

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

_____)	
J.A., Appellant)	
)	
and)	Docket No. 19-1817
)	Issued: April 6, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PATROL, Glynco, GA,)	
Employer)	
_____)	

Appearances:
Marilyn Anderson, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 27, 2019 appellant, through a representative, filed a timely appeal from a March 12, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated December 12, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the March 12, 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." 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 March 1, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 31, 2018 appellant, then a 40-year-old border patrol officer, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2018 he was participating in mandatory tactical wrestling training with a partner and sustained a left knee strain while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that he was in the performance of duty when injured. Appellant did not immediately stop work.

In a development letter dated November 7, 2018, OWCP informed appellant that the evidence submitted was insufficient to establish the claim. It advised him of the type of medical and factual evidence needed, including a detailed description of the August 9, 2018 employment incident and a narrative report from his physician explaining how and why that event would cause the claimed left knee strain. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant received treatment from Dr. Joe S. Greene, a Board-certified family practitioner, from August 10 to 20, 2018, for a left knee injury which occurred after a student rolled over him during tactical response training. He reported tenderness with weight bearing. Dr. Greene diagnosed knee pain and provided work restrictions. In a health services notice of training activities status report dated August 13, 2018, he cleared appellant for training.

On November 26, 2018 appellant was treated by Dana Fanning, a physician assistant, for work-related left knee pain. He reported twisting his left knee during a basic training drill. Findings on examination revealed an antalgic gait, positive medial joint line tenderness, positive pain on flexion, and positive McMurray's test. An x-ray of the left knee revealed no abnormalities. Ms. Fanning diagnosed joint pain of the lower leg and probable medial meniscus tear and referred appellant for a magnetic resonance imaging (MRI) scan. Appellant was instructed to avoid twisting, running, and squatting. In a certificate of care report dated November 26, 2018, Ms. Fanning advised that appellant should not stand for more than three hours without a break.

In an attending physician's report (Form CA-20) dated November 27, 2018, Dr. Michael Ayers, a Board-certified orthopedist, noted that on August 9, 2018 appellant's foot got caught in a utility belt of another employee during a basic training drill. He checked a box marked "yes" indicating that the diagnosed conditions were caused or aggravated by an employment activity, noting that the injury was caused while attending basic training. Dr. Ayers returned appellant to work with restrictions.

By decision dated December 12, 2018, OWCP accepted that the August 9, 2018 employment incident occurred as alleged. However, it denied appellant's claim finding that the evidence of record did not contain a medical diagnosis in connection with the accepted

employment incident. Consequently, OWCP found that he had not established the medical component of fact of injury.⁴

Appellant subsequently resubmitted reports from Ms. Fanning dated November 26, 2018.

On March 1, 2019 appellant requested reconsideration. He noted that paperwork for his claim and the Form CA-1 was not handled properly because there was an incorrect address on the original CA-1 form.

By decision dated March 12, 2019, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

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.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

⁴ On February 8, 2019 appellant filed a notice of recurrence of disability (Form CA-2a). He claimed medical treatment and time loss from work due to tightness and an inability to bend the left knee. Appellant indicated that he was not permitted treatment pursuant to a Form CA-16 or continuation of pay and sought these allowances. In correspondence dated February 13, 2019, OWCP informed him that his traumatic injury claim was denied on December 12, 2018. As such, it could not consider a recurrence of a denied claim. OWCP advised that if appellant disagreed with OWCP's denial of his claim he could exercise his appeal rights attached to that decision.

⁵ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁶ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *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 (iFECS). Chapter 2.1602.4b.

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

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).

In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law.¹⁰ Consequently, he is not entitled to review of the merits of his claim based on the first above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board finds that appellant did set forth a new legal argument in his request for reconsideration. Appellant asserted on the request form that OWCP had not used his proper address in the development of his claim. While new, however, this argument is not relevant to the underlying issue of the claim, which is whether he had met his burden of proof to establish a medical diagnosis in relation to the accepted employment incident. A medical diagnosis can only be provided with the submission of medical evidence.¹¹ Consequently, appellant is also not entitled to review of the merits of his claim based on the second above-noted requirement under 20 C.F.R. § 10.606(b)(3).

In support of his request for reconsideration, appellant resubmitted reports from a physician assistant. The Board notes that these reports were previously of record and addressed by OWCP in its December 12, 2018 merit decision. As this evidence is duplicative, it does not constitute a basis for reopening the case.¹² A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence. In this case, appellant did not submit any relevant and pertinent new evidence in support of his claim and he is not entitled to merit review based on the third requirement under section 10.606(b)(3).¹³

On appeal appellant, through his representative, asserts that he submitted new and relevant medical evidence in support of his claim and OWCP improperly denied merit review. As noted above, appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).¹⁴

Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's March 1, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ *E.M.*, Docket No. 18-1546 (issued December 12, 2019); *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹¹ *K.N.*, Docket No. 18-1540 (issued January 7, 2019); *E.T.*, Docket No. 14-1087 (issued September 5, 2014).

¹² *J.S.*, Docket No. 18-0726 (issued November 5, 2018).

¹³ *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

¹⁴ *L.S.*, Docket No. 18-0367 (issued September 23, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2020
Washington, DC

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

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

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