

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

C.H., Appellant)	
)	
and)	Docket No. 19-1475
)	Issued: February 6, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Moncks Corner, SC, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 26, 2019 appellant filed a timely appeal from a January 14, 2019 merit decision and a February 21, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant indicated in her appeal request form that she was requesting an appeal of a June 26, 2019 OWCP decision. The Board notes, however, that the record does not contain an adverse final decision issued by OWCP on that date. The record does contain final adverse decisions issued by OWCP on January 14 and February 21, 2019.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 21, 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a medical condition causally related to the accepted May 18, 2018 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 31, 2018 appellant, then a 47-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 18, 2018 she sprained her left ankle and experienced severe lower back pain when she tripped due to a hole in the ground while in the performance of duty. She also indicated that repetitive movements while working contributed to her medical conditions and had she not tripped in the hole and injured her ankle her conditions would have remained undiscovered. On the reverse side of the claim form, the employing establishment controverted the claim stating that it had no evidence to show the incident occurred and that appellant worked the day after the date of the alleged incident and did not mention any injury. Appellant stopped work on May 22, 2018.

In a letter dated June 5, 2018, the employing establishment further controverted appellant's claim. It noted that she did not provide a written statement, medical evidence, or witness statements indicating that she was injured while working and she did not mention her injury to management the next time she worked. The letter explained that appellant was previously off work for six months for a back injury that was not work related and that it appeared that she was submitting her CA-1 form to make her injury work related. It also noted that, one week prior to the alleged incident, appellant sold the private vehicle she used to deliver mail and no longer had a vehicle to perform her work duties.

In a development letter dated June 12, 2018, OWCP advised appellant of the deficiencies in her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant provided a December 5, 2017 medical report from Dr. Richard Frisch, a Board-certified orthopedic surgeon. Dr. Frisch noted that she had been experiencing lower back and lower extremity pain for one month. He indicated that appellant's job required her to lift heavy magazine containers, stand for greater than four hours, and to deliver mail. Based on a magnetic resonance imaging scan of her lumbar spine, Dr. Frisch noted an impression of low back pain and an annular tear and diagnosed her with low back pain. He recommended a L5-S1 epidural injection to treat appellant's condition in addition to her continued physical therapy treatment.

In a December 15, 2017 medical report, Dr. Mark Netherton, a Board-certified anesthesiologist, detailed appellant's receipt of a L5-S1 lumbar epidural steroid injection. In a January 17, 2018 medical note, Anne Buck, a physician assistant, provided that appellant experienced no improvement from her December 15, 2017 injection. She also documented a diagnosis of sacroiliitis and ordered a sacroiliac joint injection to treat appellant's condition.

In a January 24, 2018 medical report, Dr. German Levin, Board-certified in physical medicine and rehabilitation, detailed appellant's receipt of a left sacroiliac injection in order to treat a diagnosis of sacroiliac joint mediated pain.

A May 21, 2018 x-ray of appellant's left knee revealed no evidence of a fracture, dislocation, effusion, or other abnormality. In a medical note of even date, Dr. David Rodgers, Board-certified in family medicine, recommended that she be excused from work until May 26, 2018 due to her knee and back pain.

In a May 23, 2018 medical report, Ms. Buck noted that appellant's previous treatment for her back pain offered little to no improvement. She indicated that Dr. Frisch recommended a discogram of appellant's lumbar spine for further evaluation. In a medical note of even date, Ms. Buck opined that appellant could return to work with light-duty restrictions and recommended that appellant perform no twisting or bending, no pushing, pulling, or lifting over 30 pounds and limit her getting in and out of vehicles to three hours a day.

