

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

R.K., Appellant)	
)	
and)	Docket No. 19-0099
)	Issued: June 20, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Atlanta, GA, Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 17, 2018 appellant, through counsel, filed a timely appeal from an April 20, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated June 6, 2017, 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 over the merits of this 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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 21, 2015 appellant, then a 58-year-old customer service representative (call center),³ filed a traumatic injury claim (Form CA-1), alleging that he injured his neck, left hip, and left wrist while in the performance of duty on December 14, 2015 when the hydraulic lift on the chair he was sitting in failed to suspend his weight, causing him to injure himself.

By decisions dated February 9 and April 14, 2016, OWCP denied the claim, finding that the factual evidence of record was insufficient to establish that the December 14, 2015 employment incident occurred as alleged.

Appellant subsequently requested reconsideration. By decision dated August 29, 2016, OWCP modified its prior decisions to find that he had established fact of injury. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed condition(s) and the accepted December 14, 2015 employment incident.

Appellant again requested reconsideration. By decisions dated December 8, 2016 and April 7 and June 6, 2017, OWCP denied modification of its prior decisions.

Appellant subsequently submitted reports dated May 18 and August 5, 2015, March 30, 2016, and January 11, 2017 from Dr. Jeff Traub, a Board-certified orthopedic surgeon, who diagnosed left shoulder impingement, cervical radiculopathy, and degenerative changes of the cervical spine. An October 12, 2015 magnetic resonance imaging (MRI) scan of the left shoulder which showed stress-induced osteoedema at the clavicular and acromial ends.

Appellant also submitted a narrative statement dated October 6, 2016 from him reiterating the factual and medical histories of his claim.

On April 2, 2018 appellant requested reconsideration and submitted multiple narrative statements reiterating the factual and medical histories of his claim. This submission included a narrative statement dated March 27, 2018 and a resubmission of his narrative statement dated October 6, 2016, accompanied by photographs of his old and new (hydraulic) office chairs.

Appellant also submitted a September 19, 2007 report from Dr. William Vanderyt, a Board-certified orthopedic surgeon, who diagnosed lateral epicondylitis of left elbow and indicated that appellant was reaching mail with his left arm constantly. Additionally, Dr. Vanderyt submitted a September 29, 2016 report from Countiss Williams, a nurse practitioner, who diagnosed neck pain and upper extremity radiculopathy secondary to C5-6 disc herniation and impingement syndrome, bilateral shoulders, and asserted that appellant had related that the

³ Appellant previously worked for the employing establishment as a city carrier.

hydraulics of his work chair constantly malfunctioned, causing it to lower suddenly and result in neck pain.

Appellant further resubmitted reports dated May 18 and August 5, 2015, March 30, 2016, and January 11, 2017 from Dr. Traub and an October 12, 2015 MRI scan of the left shoulder.

By decision dated April 20, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim finding that he failed to advance a relevant legal argument or submit relevant and pertinent new evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶ 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.⁷ 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.⁸

ANALYSIS

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 April 2, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, he also did not advance a relevant legal argument.

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *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.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

On reconsideration, appellant reiterated the factual and medical history of his claim in a number of narrative statements, including a narrative statement dated March 27, 2018 and a resubmission of his narrative statement dated October 6, 2016 to which he attached photographs. These contentions are not legal arguments addressing the underlying issue of whether he submitted sufficient medical evidence to establish a causal relationship between his diagnosed condition(s) and the accepted December 14, 2015 sitting incident at work. The Board has held that the submission of an argument which does not address the particular issue involved does not constitute a basis for reopening a case. As such, appellant's statements are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.⁹

Accordingly, 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).

The Board also finds that appellant failed to submit relevant and pertinent new evidence not previously considered by OWCP. The underlying issue on reconsideration was causal relationship, which requires submission of relevant medical evidence.¹⁰ Appellant submitted a September 19, 2007 report from Dr. Vanderyt, which predates the date of the alleged injury in the present claim. As this evidence did not address the relevant issue on reconsideration, it is insufficient to warrant further merit review.¹¹ Appellant also submitted a September 29, 2016 report from a nurse practitioner. This report does not constitute competent medical evidence because a nurse practitioner is not considered a "physician" as defined under FECA.¹² Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.¹³ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to compensation benefits.

Appellant resubmitted reports from Dr. Traub dated May 18 and August 5, 2015, March 30, 2016, and January 11, 2017 and an October 12, 2015 MRI scan, which were already of the record. Submitting evidence that repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case.¹⁴ Therefore, Dr. Traub's May 18 and August 5, 2015, March 30, 2016, and January 11, 2017 reports are insufficient to require OWCP to reopen the case for merit review.

⁹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁰ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ *D.K.*, 59 ECAB 141, 147 (2007).

¹² 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004) (physician assistants); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

¹³ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁴ *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

The Board accordingly finds that appellant has not met any of the requirements of 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

CONCLUSION

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).

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁵ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).