

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

L.S., Appellant)	
)	
and)	Docket No. 19-1790
)	Issued: March 11, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Jacksonville, FL, Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 26, 2019 appellant, through counsel, filed a timely appeal from a February 26, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 9, 2018, 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 over the merits of this case.

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.*

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).

FACTUAL HISTORY

On December 18, 2017 appellant, then a 55-year-old lead clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 12, 2017, while in the performance of duty, he sustained injury to multiple parts of the right side of his body when he was assaulted by his coworker who threatened to kill him. He stopped working on the date of injury. On the reverse side of the claim form, appellant's supervisor noted that appellant was not injured in the performance of duty and that the employing establishment was controverting the claim.

In an undated handwritten statement, appellant related that on October 12, 2017 he was working on an automated flat sorting machine (AFSM) while his coworker, J.H. was working on another AFSM. He indicated that when he moved to help pull down the other machine J.H. initially walked off and refused to help pull down the machine. Appellant alleged that J.H. subsequently came up to him and hit him in the chest with his shoulder and elbow, while cursing and shouting that he would kill him. He noted that he was scared for his life and K.G., another coworker, stepped in between them before J.H. could hit him again. However, when appellant tried to move away, J.H. hit him in the chest. He set out immediately to his supervisor, J.C., stopping along the way to speak to L.M., another coworker, about the incident. Appellant alleged that J.H. later came up to J.C.'s desk and started yelling at him, threatening to kill and beat him up, while using racial slurs. He further alleged that his supervisor did nothing to protect him, despite telling her that J.H. had assaulted him three to four times. Appellant asserted that he told J.C. that he was hurt and needed to go to the hospital. He also asked her to call the police and the postal inspector, but she refused. Instead, appellant was told to go to the South Dock office.

Appellant explained that he was trying to write a statement detailing the assault when J.C. and his other supervisor, R.B., walked into the South Dock office and told him to leave the property. He asserted that both of them refused to help him and became hostile towards him. On his way out of the building, appellant told his supervisors that he was hurt and needed medical attention, but R.B. directed him to leave the property right away. He noted that he left work because he feared for his life. Appellant concluded by alleging that J.H. was close friends with the members of management and that J.C. treated white employees more favorably.

In a December 5, 2017 Certificate of Disability, Dr. Robert E. Groble, a Board-certified psychiatrist, noted that appellant was under his care and had not sufficiently recovered to return to full-time work until March 2, 2018.

In a December 6, 2017 witness statement, K.G. noted that she was walking to a different machine on October 12, 2017 when she heard appellant and another coworker, J.H., hollering back and forth at one another. She immediately turned around and walked towards them "as they were getting a little too close." K.G. related that she put her hand on appellant's chest and pushed him back, stepping in between he and J.H before she and another coworker ultimately separated the

two. She noted that they were both name calling and therefore, were both at fault for the altercation.

In another witness statement of even date, L.M. attested that she was not scheduled or present in the area when the dispute between appellant and J.H. occurred on October 12, 2017. She noted that on the day of the dispute appellant approached her and began telling her that he and J.H. had words over the pull-down rotation. Appellant told her that J.H. refused to go to the other side of the machine when it became appellant's turn to take up the rotation, an argument then ensued and J.H. bowed up at him, making bodily contact at his stomach or chest area and threatened to beat him up. He indicated that J.H. then left the area and must have told their supervisor something because she paged him instructing him to report to her desk.

Appellant's supervisor, J.C., noted in her witness statement dated December 6, 2017 that J.H., not appellant, approached her first on October 12, 2017 and was explaining what happened when appellant came and provoked a heated argument. She asserted that appellant did not mention anything about being assaulted or that J.H. threatened to kill him when they were baiting each other with insults, cursing, name calling, and threatening to beat each other up. J.C. observed that neither appeared injured and appellant only brought up that he was hurt when she and another supervisor instructed him to gather his belongings and escorted him out of the building. Appellant only then told them that his shoulder and chest hurt, and that his arm was numb before picking up his backpack and throwing it over the shoulder that he claimed was injured. J.C. further noted that appellant did not need any assistance getting to the parking lot and driving off the property. She also denied appellant's racial remarks and contended that appellant had been untruthful about what happened for his own benefit. J.C. indicated that he was previously involved in several arguments, where he was the one that escalated the situation each time. In a subsequent statement dated December 22, 2017, she affirmed her earlier statements, claiming that appellant had made a lot of accusations that were "only partly true and partly a vivid imagination."