By decision dated July 17, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the May 18, 2018 incident occurred in the performance of duty, as alleged. It also noted that she failed to provide medical evidence signed by a physician providing a valid medical diagnosis. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant subsequently provided a July 12, 2018 statement in response to OWCP's questionnaire. She explained that she informed her supervisor the next day after the incident and came to work because she did not realize the extent of her injury. Appellant stopped coming to work after a couple of days when her injury did not improve and she began to realize that it was more severe. She noted that, when the injury occurred, she was walking to deliver mail on her route, she stumbled on uneven ground and injured her back and ankle when they twisted. Appellant continued to deliver packages thinking the discomfort would eventually go away. She acknowledged that she previously experienced back pain and that, after a discussion with her physician, she believed that performing her job duties for several months with few days off, along with twisting her ankle on May 18, 2018 caused her injury. Appellant asserted that she was claiming injuries from both a traumatic injury and occupational disease.⁴

In an August 9, 2018 medical note, G. Ryan Aprill, a physician assistant, provided work restrictions of no lifting over 15 pounds, no repetitive motions, and no twisting, pushing, or pulling.

In another note dated November 12, 2018, Ms. Aprill indicated that appellant was unable to work. Appellant also provided a November 14, 2018 statement explaining that she underwent major lumbar spinal surgery on September 27, 2018 in order to treat her injuries and that she was seeking back pay for her medical expenses.

⁴ As appellant filed her claim as a traumatic injury claim in relation to the May 18, 2018 employment incident, OWCP's hearing representative correctly considered it as such. However, she may file an occupational disease claim (Form CA-2) along with supporting evidence after the disposition of this present claim. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800 (June 2011).

OWCP also received an undated Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) from Dr. Frisch. Dr. Frisch noted that appellant presented with evidence of low back pain, bilateral buttocks pain, and disc desiccation with an annular tear across L4-5 and that her conditions approximately began in December 2017.

On November 20, 2018 appellant requested reconsideration of OWCP's July 17, 2018 merit decision and noted that she underwent spinal surgery on August 27, 2018.

Appellant provided a January 7, 2019 medical note from Ms. Aprill indicating that appellant required six weeks of physical therapy to treat her lumbar condition.

By decision dated January 14, 2019, OWCP modified its prior decision finding that the factual and medical evidence of record established fact of injury. However, the claim remained denied because the medical evidence of record was insufficient to establish that appellant's diagnosed medical conditions were causally related to the accepted May 18, 2018 employment incident.

On January 29, 2019 appellant requested reconsideration of OWCP's January 14, 2019 merit decision. Along with her request she also submitted a January 24, 2019 medical note from Dr. Frisch providing that she would need to remain out of work until after her next follow-up appointment.

Appellant also provided copies of Dr. Frisch's December 5, 2017 medical report and Ms. Buck's May 23, 2018 medical report.

By decision dated February 21, 2019, OWCP denied appellant's request for reconsideration of the merits of the 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

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).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁸ 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.⁹ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹⁰

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.¹¹ The opinion of the physician must be based on a complete factual and medical background, 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 claimant.¹²

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish diagnosed medical conditions causally related to the accepted May 18, 2018 employment incident.

Appellant provided an undated Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) from Dr. Frisch. Dr. Frisch noted that she presented with evidence of low back pain, bilateral buttocks pain, and disc desiccation with an annular tear across L4-5. He indicated that appellant's conditions approximately began in December 2017, prior to the accepted May 18, 2018 employment incident, and he did not offer an opinion on causal relationship. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁴ Moreover, the need for a rationalized medical opinion based on medical rationale is especially

⁸ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

¹² *I.J.*, 59 ECAB 408 (2008).

¹³ *Supra* note 4 at Chapter 2.805.3e (January 2013); *see also N.C.*, Docket No. 19-1191 (issued December 19, 2019); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

¹⁴ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

important in this case as the evidence suggests that appellant had a preexisting medical condition.¹⁵ For these reasons, Dr. Frisch's undated certification is of limited probative value.

In medical notes dated May 21, 2018 and January 24, 2019, Drs. Rodgers and Frisch indicated that appellant would need to remain out of work due to knee and back pain. As stated previously, the Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁶ Therefore, Drs. Rodgers and Frisch's medical notes are insufficient to establish appellant's claim.

Appellant submitted a May 21, 2018 x-ray of her left knee, which revealed no evidence of a fracture, dislocation, effusion, or other abnormality. The Board has held that diagnostic reports do not offer an opinion regarding the cause of an employee's condition and therefore lack probative value on the issue of causal relationship.¹⁷ Thus, this report is also insufficient to meet appellant's burden of proof.

