

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

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H.A., Appellant)	
)	
and)	Docket No. 18-1253
)	Issued: April 23, 2020
DEPARTMENT OF THE AIR FORCE, AIR)	
MOBILITY COMMAND, CHARLESTON AIR)	
FORCE BASE, SC, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 6, 2018 appellant filed a timely appeal from a March 2, 2018 merit decision and an April 9, 2018 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 medical condition causally related to the accepted October 7, 2017 employment incident; and (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 9, 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 caserecord 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.*

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 October 9, 2017 appellant, then a 46-year-old lead firefighter, filed a traumatic injury claim (Form CA-1) alleging that on October 7, 2017 he sustained right shoulder pain when a left front tire blew out on a vehicle in which he was riding while in the performance of duty. The employing establishment acknowledged that the alleged incident occurred in the performance of duty and it agreed that its knowledge of the facts of the incident were in agreement with appellant's statement. Appellant stopped work that day and returned to full-duty work without restrictions on October 13, 2017.³

In a development letter dated October 17, 2017, OWCP advised appellant that he had submitted insufficient evidence to establish his claim. It informed him of the type of factual and medical evidence needed and attached a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary information.

Appellant submitted one page of a ten-page "patient summary" report dated October 7, 2017, which noted that the care provider was Dr. Jeremy P. Skotko, Board-certified in emergency medicine, and that he was discharged with follow-up instructions. This summary notes in the diagnosis section of the report "MVC (motor vehicle collision)."⁴

By decision dated November 16, 2017, OWCP found that appellant had established that the October 2, 2017 incident occurred as alleged, but denied the claim finding that he had not submitted medical evidence containing a diagnosis in connection with this incident.

OWCP subsequently received a series of reports dated October 7, 2017. The reports included pre-arrival and triage notes by Ashlee A. Sumner, a registered nurse, as well as a treatment and procedure note by Stephanie R. Mitchell, a registered nurse. In a final report, Dr. Skotko noted the history of the October 7, 2017 incident and appellant's complaints of right shoulder pain with tingling in his fingers. He noted that appellant shared his history of multiple surgeries to the right shoulder. Dr. Skotko noted examination findings of tenderness to palpation of the right shoulder. He noted his impression of an "MVC" and recommended that appellant use an arm sling for comfort. An accompanying right shoulder x-ray report by Dr. Amit Kumar Sanghi, an osteopath Board-certified in diagnostic radiology, who found no fracture or dislocation, normal mineralization, normal soft tissues, no significant degenerative changes, and prior "rotator cuff ankle repair." Dr. Sanghi found no acute findings.

On December 8, 2017 appellant requested reconsideration of OWCP's November 16, 2017 decision. With his request, he resubmitted the October 7, 2017 final report of Dr. Skotko.

³ The record includes a position description for lead firefighter and a January 8, 2017 Notification of Personnel Action Standard Form (Form SF-50).

⁴ The Board notes that this document contains the markings from a facsimile machine which indicate that not all pages of the document as submitted to OWCP are contained in the record as presented to the Board.

By decision dated March 2, 2018, OWCP denied modification of its November 16, 2017 decision.

On March 29, 2018 appellant again requested reconsideration.

With his request, appellant submitted a March 20, 2018 update of Dr. Skotko's October 7, 2017 final report. The report was identical to his final report previously submitted except that Dr. Skotko provided an updated impression to include shoulder pain.

By decision dated April 9, 2018, OWCP denied appellant's request for reconsideration of the merits of his 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,⁵ 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 related to the employment injury.⁶ 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.⁷

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her condition relates to the employment incident.⁸

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of

⁵ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *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).

⁸ *See B.B.*, Docket No. 19-1541 (issued March 2, 2020); *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁹ *S.A.*, Docket No. 19-1765 (issued March 13, 2020); *T.H.*, 59 ECAB 388 (2008).

the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted October 7, 2017 employment incident.

In support of his claim, appellant has submitted medical documentation from his October 7, 2017 treatment with Dr. Skotko. In the initial October 7, 2017 “patient summary,” which noted that Dr. Skotko was the care provider, the “diagnosis section” listed an “MVC.” Appellant subsequently provided Dr. Skotko’s October 7, 2017 final report which included physical examination findings and noted his impression of an “MVC.” While these reports establish that a motor vehicle incident occurred on October 7, 2017, neither report provides a valid diagnosis. The mere acknowledgment of how an incident occurred, or that it caused an injury, does not constitute a valid medical diagnosis necessary to establish fact of injury.¹¹

An October 7, 2017 report by Dr. Sanghi noted diagnostic findings from x-rays completed on that date. However, the Board has held that diagnostic studies lack probative value, as to the issue of causal relationship, as they do not address whether the employment incident caused any of the diagnosed conditions.¹²

Appellant also presented notes from Ms. Mitchell and Ms. Sumner dated October 7, 2017. However, these notes do not constitute competent medical evidence because a nurse is not considered a “physician” as defined under FECA.¹³ As such, this evidence is also insufficient to meet appellant’s burden of proof.

As appellant has not submitted medical evidence establishing a medical condition in relation to the accepted October 7, 2017 employment incident, the Board finds that he has not met his burden of proof to establish his claim.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁰ *D.J.*, Docket No. 19-0130 (issued January 29, 2020).

¹¹ *See G.W.*, Docket No. 16-0517 (issued April 27, 2016).

¹² *See J.S.*, Docket No. 17-1039 (issued October 6, 2017).

¹³ *See M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *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).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹⁴

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁸

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).

On reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. As such, he was not entitled to a 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).

With his request for reconsideration appellant submitted an updated version of Dr. Skotko's final report dated October 7, 2017. The report was identical to the October 7, 2017 final report previously of record except that, in the newly submitted report, Dr. Skotko also provided a new impression of "shoulder pain." The Board has held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute

¹⁴ 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1790 (issued March 11, 2020).

¹⁵ 20 C.F.R. § 10.606(b)(3); *L.S.*, *id.*; *D.K.*, 59 ECAB 141 (2007).

¹⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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. Chapter 2.1602.4b.

¹⁷ *Id.* at § 10.608(a); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

¹⁸ *Id.* at § 10.608(b); *see C.H.*, *supra* note 6.

a basis for reopening the merits of a case.¹⁹ This updated report also fails to provide a valid medical diagnosis and therefore is irrelevant to the underlying issue in the claim as the Board has held that pain is a symptom, not a medical diagnosis.²⁰ Thus, he is not entitled to a review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).

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.²¹

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted October 7, 2017 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).

ORDER

IT IS HEREBY ORDERED THAT the April 9 and March 2, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 23, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁹ *A.K.*, Docket No. 19-1210 (issued November 20, 2019); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *Richard Yadron*, 57 ECAB 207 (2005).

²⁰ *See T.G.*, Docket No. 19-0904 (issued November 25, 2019).

²¹ *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request 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 request for reconsideration without reopening the case for a review on the merits).