United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 20-0118**
	)	**Issued: June 17, 2020**
SOCIAL SECURITY ADMINISTRATION, OFFICE OF ANTI-FRAUD PROGRAMS, Baltimore, MD, Employer	)	

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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 17, 2019 appellant filed a timely appeal from a July 22, 2019 merit decision and an October 7, 2019 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a medical condition causally related to the accepted May 9, 2019 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 12, 2019 appellant, then a 38-year-old program analyst, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2019 he sustained a concussion when he was struck by another automobile while enroute from his primary residence to an offsite training facility, while in the performance of duty. He stopped work on May 10, 2019 and returned to work on May 21, 2019. On the reverse side of the claim form appellant's supervisor noted that appellant was in the performance of duty when injured.

In an attached undated statement, appellant indicated that the accident occurred between his primary residence and the offsite training facility in Washington, DC while operating his personal vehicle. He noted that the distance between the place of injury and the place where official duty was last performed was less than two miles. Appellant further noted that his local travel expenses were reimbursable by the employing establishment.

Appellant was treated at a medical care facility on May 10, 2019 by Khajae Newell, a physician assistant. In an acute concussion evaluation (ACE) form Ms. Newell noted that appellant could not return to work until he was medically cleared.

In an ACE form dated May 13, 2019, Jessica Ray, a certified physician assistant, noted symptoms of headache, nausea, fatigue, sensitivity to light, dizziness, mental fogginess, and problems concentrating and with memory. She advised that appellant could gradually increase exercise and return to work in one week. In an ACE form dated May 20, 2019, appellant reported problems with balance and concentration. Ms. Ray returned appellant to work subject to a shortened workday, breaks when symptoms worsened, no heavy lifting or working with machinery, and no heights due to dizziness and balance problems. She advised that appellant could return to work initially on a telework basis and, when tolerated, he could increase to partial days in the office. Appellant was treated in follow-up by Ms. Ray on June 3, 2019 and reported symptoms of trouble falling asleep and sleeping less than usual. Ms. Ray continued restrictions of a shortened workday, breaks when symptoms worsen, and no heights due to dizziness and balance problems.

In a June 18, 2019 development letter, OWCP informed appellant that the factual and medical evidence of record was insufficient to establish his claim. It requested that he submit medical evidence in support of his claim. OWCP specifically noted that there was no diagnosis of a medical condition resulting from the alleged injury. It also requested that appellant respond to a questionnaire to substantiate the factual elements of his claim. In a separate letter of even date, OWCP also requested additional information from the employing establishment. It afforded both parities 30 days to respond. No additional evidence was submitted.

By decision dated July 22, 2019, OWCP accepted that the May 9, 2019 incident occurred as alleged. However, it denied appellant's traumatic injury claim finding he had not submitted evidence containing a medical diagnosis in connection with the accepted employment incident. Consequently, OWCP found that the requirements had not been to establish an injury as defined by FECA.

On August 12, 2019 appellant requested reconsideration.

In support of his request, appellant submitted a "summarization of episode note" dated May 10, 2019 prepared by Ms. Newell, who diagnosed concussion without loss of consciousness.

By decision dated October 7, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,[3] 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.[4] 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.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[6]

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[7] 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 the relationship between the diagnosed condition and specific employment factors identified by the employee.[8]

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[2] *Id.*

[3] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[8] *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

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 May 9, 2019 employment incident.

In support of his claim, appellant submitted ACE forms signed by Ms. Ray and Ms. Newell, both physician assistants, who treated appellant for a concussion. Certain healthcare providers such as physician assistants are not considered "physician[s]" as defined under FECA.[9] Consequently, the reports of Ms. Ray and Ms. Newell will not suffice for purposes of establishing entitlement to FECA benefits.[10]

The Board finds that there is no evidence of record that establishes a medical diagnosis in connection with the accepted employment incident. Consequently, appellant failed to establish that he sustained a medical condition causally related to the accepted May 9, 2019 employment incident.

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 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.[11]

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.[12]

[9] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[10] Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship,* Chapter 2.805.3a(1) (January 2013); *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); *C.P.*, Docket No. 19-1716 (issued March 11, 2020) (a physician assistant is not a physician as defined under FECA).

[11] 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

[12] 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.; B.W.*, Docket No. 18-1259 (issued January 25, 2019).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[13] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[14] 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.[15]

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).

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[16]

The Board further finds that appellant has not provided relevant and pertinent new evidence in support of his request for reconsideration. The underlying issue is whether appellant submitted sufficient medical evidence to establish a medical condition in connection with the accepted May 9, 2019 employment incident. This is a medical issue which must be determined by rationalized medical evidence.[17] On reconsideration appellant submitted medical notes from Ms. Newell, a physician assistant. As noted above, a physician assistant is not considered a physician as defined under FECA and thus their reports do not constitute competent medical evidence.[18] As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).[19]

[13] *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

[14] *Id.* at § 10.608(a); *see also Y.H.,* Docket No. 18-1618 (issued January 21, 2020); *R.W.,* Docket No. 18-1324 (issued January 21, 2020); *M.S.,* 59 ECAB 231 (2007).

[15] *Id.* at § 10.608(b); *D.C.,* Docket No. 19-0873 (issued January 27, 2020); *M.S.,* Docket No. 19-0291 (issued June 21, 2019).

[16] *M.O.,* Docket No. 19-1677 (issued February 25, 2020); *C.B.,* Docket No. 18-1108 (issued January 22, 2019).

[17] *See J.B.,* Docket No. 18-1531 (issued April 11, 2019); *E.D.,* Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward,* 52 ECAB 140 (2000).

[18] 5 U.S.C. § 8101(2); *J.M.,* 58 ECAB 448 (2007); *G.G.,* 58 ECAB 389 (2007); *David P. Sawchuk,* 57 ECAB 316, 322 n.11 (2006); *Allen C. Hundley,* 53 ECAB 551 (2002).

[19] 20 C.F.R. § 10.606(b)(3)(iii); *T.W.,* Docket No. 18-0821 (issued January 13, 2020).

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.[20]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted May 9, 2019 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 7 and July 22, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 17, 2020
Washington, DC

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

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

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

[20] *D.G.*, Docket No. 19-1348 (issued December 2, 2019).