United States Department of Labor
Employees' Compensation Appeals Board

S.F., Appellant	)	
and	)	**Docket No. 18-0516**
	)	**Issued: February 21, 2020**
DEPARTMENT OF THE ARMY, MADIGAN ARMY MEDICAL CENTER, JOINT BASE LEWIS-McCHORD, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 16, 2018 appellant filed a timely appeal from a September 27, 2017 merit decision and a January 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 her burden of proof to establish an injury causally related to the accepted July 17, 2017 employment incident; and (2) whether OWCP

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. 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 evidence for the first time on appeal. *Id*.

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

FACTUAL HISTORY

On August 11, 2017 appellant, then a 32-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that she injured her left leg and knee after being hit by a vehicle when walking in a crosswalk while in the performance of duty. She stopped work that day.

An x-ray of the left leg dated August 1, 2017 demonstrated a nondisplaced oblique recent fracture at the fibular head.

In an e-mail message dated August 15, 2017, the employing establishment indicated that appellant was on an authorized lunch break when she was struck in a crosswalk just outside of an installation on the way to the GSA parking lot across from her duty station.

In an August 18, 2017 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

The employing establishment submitted an additional statement on August 25, 2017 reiterating that appellant sustained an injury at work during an official, scheduled lunch break while leaving a federally-owned premises and crossing the street to a parking lot owned by the premises. It also attached a map of the location.

In an attending physician's report (Form CA-20) dated August 29, 2017, Kelsey Platt, a nurse practitioner, diagnosed a fracture of the left proximal fibula and checked a box marked "No," indicating her opinion that appellant's condition was not caused or aggravated by an employment activity.

In a Form CA-20 dated September 6, 2017, Aaron Von Krueger, a physician assistant, diagnosed fracture of the left proximal fibula and checked a box marked "No" indicating his opinion that appellant's condition was not caused or aggravated by an employment activity.

On September 19, 2017 Mr. Von Krueger advised that appellant should be excused from work on September 5 and 6, 2017 for medical reasons and then released to return to work on September 7, 2017.

In a September 25, 2017 note, Ms. Platt prescribed physical therapy for appellant's left knee.

By decision dated September 27, 2017, OWCP accepted that the July 17, 2017 incident occurred as alleged, but denied appellant's claim finding that she had not established fact of injury as she failed to submit medical evidence from a physician containing a medical condition in connection with the employment incident.

Appellant subsequently submitted an August 17, 2017 report from Ms. Platt who advised that, due to her leg injury and her use of crutches, appellant was unable to perform her regular job

duties. Ms. Platt opined that if no light-duty options were available, appellant would be totally disabled from work for the period August 17 to 31, 2017.

On December 15, 2017 appellant requested reconsideration. She resubmitted an x-ray of her left leg dated August 1, 2017, a Form CA-20 dated August 29, 2017 from Ms. Platt, and a Form CA-20 dated September 6, 2017 from Mr. Von Krueger.

By decision dated January 3, 2018, OWCP denied appellant's request for reconsideration without a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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,[4] 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.[5] 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.[6]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[7] There are 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.[8] The second component is whether the employment incident caused a personal injury.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish an injury causally related to the accepted July 17, 2017 employment incident.

Appellant submitted reports from Ms. Platt, a nurse practitioner, and Mr. Von Krueger, a physician assistant. These documents do not constitute competent medical evidence because

[3] *Supra* note 1.

[4] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[6] *A.M., supra* note 4; *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).

[7] *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[8] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *E.M., id.; John J. Carlone*, 41 ECAB 354 (1989).

neither a nurse practitioner nor a physician assistant is considered a "physician" as defined under FECA.[10] As such, this evidence is insufficient to meet appellant's burden of proof.

Appellant also submitted an x-ray report dated August 1, 2017 which demonstrated a nondisplaced oblique recent fracture at the fibular head. This diagnostic study does not, however, note whether it had been conducted or reviewed by a physician. This x-ray report is, therefore, insufficient to establish appellant's claim.[11]

Accordingly, the Board finds that appellant has not met her burden of proof to establish her claim because she has not submitted competent medical evidence containing a diagnosed medical condition as found by a qualified physician under FECA.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[12] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[13]

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.[14] 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.[15] When

[10] Section 8101(2) of FECA provides that medical opinion, in general, can only be given by a qualified physician. This section 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. *H.K.*, Docket No. 19-0429 (issued September 18, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[11] *Id*.

[12] 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).

[13] 20 C.F.R. § 10.607.

[14] *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. *Id*. at Chapter 2.1602.4b.

[15] 20 C.F.R. § 10.606(b)(3).

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.[16]

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[17] He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.[18] When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.[19]

ANALYSIS -- ISSUE 2

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

In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, she is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).[20]

Appellant also failed to submit relevant and pertinent new evidence in support of her request for reconsideration. The underlying issue in this case is whether she has submitted sufficient medical evidence to establish a diagnosed condition in connect to the accepted employment incident. On reconsideration appellant submitted an August 17, 2017 report from Ms. Platt, who is a nurse practitioner. The Board finds that this report does not constitute competent medical evidence because Ms. Platt has already been found not to be a "physician" as defined under FECA and is, therefore, not qualified to provide a medical opinion.[21] Therefore, Ms. Platt's note is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

Appellant also resubmitted an August 1, 2017 x-ray, Ms. Platt's August 29, 2017 Form CA-20, and Mr. Von Krueger's September 6, 2017 Form CA-20. The Board finds that submission of this evidence did not require reopening appellant's case for merit review as it had already been considered by OWCP and therefore was not new evidence. As these reports repeat evidence already in the case record, they are cumulative and do not constitute relevant and pertinent new evidence. Providing additional evidence that either repeats or duplicates information already in

[16] *Id*. at § 10.608(a), (b).

[17] *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[18] *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

[19] *P.L., supra* note 17; *Annette Louise*, 54 ECAB 783 (2003).

[20] *Id*. at § 10.606(b)(3)(i) and (ii).

[21] *Supra* note 10.

the record does not constitute a basis for reopening a claim.[22] Therefore, they are also insufficient to require OWCP to reopen the claim for consideration of the merits. Because appellant has not provided relevant and pertinent new evidence, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).[23]

The Board therefore 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury causally related to the accepted July 17, 2017 employment incident. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2018 and September 27, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 21, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[22] *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

[23] 20 C.F.R. § 10.606(b)(3)(iii).