United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 19-0312**
	)	**Issued: June 18, 2019**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL PROTECTION SERVICE, Des Moines, IA, 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 November 28, 2018 appellant filed a timely appeal from a June 21, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since OWCP's last merit decision, dated March 26, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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] 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On August 24, 2016 appellant, then a 34-year-old physical security specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 5, 2016 she sustained a possible cervical fracture due to a motor vehicle accident while in the performance of duty. She explained that she was approaching a barbed-wire gate and attempted to slam on the brakes, but her vehicle skidded through a barbed-wire gate causing her side airbags to deploy. Appellant stopped work on August 11, 2016.

An August 17, 2016 magnetic resonance imaging (MRI) scan of appellant's cervical spine indicated no evidence of a fracture, herniated discs, or stenosis, and also indicated normal soft tissue findings. A mild straightening of cervical lordosis was noted.

In an August 23, 2016 note, Dr. Hanna Engel-Brower, Board-certified in family medicine, reported that appellant was confined to desk work and indicated that she was to undergo physical therapy.

In a development letter dated August 25, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her traumatic injury claim. Appellant was advised of the medical and factual evidence needed. OWCP afforded her 30 days to submit the requested evidence.

In a September 2, 2016 attending physician's report (Form CA-20), Dr. Engel-Brower diagnosed neck pain which she opined was causally related to appellant's August 5, 2016 motor vehicle accident. She noted that appellant's cervical spine x-ray revealed reversal of the cervical lordosis and body height loss at C6. The cervical spine MRI scan revealed normal findings.

By decision dated September 30, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a firm medical diagnosis which could be reasonably attributed to the accepted August 5, 2016 employment incident.

On October 26, 2016 appellant requested an oral hearing before an OWCP hearing representative.

In an October 14, 2016 medical note, Dr. Engel-Brower discussed appellant's physical therapy treatment and work restrictions, noting that she had been released to full-duty work on September 19, 2016.

A hearing was held on May 10, 2017 and appellant testified in support of her claim. She noted that her cervical x-rays showed a mild reversal of the usual cervical lordosis and her MRI scan also revealed a mild straightening of the cervical lordosis that was not as prominent. Appellant reported that her physician informed her that this was "a kind of whiplash" for which she underwent a course of physical therapy. She reported continued symptoms following her return to full-duty work which subsequently resulted in low back symptoms due to inflammation of her neck. The hearing representative advised her of the medical evidence needed in support of her claim and the record was held open for 30 days.

Following the hearing, a form dated August 25, 2016 was received on which appellant advised that she had previously undergone a micro discectomy. She also reported current symptoms of neck stiffness.

In an undated note received on July 10, 2017, Dr. Engel-Brower reported that appellant had been evaluated in her clinic for neck pain on August 8, 2016 following a work related motor vehicle accident which had occurred three days prior. She noted a muscle spasm in the cervical spine which was due to a whiplash injury. Dr. Engel-Brower noted that appellant had muscle spasms and her x-rays revealed evidence of a reversal of cervical lordosis. Appellant was placed in a cervical collar to stabilize the cervical spine and restricted from working until a cervical MRI scan could be performed. Dr. Engel-Brower noted that appellant's August 17, 2016 cervical MRI scan revealed persistent, but improving, straightening of the cervical spine which was also due to muscle spasm.

By decision dated July 24, 2017, OWCP's hearing representative affirmed the September 30, 2016 decision, finding that the evidence of record was insufficient to establish a firm medical diagnosis which could be reasonably attributed to the accepted August 5, 2016 employment incident.

In an undated narrative statement received on December 26, 2016, appellant argued that Dr. Engel-Brower's report previously submitted explained how the motor vehicle accident caused her cervical spine muscle spasms and whiplash injury. She noted resubmission of the report and the cervical spine x-ray and MRI scan studies, as well as submission of two pictures of her vehicle which showed the barbed wire gate and where the airbags had deployed.

By decision dated March 26, 2018, OWCP denied modification of the July 24, 2017 decision finding that the evidence of record failed to establish a firm medical diagnosis which could be reasonably attributed to the accepted August 5, 2016 employment incident.

On June 5, 2018 appellant requested reconsideration of OWCP's decision.

In support of her claim, appellant submitted physical therapy notes dated August 25 and September 9, 2016 documenting treatment for neck pain. She also submitted an unsigned and undated medical note received on June 5, 2018 which was a partial duplicate of Dr. Engel-Brower's previously submitted July 26, 2017 note. The medical note reported appellant's muscle spasm of the cervical spine was due to a whiplash injury that was caused from the airbags deploying as a result of the August 5, 2016 motor vehicle accident. Findings pertaining to cervical spine x-ray and MRI scan studies were discussed.

Appellant also resubmitted photographs related to the August 5, 2016 motor vehicle accident.

By decision dated June 21, 2018, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that her reconsideration request neither raised substantive legal questions, nor included new and relevant pertinent evidence sufficient to warrant further merit review 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.[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: (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.[6] 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.[7]

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).[8]

In her timely application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and she did not advance a new and relevant legal argument not previously considered.[9] Consequently, she is not entitled to 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).

The Board notes that the underlying issue in this case was whether appellant sustained a diagnosed medical condition causally related to the accepted August 5, 2016 employment incident. That is a medical issue which must be addressed by relevant medical 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). 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.

[6] 20 C.F.R. § 10.606(b)(3).

[7] *Id.* at § 10.608.

[8] *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

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

considered.[10] In support of her request for reconsideration appellant submitted physical therapy notes. As these notes were not signed or reviewed by a physician, they do not constitute competent medical evidence and are thus irrelevant to the critical issue of causal relationship.[11] The Board has held that evidence which is irrelevant to the claim is insufficient to warrant a merit review.[12]

Appellant also submitted a partial duplicate of Dr. Engel-Brower's July 26, 2017 note, discussing diagnostic testing, which was previously considered in the prior OWCP merit decisions, as well as photographs from the motor vehicle accident already of record. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[13]

In this case, appellant failed to submit relevant and pertinent new evidence establishing a firm medical diagnosis.[14] Thus, appellant is not entitled to a review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).[15]

Accordingly, 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.[16]

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] *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

[11] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists 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). *C.L.*, Docket No. 17-0354 (issued July 10, 2018) (physical therapists are not considered physicians under FECA).

[12] *J.W.*, Docket No. 18-0800 (issued November 19, 2018).

[13] *D.T.*, Docket No. 17-1734 (issued January 18, 20180; *Richard Yadron*, 57 ECAB 207 (2005).

[14] *P.C.*, Docket No. 18-1703 (issued March 22, 2019); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

[15] *Id.*

[16] *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 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