

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

S.M., Appellant)	
)	
and)	Docket No. 20-0423
)	Issued: July 9, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
JESSE BROWN VETERANS)	
ADMINISTRATION MEDICAL CENTER,)	
Chicago, IL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 16, 2019 appellant filed a timely appeal from an October 3, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated December 31, 2018 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 3, 2019 decision, OWCP received additional evidence. The Board notes that appellant further 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is 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 November 1, 2018 appellant, then a 45-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging on that day she experienced lower back pain when struck by a motorized wheelchair while in the performance of duty. She explained that a veteran who was at the Veterans Affairs (VA) store was operating the motorized wheelchair. On the reverse side of the claim form, the employing establishment indicated by checking a box marked "No" that appellant was not in the performance of duty when injured and that she did not stop work.

In a November 27, 2018 development letter, OWCP informed appellant of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. It afforded her 30 days to submit the necessary evidence.

OWCP subsequently received an emergency department (ED) discharge note from the employing establishment's emergency department dated November 1, 2018 from Dr. Betsy Ellen Wesley, a Board-certified emergency medicine specialist, who noted that appellant had been diagnosed with contusion to the low back. In a return to work note of even date, Dr. Wesley indicated that appellant had been seen in the ED and released her to work following clearance by employee health.

In reports dated November 6 and 13, 2018, Dr. Dionne J. Blackman, a Board-certified internist, diagnosed an injury to the left lower extremity, acute pain of left knee, contusion of back, and moderate persistent asthma refractory to systemic steroids with acute exacerbation. On November 13, 2018 she noted that appellant's left knee pain was improving, but she continued to have back pain and was now having a new onset of right hip pain. Dr. Blackman diagnosed right hip trochanteric bursitis and oral thrush.

In a letter dated November 30, 2018, the employing establishment controverted appellant's claim on the basis that she was not engaged in official duty at the time and location the injury took place, as she was not in the performance of duty when she was purchasing items in the VA store at 4:15 p.m. on November 1, 2018.

In a supplemental letter dated December 19, 2018, an employing establishment human resource specialist, A.C., further controverted appellant's claim noting that she provided inconsistent reasons for visiting the ED on November 1, 2018, including for the purposes of treating an asthma flare-up. He contended that she initially claimed that the November 1, 2018 injury followed after being struck in her lower back, but later claimed that she also injured her left leg and knee, but he observed her having no difficulties standing or moving about. A.C. concluded by noting that appellant reported to her co-worker that she had fallen out of her bed and hit her back and leg following the date of injury and speculated that nonwork factors caused her claimed injuries.

By decision dated December 31, 2018, OWCP denied the claim finding that the evidence of record was insufficient to establish a causal relationship between appellant's diagnosed medical conditions and the accepted November 1, 2018 employment incident.

On August 1, 2019 appellant requested reconsideration and submitted a narrative statement in response to OWCP's questionnaire, where she explained that she was on site in the VA store on November 1, 2018 when a veteran patient ran into her from behind with a motorized wheelchair while she was standing in the aisle looking for an item. She indicated that she stumbled from the impact and turned around to face the patient who, at that time, related that she forgot to use her audible alarm feature when reversing her wheelchair. Appellant contended that although she was not performing her work duties, she was on break, inside the VA store when the injury occurred. She indicated that the store manager, J.L., had assured her that a copy of the video footage of the incident would be made available for her to submit along with other documentation; however, the video disappeared.

Appellant also resubmitted a copy of OWCP's December 31, 2018 decision denying her claim.

By decision dated October 3, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

A timely request 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.⁶ When a timely request for reconsideration does not meet at least one of

³ 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).

⁴ 20 C.F.R. § 10.607.

⁵ *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.

⁶ *Id.* at § 10.606(b)(3).

the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

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 timely request for reconsideration, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by OWCP.⁸ Consequently, 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).⁹

In support of her request for reconsideration, appellant submitted a narrative statement in response to OWCP's factual development questionnaire; however, the underlying issue of causal relationship is a medical issue which must be addressed by relevant medical evidence not previously considered.¹⁰ Her own factual statement does not constitute relevant medical evidence.¹¹ Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

Appellant failed to submit relevant and pertinent new evidence in support of her reconsideration request. She only submitted a copy of OWCP's December 31, 2018 decision denying her claim, which is a part of the claim record. Because appellant's request for reconsideration did not include relevant and pertinent new evidence not previously considered she is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

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.

CONCLUSION

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).

⁷ *Id.* at § 10.608(a), (b).

⁸ *See T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

⁹ *Id.*

¹⁰ *See A.M.*, Docket No. 18-1033 (issued January 8, 2019); *see also Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ *See B.R.*, Docket No. 17-1661 (issued January 4, 2018); *James A. Long*, 40 ECAB 538 (1989).

¹² 20 C.F.R. § 10.606(b)(3)(iii); *see M.C.*, Docket No. 18-0841 (issued September 13, 2019); *D.P.*, Docket No. 17-0290 (issued May 14, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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