

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

C.C., Appellant)	
)	
and)	Docket No. 19-1622
)	Issued: May 28, 2020
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISIONS, FEDERAL)	
CORRECTIONAL INSTITUTION, Miami, FL,)	
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 26, 2019 appellant filed a timely appeal from a January 30, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated January 12, 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.

ISSUE

The issue is 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 August 24, 2004 appellant, then a 36-year-old cook supervisor, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2004 he sustained severe ankle and knee sprains when he slipped and fell when opening the bakery door while in the performance of duty. He stopped work on August 21, 2004. OWCP accepted the claim for right knee and ankle sprains, and right knee and lower leg contusions. It paid appellant wage-loss compensation on the supplemental rolls from October 6, 2004 through January 22, 2015, and on the periodic rolls commencing January 23, 2015.

In a letter dated May 11, 2011, OWCP advised appellant that it proposed to reduce his wage-loss compensation based on his capacity to earn wages as a customer service representative. In a June 17, 2011 loss of wage-earning capacity (LWEC) determination, it finalized the May 11, 2011 proposal to reduce his wage-loss compensation.

On November 12, 2013 OWCP referred appellant, medical record, and statement of accepted facts (SOAF) to Dr. Peter J. Millheiser, a second opinion Board-certified orthopedic surgeon, for an assessment of his work-related condition.² It requested that Dr. Millheiser provide an opinion as to whether appellant continued to have residuals and disability due to his accepted August 20, 2004 employment injury.

In progress notes dated December 23, 2013, Dr. Mauricio Herrera, Board-certified in orthopedic surgeon and orthopedic sports medicine, opined that appellant's severe ankle sprain had healed. He, in a December 23, 2013 visit summary, related a diagnosis of right ankle sprain.

In a report dated January 10, 2014, Dr. Millheiser reviewed appellant's history of injury, the SOAF and the medical record. He related appellant's physical examination findings and diagnosed post right ankle sprain, rule out possible osteochondral lesion. Dr. Millheiser opined that appellant was capable of performing his regular work duties without restrictions based on review of a January 2, 2014 MRI scan and examination findings. In a supplemental report dated March 7, 2014, he opined that appellant's right ankle and knee injuries had resolved.

In a preliminary notice dated April 15, 2014, OWCP advised appellant of its proposal to modify the June 17, 2011 LWEC determination and terminate his wage-loss compensation and medical benefits. It found the medical evidence from Dr. Millheiser and Dr. Herrera established that he no longer had any disability or residual due to the accepted August 20, 2004 employment injury.

By decision dated June 2, 2014, OWCP modified the June 17, 2011 LWEC to zero and finalized the April 15, 2014 proposed notice and terminated appellant's wage-loss compensation and medical benefits effective that day.

² OWCP also referred appellant for a magnetic resonance imaging (MRI) scan of his right ankle. A January 2, 2014 MRI scan revealed diffuse soft tissue swelling, no fracture, joint effusion or bone marrow edema, and no acute ligamentous injury.

Appellant requested reconsideration on May 8, 2015.³ OWCP, by decision dated May 27, 2015, denied modification finding the evidence he submitted was insufficient to establish that he had disability or residuals due to the accepted August 20, 2004 employment injury. It also found that the opinion of Dr. Millheiser constituted the weight of the medical opinion evidence that his accepted August 20, 2004 employment injury had resolved without residuals or disability.

Appellant again filed a request for reconsideration on May 5, 2016.⁴ By decision dated October 21, 2016, OWCP denied modification finding the additional evidence he had submitted was insufficient to outweigh the opinion of Dr. Millheiser.

On October 17, 2017 appellant requested reconsideration.⁵

By decision dated January 12, 2018, OWCP denied modification finding that the additional evidence appellant had submitted was of insufficient probative value to warrant modification.

On January 14, 2019 appellant requested reconsideration. In support of his request, he submitted illegible copies of x-ray scans and a business card for Dr. Bernstein, a podiatrist.

