears. Appellant stopped work on September 27, 2017.

By development letter dated November 2, 2017, OWCP notified appellant of the type of factual and medical evidence needed to establish her traumatic injury claim, including a detailed factual statement describing the mechanism of injury, and a narrative opinion from her attending physician explaining how and why the identified employment factors would cause the claimed left lumbar injury. It afforded her 30 days to submit the necessary evidence.

In response, appellant submitted her statements dated November 6 and 15, 2017. She recalled the onset of severe, left-sided lumbar pain while exiting the employing establishment on September 27, 2017.³ Appellant first sought care at 4:00 a.m. on September 28, 2017 at a hospital emergency department. She was advised that she had sustained lumbar muscle tears with bleeding into her left lower extremity. Appellant remained hospitalized through October 7, 2017.

Appellant provided physical therapy prescriptions dated from October 4 to 30, 2017 listing diagnoses of syncope and collapse, a left hip strain, and left gluteus minimus tendon tear, and hospital discharge instructions dated October 7, 2017.

In an October 9, 2017 letter, Dr. Patrick S. Thompson, an attending Board-certified family practitioner, held appellant off work through November 6, 2017. He restricted her to sedentary work through January 2, 2018.⁴

In a report dated November 7, 2017, Dr. Thompson diagnosed gluteus minimus and gluteus medius tears with hematoma. He noted that the "injury occurred at work based on symptoms."

By decision dated December 14, 2017, OWCP accepted that the claimed September 27, 2017 event occurred at the time, place, and in the manner alleged, but denied the claim, finding that causal relationship had not been established. It found that the medical evidence of record did

³ Appellant also provided an October 26, 2017 witness statement from S.R., a coworker, who described appellant bending over with severe lumbar pain while exiting the employing establishment, and that she had been hospitalized the following day.

⁴ An October 16, 2017 lumbar magnetic resonance imaging (MRI) scan demonstrated a left gluteus medius tendon tear at the greater trochanter and a moderate gluteus minimus tendon tear.

not contain sufficient medical reasoning to support a pathophysiologic connection between the established work factors of walking and doubling over and the diagnosed gluteal tendon tears.

On January 11, 2018 appellant requested reconsideration. She submitted a January 3, 2018 statement explaining that her condition made it difficult for her to have obtained the requested medical evidence within 30 days of OWCP's November 2, 2017 development letter. Appellant submitted copies of documents previously of record, including her statements, the hospital discharge documents, and physical therapy prescriptions.

By decision dated February 23, 2018, OWCP denied reconsideration pursuant to 5 U.S.C. § 8128(a), finding that appellant had not submitted new and relevant evidence, or legal argument sufficient to warrant reopening the merits of 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.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷

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 considered by OWCP.⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS

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).

Appellant disagreed with the December 14, 2017 decision and timely requested reconsideration on January 11, 2018. The underlying issue on reconsideration is the medical

⁵ This section provides in pertinent part: "[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 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *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. The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(a),(b).

question of causal relationship. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding causal relationship to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹⁰

In her January 11, 2018 request for reconsideration and accompanying statement, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument not previously considered. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Apart from her January 11, 2018 statement, the documents appellant submitted in support of her January 11, 2018 request for reconsideration are duplicate copies of evidence considered by OWCP prior to the issuance of the December 14, 2017 decision. The Board has held that evidence that is duplicative of evidence previously of record does not warrant further merit review.¹¹ Therefore, she was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

Accordingly, as appellant's request for reconsideration did not meet the requirements for reopening her case, the Board finds that OWCP properly denied merit review.¹²

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).

¹⁰ *S.V.*, Docket No. 17-2012 (issued October 18, 2018).

¹¹ *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹² *S.V.*, *supra* note 10; *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *M.E.*, 58 ECAB 694 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 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