

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

S.B., Appellant)	
)	
and)	Docket No. 19-1320
)	Issued: January 17, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Boca Raton, FL, Employer)	
)	

Appearances:
Joanne Marie Wright, for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 26, 2019 appellant, through her representative, filed a timely appeal from a December 6, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 29, 2017, 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 to review 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 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 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 March 29, 2016 appellant, then a 30-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2016 her supervisor, D.Z., struck her on the left side of her eye/forehead with his wooden clipboard while he was talking to another carrier, as she bent down to pick up flats while in the performance of duty. She indicated that she sustained injury to her forehead, left eye, both knees, and the left side of her back. Appellant did not initially stop work. OWCP accepted the claim for concussion with loss of consciousness, contusion to unspecified part of the head, and headache.

In a May 20, 2016 report, Dr. David B. Ross, a Board-certified neurologist, noted that he was only authorized to evaluate and treat appellant for headaches. He indicated that appellant's headaches were not disabling and that appellant had no work restrictions.

In a May 26, 2016 form report, Dr. Michael Mikolajczak, a Board-certified orthopedic surgeon, diagnosed lumbar strain and bilateral knee sprain, and noted appellant's work restrictions.

Between June 10 and August 5, 2016, appellant filed claims for wage-loss compensation (Form CA-7) for intermittent disability for the period May 7 to August 5, 2016.

In a July 18, 2016 memorandum of interview conducted by the Office of Inspector General, Dr. Mikolajczak explained that appellant had preexisting conditions involving her back and knees because she played basketball in college. He also indicated there were signs of symptom magnification, and that "he did not know why [appellant] is not working."

By decision dated August 9, 2016, OWCP denied appellant's claims for wage-loss compensation for intermittent disability for the period May 7 to August 5, 2016. It also found that, while appellant alleged injury to both knees and her back as a result of the March 2, 2016 injury, the medical evidence of record did not support that allegation.

On August 1, 2017 appellant requested reconsideration.

OWCP subsequently received additional evidence including a July 29, 2016 report from Dr. Mikolajczak, who opined that appellant had a preexisting history of bilateral chondromalacia patella. Dr. Mikolajczak related that on March 2, 2016 appellant was bending down when she was hit with a clipboard, "fell backward onto a desk," and complained of pain in the head, neck, and both knees. He indicated that magnetic resonance imaging (MRI) scans obtained on June 22, 2016 revealed no acute disc herniation or neural element compression. Dr. Mikolajczak released

appellant to light-duty work, with restrictions of no lifting over 10 pounds and no repetitive bending or twisting at the waist.

OWCP also received an August 29, 2016 report from Dr. Ross who indicated that he was following up for treatment of appellant's headaches. Dr. Ross diagnosed chronic post-traumatic headache, not intractable, and sprain of ligaments of the cervical spine.

In a November 29, 2017 decision, OWCP denied modification of the August 9, 2016 decision. It noted that Dr. Mikolajczak based his opinion on a history of injury that appellant fell backward onto her desk, which was different from the initial description of the injury.

On November 26, 2018 appellant requested reconsideration. She described her injury and summarized the reports of Drs. Jones and Malpica. With her reconsideration request, appellant provided a drawing illustrating how she was injured, as well as a photograph of a mail case.

OWCP received Form CA-17s dated July 12 and 13, 2018, from Dr. Danita Jones, a neurologist, who diagnosed fibromyalgia, chronic pain syndrome, and cervicgia. Dr. Jones indicated that appellant could work part time commencing July 13, 2019, with restrictions.

OWCP also received a March 2, 2016 report from Dr. Indira Malpica, a chiropractor. Dr. Malpica diagnosed lumbosacral radiculopathy, low back pain, degenerative disc disease in the lumbar region, myalgia, segmental, and somatic dysfunction of lumbar region, cervicocranial syndrome, degenerative disc disease in the cervical region, cervicgia, cervicogenic headaches, segmental and somatic dysfunction of the cervical region, thoracic spine pain, and segmental and somatic dysfunction of the thoracic region.

In a December 18, 2017 report, Dr. Jones noted that appellant had no evidence of cervical radiculopathies. She indicated that imaging revealed mild degenerative disease within the spine, which might be exacerbating her musculoskeletal pain. Dr. Jones noted that chronic pain syndrome and/or fibromyalgia might be playing a part in appellant's symptoms.

By decision dated December 6, 2018, 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 vests OWCP with discretionary authority to determine whether to review an award for or against compensation. It may review an award for or against payment of compensation at any time based on its own motion or on application.⁴

A claimant seeking reconsideration of a final decision must present arguments or provide evidence 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.⁵ If OWCP determines

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

that at least one of these requirements is met, it reopens and reviews the case on its merits.⁶ 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.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).

Appellant's reconsideration request summarized the reports of Drs. Jones and Malpica. However, it did not show that OWCP erroneously applied or interpreted a specific point of law, and did not advance a new and relevant legal argument not previously considered.⁸ Consequently, appellant is not entitled to further review of the merits of her claim based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁹

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP under 20 C.F.R. § 10.606(b)(3). The drawings and photographs submitted with her reconsideration request were irrelevant, as the factual basis had already been established. The underlying issues in this case were whether appellant had established intermittent disability during the period May 7 to August 5, 2016 due to her accepted conditions and whether she had met her burden of proof to expand the acceptance of her claim to include low back and bilateral knee conditions causally related to the accepted March 2, 2016 employment injury. These are medical issues which must be determined by rationalized medical evidence.¹⁰ The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹¹

The Board also finds that the Form CA-17s and December 18, 2017 report from Dr. Jones indicating that appellant could work part time commencing July 13, 2019, with restrictions were irrelevant to the issues at hand because they did not address whether appellant was disabled from

⁶ *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

⁷ *Id.* at § 10.608(b). 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.

⁸ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also M.S.*, Docket No. 19-0291 (issued June 21, 2019).

⁹ *Id.*

¹⁰ *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).

¹¹ *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

work during the claimed period May 7 to August 5, 2016, or whether appellant's low back and bilateral knee conditions were causally related to the accepted employment injury.¹²

The report from Dr. Malpica while new, was also not relevant or pertinent to the underlying issues.¹³ Dr. Malpica did not diagnose a subluxation based upon x-ray evidence and therefore is not considered a physician under FECA.¹⁴

Although evidence submitted on reconsideration need not carry appellant's burden entirely to suffice for reconsideration, the new evidence must at least be relevant and pertinent to the issue upon which the claim was denied.¹⁵ While appellant submitted new evidence, it does not address the underlying medical issues. Therefore, she also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

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).

¹² *Id.*

¹³ See *L.H.*, Docket No. 16-0868 (issued September 12, 2016).

¹⁴ *R.P.*, Docket No. 19-0271 (issued July 24, 2019). Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. See *R.M.*, 59 ECAB 690 (2008); *Merton J. Sills*, 39 ECAB 572 (1988).

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

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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