

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

M.B., Appellant)	
)	
and)	Docket No. 19-0828
)	Issued: September 17, 2019
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Omaha, NE, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 8, 2019 appellant filed a timely appeal from a November 16, 2018 merit decision and a January 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a back condition causally related to the accepted May 31, 2018 employment incident; and (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the January 22, 2019 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." Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 September 12, 2018 appellant, then a 36-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on May 31, 2018 he sustained a muscle spasm to the mid to lower back when the tractor he was driving was struck by a motor vehicle while in the performance of duty. He did not stop work. The employing establishment acknowledged on the reverse side of the claim form that the incident occurred while appellant was in the performance of duty.

A June 1, 2018 report prepared by Dr. John B. Jones, a Board-certified family practitioner, and finalized by Dr. Patsy A. Uken, a Board-certified diagnostic radiologist, noted that appellant was driving a tractor with a mower when another vehicle struck the mower, which jerked the tractor, and injured appellant's back. Dr. Jones indicated that appellant had been previously diagnosed with mild scoliosis. He assessed acute bilateral low back pain without sciatica, and noted that an x-ray of appellant's lumbar spine revealed no spondylosis, lumbar compression fractures, or subluxation.

In a September 17, 2018 development letter, OWCP informed appellant that additional medical evidence was needed to establish his claim. It advised him of the type of factual and medical evidence needed and afforded him 30 days to submit the necessary evidence. No further evidence was received.

By decision dated November 16, 2018, OWCP accepted that the May 31, 2018 employment incident occurred as alleged, but denied appellant's traumatic injury claim because the evidence of record did not contain a diagnosed medical condition in connection with the accepted employment incident.

On January 15, 2019 appellant requested reconsideration. No further evidence was submitted.

By decision dated January 22, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA,³ that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally

³ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

related to the employment injury.⁴ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁶ The second component is whether 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 evidence.⁸ 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 employee.⁹ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a back condition causally related to the accepted May 31, 2018 employment incident.

In support of his claim, appellant submitted a June 1, 2018 report from Dr. Jones. However, while Dr. Jones noted appellant's history of injury, he only assessed acute bilateral low back pain without sciatica and did not provide a medical diagnosis. The Board has found that pain

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁹ *L.D.*, *id.*; *see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁰ *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

is a symptom and not a specific medical diagnosis.¹¹ Lacking a firm diagnosis and rationalized medical opinion regarding causal relationship, this report is of no probative value.¹²

Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.¹³ The Board finds that the record lacks rationalized medical evidence which explains how the accepted May 31, 2018 employment incident physiologically caused a back condition.¹⁴ As appellant has not provided rationalized medical evidence establishing a back condition causally related to the accepted May 31, 2018 employment incident, he has not met his burden of proof.¹⁵

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128 (a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.¹⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁷ 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.¹⁸

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.¹⁹ When a timely application for reconsideration does not meet at least one

¹¹ Findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury medical determination. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.4a(6) (August 2012).

¹² *P.C.*, Docket No. 18-0167 (issued May 7, 2019).

¹³ *See A.S.*, Docket No. 17-2010 (issued October 12, 2018); *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

¹⁴ *See J.S.*, Docket No. 17-0507 (issued August 11, 2017).

¹⁵ *K.L.*, Docket No. 18-1029 (issued January 9, 2019).

¹⁶ 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.607.

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. *Supra* note 12 at 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.

¹⁹ *Id.* at § 10.606(b)(3); *see J.B.*, Docket No. 18-1531 (issued April 11, 2019).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.²⁰

ANALYSIS -- ISSUE 2

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 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. Accordingly, he 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).

Appellant also did not submit any evidence on reconsideration addressing the issue under consideration therefore there was no basis to reopen the claim. As he did not submit new and relevant pertinent evidence in support of his claim,²¹ he was not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that 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.²²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a back condition, causally related to the accepted May 31, 2018 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁰ *Id.* at § 10.608.

²¹ *Supra* note 19.

²² *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 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 January 22, 2019 and November 16, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 17, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board