

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

S.S., Appellant)	
)	
and)	Docket No. 19-0066
)	Issued: May 8, 2019
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, Arlington, VA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 10, 2018 appellant filed a timely appeal from a May 31, 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 March 8, 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 31, 2018 decision, OWCP received additional evidence. 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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 18, 2017 appellant, then a 52-year-old deputy marshal, filed a traumatic injury claim (Form CA-1) for a wrist/arm injury, which he attributed to using a battering ram on January 16, 2017 to breach the door of a fugitive's residence while in the performance of duty. He indicated that he struck the door three times with the ram and developed wrist pain that radiated up his arm. The employing establishment indicated that appellant received continuation of pay (COP) beginning January 16, 2017.³

A January 17, 2017 report from Dr. Jeffrey N. Guttman, a Board-certified orthopedic surgeon, related that appellant presented with left wrist pain and was "[status post] injury yesterday while knocking down door ... using a battering ram ... at the time of injury." Dr. Guttman noted the pain to be moderately severe, sharp, and localized to the distal ulna, and that pain is worse with forearm rotation. Under medical history, he concluded, "noncontributory to the current problem." In his examination of appellant's left wrist, Dr. Guttman noted soft tissue swelling, tenderness over the distal ulna, that range of motion testing was limited by pain, strength was limited by pain, but he found no gross instability on stress testing. After a left wrist x-ray taken the same day, he diagnosed a distal ulna fracture, and a triangular fibrocartilage complex (TFCC) tear, and prescribed a wrist support brace. Dr. Guttman authorized magnetic resonance imaging (MRI) scan, prescribed nonsteroidal anti-inflammatory drugs, and indicated that appellant could perform only light-duty work until further notice. He ordered a follow-up appointment after the MRI scan.

In Part B of an undated authorization for examination and/or treatment (Form CA-16), Dr. Guttman diagnosed left wrist sprain, with a differential (rule out) diagnosis of occult fracture and TFCC tear.⁴ He checked a box marked "Yes," indicating his belief that appellant's condition was caused or aggravated by appellant's employment.

A January 18, 2017 left wrist MRI scan revealed: (1) an incomplete fracture at the base of the ulnar styloid; (2) ulnar and central TFCC tear; (3) a lunotriquetral ligament tear; and (4) ulnar subluxation of the extensor carpi ulnaris (ECU) tendon with tear of the subsheath.

In a February 21, 2017 follow-up report, Dr. Guttman diagnosed left distal ulna fracture and TFCC tear with a January 16, 2017 date of injury. He prescribed occupational therapy and advised appellant to follow up in four weeks. In his March 21, 2017 follow-up treatment notes,

³ Under OWCP File No. xxxxxx449, appellant has an accepted traumatic injury claim for right finger closed dislocation, left wrist sprain, and left elbow contusion, with a July 21, 2010 date of injury. Under OWCP File No. xxxxxx190, he has an accepted traumatic injury claim for left wrist sprain and bilateral knee contusion, with a February 24, 2006 date of injury. To date these claims have not been administratively combined with the current claim, OWCP File No. xxxxxx265.

⁴ On January 17, 2017 the employing establishment authorized medical treatment for appellant's wrist/arm (Form CA-16).

Dr. Guttman continued to diagnose left distal ulna fracture and TFCC tear. He noted that appellant's pain was improving and less sharp, while remaining mild-to-moderately severe and was worse with forearm rotation. Dr. Guttman provided instructions on a home exercise program and recommended continued physical therapy. Appellant was to follow up in another four weeks. When appellant returned on April 24, 2017, his left wrist diagnoses were unchanged and Dr. Guttman administered a corticosteroid injection. Dr. Guttman advised appellant to follow up in two to three weeks.

By development letter dated May 19, 2017, OWCP noted that appellant's claim originally appeared to be a minor injury that resulted in minimal or no lost time from work. It further noted that it initially authorized payment for a limited amount of medical expenses, but because the medical expenses had exceeded \$1,500.00, the case had been reopened for consideration. OWCP informed appellant that his claim was deficient and advised him of the type of medical evidence needed to establish the claim.⁵ It afforded appellant 30 days to submit the necessary medical evidence.

In a May 22, 2017 follow-up report, Dr. Guttman continued to diagnose left distal ulna fracture and TFCC tear with a January 16, 2017 date of injury "while knocking down door." He advised that appellant was able to return to work full duty with no restrictions.

By decision dated June 30, 2017, OWCP denied appellant's claim, finding that he had not met his burden of proof to establish causal relationship between the January 16, 2017 employment incident and the claimed left wrist conditions.

Following its June 30, 2017 decision, OWCP received requests for physical/occupational therapy from Dr. Guttman dated February 21, March 21, and April 24, 2017. It also received a February 27, 2017 initial physical therapy evaluation, and physical therapy progress notes through April 21, 2017.

On July 31, 2017 appellant requested reconsideration. He submitted an amended copy of the Form CA-16, which was dated January 25, 2017. Dr. Guttman noted that appellant injured his left wrist at work. The form report also included findings of left wrist distal ulna fracture and TFCC tear. Dr. Guttman also noted light-duty work restrictions effective January 17, 2017.

By decision dated October 26, 2017, OWCP, following a merit review, denied modification of the prior decision, finding that the evidence submitted remained insufficient to establish causal relationship.

OWCP subsequently received additional physical therapy treatment records dated through June 16, 2017.

On December 12, 2017 appellant requested reconsideration. He submitted a December 1, 2017 report from Dr. Guttman, which noted that he previously treated appellant for a left distal ulna fracture and TFCC tear status post a work-related injury on January 16, 2017. Dr. Guttman

⁵ OWCP noted that appellant's physician should differentiate the current claimed injury from the symptoms of his preexisting left wrist injuries as noted under OWCP File Nos. xxxxxx190 and xxxxxx449.

further noted that, at the time of injury, appellant worked as a U.S. Marshal and was injured while using a battering ram to knock down a door. He explained that appellant's history, physical examination, x-rays, and MRI scans were all consistent with the diagnosis. Dr. Guttman also indicated that appellant denied any prior history of wrist pain or injury. In closing, he stated that it was his opinion, within a reasonable degree of medical certainty, that the diagnosis was directly causally related to the work-related injury on January 16, 2017, as described by appellant.

By decision dated March 8, 2018, OWCP reviewed the merits of the claim based on Dr. Guttman's note of December 1, 2017. However, it denied modification of the prior decision, finding that the newly submitted evidence remained insufficient to establish causal relationship.

On May 23, 2018 appellant again requested reconsideration *via* the appeal request form that accompanied OWCP's March 8, 2018 merit decision. No additional evidence was received.

By decision dated May 31, 2018, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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.⁸ 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.⁹ 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.¹⁰

⁶ 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).

⁷ 20 C.F.R. § 10.607.

⁸ *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.

⁹ *Id.* at § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

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).

On May 23, 2018 appellant requested reconsideration *via* the appeal request form that accompanied OWCP's March 8, 2018 decision. He neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirements under 20 C.F.R. § 10.606(b)(3).¹¹

The Board further finds that appellant did not submit any relevant and pertinent new evidence in support of his May 23, 2018 request for reconsideration. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

As appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) in his May 23, 2018 request for reconsideration, the Board finds that, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹¹ *R.R.*, Docket No. 18-1562 (issued February 22, 2019).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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