

FACTUAL HISTORY

On May 17, 2018 appellant, then a 40-year-old criminal investigator (special agent), filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2018 he sustained soreness and aching of the upper back when his vehicle was struck from behind while in the performance of duty.

In a May 24, 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, including medical evidence from a qualified physician which provided a diagnosis and a rationalized explanation as to how the employment incident caused the diagnosed condition. OWCP afforded appellant 30 days to submit the necessary evidence.

In progress notes dated May 17, 2018, Dr. Norman J. Kakos, a Board-certified internist, noted appellant's complaints of pain between the shoulder blades. Appellant told Dr. Kakos that he had been involved in a motor vehicle accident (MVA) in which he was rear-ended. On physical examination of the spine, Dr. Kakos observed no tenderness to palpation. He assessed appellant had back pain after an MVA.

A diagnostic report dated May 21, 2018 noted results of appellant's thoracic spine x-rays taken on that date, which demonstrated unremarkable vertebral body height and alignment with no definite bony destructive change, paraspinal mass, or acute fracture site. A diagnostic report of the same date noted that x-rays of appellant's cervical spine demonstrated a slight contour deformity of the superior endplate at C6, which was of questionable significance, with otherwise unremarkable results.

By decision dated June 27, 2018, OWCP denied the claim finding that appellant had not established the medical component of fact of injury. While it accepted that the employment incident on May 9, 2018 occurred as alleged, it found that no valid diagnosis had been established in connection with the incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

A cervical spine x-ray report dated May 17, 2018 demonstrated questionable findings in relation to the spinous process at C5, with no other significant findings. An x-ray report of appellant's lumbar spine of even date demonstrated nonrib-bearing lumbar-type vertebral bodies with probable transitional L5; unremarkable vertebral body height and alignment; relatively well-preserved disc spaces with probable mild narrowing at L4-5; and no definite spondylosis, bony destructive change, or acute fracture site.

On July 5, 2018 Dr. Kakos examined appellant for a complaint of neck pain. He noted that appellant had no exacerbation of a preexisting condition due to the motor vehicle incident. Physical examination of the musculoskeletal system was negative for symptoms. Dr. Kakos diagnosed neck pain and hematuria following an MVA.

In a letter dated July 9, 2018, Dr. Kakos noted that appellant had been seen in his office on May 17, 2018 for an MVA that took place on May 9, 2018, after which appellant complained of

neck and back pain. X-rays were negative and there was no exacerbation of preexisting medical conditions due to the incident. Dr. Kakos diagnosed musculoskeletal pain.

On August 13, 2018 appellant requested reconsideration of OWCP's June 27, 2018 decision.

By decision dated August 16, 2018, OWCP denied modification finding that appellant had not submitted evidence containing a valid medical diagnosis in connection with the incident of May 9, 2018.

On September 25, 2018 appellant requested reconsideration. With his request, OWCP received a statement from a supervisor dated September 21, 2018, which verified that appellant was in the performance of duty on May 9, 2018 when he was involved in an MVA. It also received a police report dated May 9, 2018. Appellant also resubmitted Dr. Kakos' letter of July 9, 2018.

By decision dated October 11, 2018, OWCP denied appellant's request for reconsideration of the merits of appellant's claim.

On November 28, 2018 appellant requested reconsideration.

In a letter dated February 26, 2019, OWCP informed appellant that reconsideration was not an appeal option from the October 11, 2018 nonmerit decision. It further informed him that, even if he had indicated that he was requesting reconsideration of the June 27 or August 16, 2018 decisions, he had not submitted any new evidence or argument requiring a merit review of his case, and that OWCP would have once again refused to review the prior decisions. OWCP explained that no further action would be taken on appellant's request and that, if he wished to request reconsideration of a merit decision in his case, he must make such a request in writing within one year of the date of the decision for which reconsideration is requested.

Appellant submitted an unsigned note dated May 17, 2017 containing information about his visit with Dr. Kakos on that date, for an admitting diagnosis of MVA, as well as x-ray orders dated May 21, 2018, which contained the same diagnosis. He resubmitted the thoracic and cervical x-rays of May 17 and 21, 2018, as well as Dr. Kakos' letter of July 9, 2018.

On May 30, 2019 appellant requested reconsideration of OWCP's August 16, 2018 decision.

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

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain

² 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).

limitations in exercising its authority.³ 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.⁴ A timely request 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.⁵ When a timely request 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.⁶

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).

Although appellant timely requested reconsideration, he neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance relevant legal arguments 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).

The Board further finds that appellant did not fulfill the third requirement under 20 C.F.R. § 10.606(b)(3) because he did not submit relevant and pertinent new evidence not previously considered by OWCP. OWCP previously denied his claim because the medical evidence of record did not include a definitive diagnosis in connection with the accepted incident of May 9, 2018. In support of his reconsideration request, appellant submitted an unsigned note dated May 17, 2017 containing information about his visit with Dr. Kakos, as well as x-ray orders dated May 21, 2018. He also resubmitted thoracic and cervical x-ray reports from May 17 and 21, 2018, as well as Dr. Kakos' letter of July 9, 2018. The Board finds that the unsigned note dated May 17, 2018 did not contain a valid diagnoses of a condition, nor did the x-ray orders dated May 21, 2018. Although evidence submitted on reconsideration need not carry appellant's burden entirely to warrant reopening the claim for merit review, the new evidence must at least be relevant and pertinent to the issue(s) upon which the claim was denied.⁷ While this evidence is new, it does not address the relevant issues regarding the claim because it does not provide a definitive medical

³ 20 C.F.R. § 10.607.

⁴ *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.

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(a), (b).

⁷ *R.R.*, Docket No. 18-1562 (issued February 22, 2019).

diagnosis.⁸ The thoracic and cervical x-rays of May 17 and 21, 2018, as well as Dr. Kakos' letter of July 9, 2018, were before OWCP at the time of its August 16, 2018 decision and were reviewed by OWCP in that decision. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁹

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.¹⁰

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

⁸ *Id.*

⁹ *See J.B.*, Docket No. 18-1531 (issued April 11, 2019); *D.K.*, 59 ECAB 141 (2007).

¹⁰ *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).