In a letter dated December 27, 2017, the employing establishment controverted appellant's claim.

In a development letter dated January 2, 2018, OWCP advised appellant that the evidence of record was not sufficient to establish that he actually experienced the incident alleged to have caused injury on October 12, 2017. It further noted that he submitted no evidence showing a medical diagnosis of any condition resulting from his injury. OWCP provided appellant a factual questionnaire for completion and afforded him 30 days to respond.

By decision dated February 9, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the October 12, 2017 employment incident occurred as alleged. It noted that he had not responded to the January 2, 2018 questionnaire nor did he provide any witness statements to support that he was threatened or physically struck by his coworker. OWCP therefore, found that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive additional medical evidence, including an October 12, 2017 emergency room report from Dr. Kevin Gysling, Board-certified in emergency medicine. Dr. Gysling noted that appellant reported being assaulted at work when he was pushed back and

his arms were forced above his head. An x-ray of the right shoulder performed that day showed degenerative changes with no acute abnormalities. X-rays of the right hand and wrist were normal.

On February 8, 2019 appellant requested reconsideration of the February 9, 2018 decision.

In an October 24, 2017 magnetic resonance imaging (MRI) scan of the cervical spine, appellant was noted to have findings, including disc bulges and herniation, throughout the cervical spine that when compared to prior examinations revealed no significant changes. An MRI scan of the right shoulder of even date revealed moderate supraspinatus and infraspinatus tendinitis, degenerative changes and joint effusion.

By decision dated February 26, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim, noting that he had not responded to the January 2, 2018 factual questionnaire and that the medical documentation submitted in support of his request was insufficient to establish the factual component of his claim.

LEGAL PRECEDENT

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.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the

³ 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).

⁴ 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).

⁵ *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.

⁶ *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).

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 his claim pursuant to 5 U.S.C. § 8128(a).

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. As such, 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).⁸

In support of his request for reconsideration, appellant submitted October 12, 2017 x-rays of the right hand and wrist and October 24, 2017 MRI scans of his right shoulder and cervical spine. These reports cannot alone establish the factual basis for appellant's claim.⁹ As noted, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a claim.¹⁰ While, in his October 12, 2017 medical report, Dr. Gysling noted that appellant reported being assaulted that day while at work, he did not provide the specific details needed to establish that the claimed injury occurred at the time, place, and in the manner alleged. Additionally, appellant has yet to respond to OWCP's January 2, 2018 development letter requesting specific details of the alleged October 12, 2017 employment incident. Thus, he is not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹¹

The Board accordingly finds that as appellant has not satisfied any of the three requirements under 20 C.F.R. § 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.¹²

On appeal counsel argues that OWCP improperly denied review when appellant presented evidence of compensability. As previously noted, the Board does not have jurisdiction over the February 9, 2018 merit decision.

⁷ *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).

⁸ *E.W.*, *supra* note 4; *T.V.*, Docket No. 19-1504 (issued January 23, 2020).

⁹ *B.V.*, Docket No. 18-1473 (issued April 23, 2019); *C.F.*, Docket No. 17-1611 (issued December 13, 2017).

¹⁰ *S.W.*, Docket No. 19-1498 (issued January 9, 2020); *E.J.*, Docket No. 19-1509 (issued January 9, 2020); *M.E.*, Docket No. 18-0553 (issued November 5, 2018).

¹¹ *S.B.*, Docket No. 19-1320 (issued January 17, 2020); *J.M.*, Docket No. 19-0252 (issued January 8, 2020).

¹² *C.A.*, Docket No. 19-0160 (issued January 16, 2020); *L.E.*, Docket No. 19-0470 (issued August 12, 2019).

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).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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