Appellant also submitted a January 7, 2019 progress note, with an illegible signature, which summarized his history of injury and provided examination findings. The assessment included right ankle anterior talofibular (ATF) ligament tear and right knee ligament tear.

By decision dated January 30, 2019, OWCP denied appellant's request for reconsideration. It found the evidence submitted in support of his request was immaterial, irrelevant or inconsequential to the underlying issue. OWCP further found that it was unable to determine if the January 7, 2019 report was from a physician due to the illegible signature.

³ Appellant submitted a visit summary, progress notes, and a state workers' compensation reporting form dated December 23, 2013, progress notes dated November 17, 2014, and a November 17, 2014 letter from Dr. Herrera. In the November 17, 2014 progress notes, Dr. Herrera provided examination findings and diagnosis of stable and unchanged severe right ankle sprain. He, in the November 17, 2014 letter, opined that appellant's injury was permanent and work restrictions were unchanged. OWCP also received a December 17, 2014 summary of office visit and findings with an illegible signature.

⁴ In support of his request, appellant submitted reports dated December 27, 2014 and March 7, 2016 from Dr. Scott Bernstein, a podiatrist. He also submitted state workers' compensation reporting forms dated December 23, 2013 and November 17, 2014, December 23, 2013, November 17, 2014 and September 30, 2015 progress notes, and March 1, 2016 report from Dr. Herrera. Dr. Herrera, in the September 30, 2015 progress notes, diagnosed right ankle pain and discomfort, possible rotator cuff tear, and rotator cuff arthropathy. In the March 1, 2016 report, he noted that appellant had not fully healed from his ankle injury and that an error was made in the report where he indicated it had healed. Dr. Herrera opined that appellant had permanent conditions and work restrictions.

⁵ The evidence submitted with his request included a June 23, 2017 report from Dr. Michael M. Cohen, a podiatrist, and Dr. Elliot A. Fialkoff, a podiatrist, an October 11, 2017 report by Dr. Patrick Martyka, a podiatrist, who all diagnosed right peroneal nerve entrapment.

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.⁶

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.⁷ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁸ 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.⁹

ANALYSIS

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 most recent merit decision of OWCP was the January 12, 2018 decision. One year from January 12, 2018 elapsed on January 12, 2019. As January 12, 2019 fell on a Saturday, appellant had until the next business day on Monday, January 14, 2019 to file his reconsideration request.¹⁰ As OWCP received appellant's request for reconsideration on January 14, 2019 it was timely filed.

With his timely request for reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. Accordingly, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).¹¹

Additionally, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether he had continuing disability or residuals of his accepted right knee and ankle sprains and right knee and right lower leg contusions after June 2, 2014, the date OWCP terminated his wage-loss compensation and medical benefits. Because the underlying issue in this case is medical in nature, it must be addressed by relevant medical evidence. The evidence appellant submitted in support of his

⁶ *Supra* note 1.

⁷ 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).

⁸ *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

⁹ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019); *K.H.*, 59 ECAB 495 (2008).

¹⁰ *P.H.*, Docket No. 19-1354 (issued March 13, 2020).

¹¹ *Supra* note 7 at at § 10.606(b)(3) (i) and (ii).

request for reconsideration consisted of a January 7, 2019 progress note with an illegible signature, unsigned illegible x-ray interpretations, and a business card for Dr. Bernstein, a podiatrist. The Board notes that unsigned reports and reports that bear illegible signatures cannot be considered probative medical evidence because they lack proper identification.¹² Moreover, while this evidence was new, it did not address the relevant issue in this claim as to whether appellant established continuing residuals or disability of his accepted conditions after June 2, 2014. Therefore, this evidence does not constitute relevant and pertinent new evidence.¹³ Accordingly, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirements under section 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.¹⁴

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

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).

¹² *L.D.*, Docket No. 18-1468 (issued February 11, 2019).

¹³ *Id.*

¹⁴ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 23, 2019 is affirmed.

Issued: May 28, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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