Appellant also provided multiple medical reports from physician assistants. The Board has consistently held that medical reports signed solely by a physician assistant are of no probative value as such health care providers are not considered "physician[s]" as defined under FECA and are therefore not competent to provide medical opinions.¹⁸ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁹

The remaining medical records are of no probative value as they either do not address appellant's claimed conditions or are dated prior to the accepted May 18, 2018 employment incident.²⁰

As appellant has not submitted rationalized medical evidence establishing that her conditions are causally related to the accepted May 18, 2018 employment incident, the Board finds that she has not met her burden of proof to establish her claim.

¹⁵ See *M.E.*, Docket No. 18-0940 (issued June 11, 2019); *E.V.*, Docket No. 17-0417 (issued September 13, 2017).

¹⁶ *M.D.*, Docket No. 19-0338 (issued July 9, 2019); *S.F.*, Docket No. 18-1030 (issued April 5, 2019); *L.B.*, and *D.K.*, *supra* note 14.

¹⁷ *K.S.*, Docket No. 18-1781 (issued April 8, 2019); *G.S.*, Docket No. 18-1696 (issued March 26, 2019); *J.M.*, Docket No. 17-1688 (issued December 13, 2018).

¹⁸ The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. See 5 U.S.C. § 8102(2); *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *M.M.*, Docket No. 16-1617 (issued January 24, 2017) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

¹⁹ *D.F.*, Docket No. 19-0108 (issued April 16, 2019); see also *T.H.*, Docket No. 18-1736 (issued March 13, 2019).

²⁰ *D.J.*, Docket No. 18-0200 (issued August 12, 2019).

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 FECA²¹ 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 payment of compensation at any time on his own motion or on application.²²

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), OWCP 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.²³

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.²⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁵ 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.²⁶

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, and she did not advance a new and relevant legal argument not previously considered. Accordingly, she is 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).

Furthermore, appellant did not submit relevant and pertinent new evidence with her January 25, 2019 request for reconsideration.²⁷ The underlying issue in this case is whether her

²¹ *Supra* note 2.

²² 5 U.S.C. § 8128(a).

²³ 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²⁴ *Id.* at § 10.607(a).

²⁵ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²⁶ *Id.* at § 10.608(b); *H.H.*, *supra* note 23; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁷ *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

medical condition is causally related to the accepted May 18, 2018 employment incident. That is a medical issue which must be addressed by relevant medical evidence not previously considered.²⁸ Although evidence submitted on reconsideration need not carry appellant's burden of proof entirely to suffice for reconsideration, the new evidence must at least be relevant and pertinent to the issue upon which the claim was denied.²⁹

In support of her request for reconsideration, appellant submitted a January 24, 2019 medical note from Dr. Frisch, wherein he provided that she would need to remain out of work until after her next follow-up appointment. The submission of this evidence does not require reopening of Dr. Frisch's claim for review of the merits of the claim because this evidence is irrelevant to the underlying issue of causal relationship.³⁰

Appellant also provided copies of Dr. Frisch's December 5, 2017 medical report and Ms. Buck's May 23, 2018 medical report. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³¹ In this case, appellant failed to submit relevant and pertinent new evidence regarding causal relationship.³² Thus, she is not entitled to a review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).³³

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 a medical condition causally related to the accepted May 18, 2018 employment incident. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²⁸ *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

²⁹ *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *K.B.*, Docket No. 18-1392 (issued January 15, 2019); *A.A.*, Docket No. 18-0031 (issued April 5, 2018).

³⁰ *L.E.*, Docket No. 19-0470 (issued August 12, 2019).

³¹ *R.S.*, *supra* note 28; *D.T.*, Docket No. 17-1734 (issued January 18, 2018); *Richard Yadron*, 57 ECAB 207 (2005).

³² *P.C.*, Docket No. 18-1703 (issued March 22, 2019); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

³³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 21 and January 14, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 6, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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