United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 21-0641**
	)	**Issued: August 25, 2021**
DEPARTMENT OF VETERANS AFFAIRS, NATIONAL CEMETERY ADMINISTRATION, LONG ISLAND NATIONAL CEMETERY, Farmingdale, NY, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 17, 2021 appellant filed a timely appeal from a December 23, 2020 merit decision and a March 15, 2021 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 September 15, 2020 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 September 22, 2020 appellant, then a 49-year-old cemetery caretaker, filed a traumatic injury claim (Form CA-1) alleging that on September 15, 2020 he injured his right hip when excavating a gravesite while in the performance of duty. He did not immediately stop work.

Appellant was treated in the emergency room by Dr. Candie Richardson, a Board-certified emergency room physician, on September 23, 2020 for right hip pain. She recounted that, while digging a grave, he accidentally rammed his leg against a piece of machinery. Findings on examination revealed arthralgias, myalgias, shooting pain down the right leg, and tenderness to touch of the right hip and gluteal region. Dr. Richardson noted that an x-ray of appellant's right hip of even date was unremarkable. She diagnosed right hip pain. In a work excuse note dated September 23, 2020, Dr. Richardson returned appellant to work on September 25, 2020.

In a September 23, 2020 authorization for examination and/or treatment (Form CA-16), the employing establishment authorized appellant to seek medical care. In Part B of the Form CA-16, attending physician's report, of even date, Dr. Richardson reported that, while he was digging a grave, a machine jammed into his right hip. She diagnosed right hip pain. Dr. Richardson opined that the diagnosed conditions were caused or aggravated by the described employment activity and that appellant could return to light-duty work with limited standing and no climbing.

In a November 3, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish a claim and attached a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant continued to submit medical evidence. On October 14, 2014 he was treated by Dr. David Wiles, a Board-certified neurosurgeon, for an acute onset of right L4 distribution pain and numbness radiating into the right lower extremity. He reported that appellant's symptoms began on September 15, 2020 while he was at work digging a grave. Appellant's history was significant for a C6-7 cervical fusion. Findings on physical examination revealed mild painful range of motion of the lumbar spine, decreased sensory testing at C5, C6, C7, and L4. Dr. Wiles noted an October 14, 2020 magnetic resonance imaging (MRI) scan of the cervical spine revealed an anterior cervical discectomy and fusion (ACDF) with a plate at C6-7, residual disc bulge, foraminal stenosis at C6-7, and bilateral foraminal stenosis at C5-6. He diagnosed acute onset of right L4 distribution pain and numbness, absent right L4 knee reflex, and radiculopathy. Dr. Wiles noted work restrictions of no lifting over 10 pounds, no repetitive bending or twisting, and no standing or walking for more than 1 hour without a 10-minute break.

An x-ray of the lower spine, dated October 16, 2020, revealed grade-two spondylolisthesis at L4-5 and severe loss of disc height at L5-S1.

By decision dated December 23, 2020, OWCP denied appellant's traumatic injury claim, finding that the medical evidence submitted was insufficient to establish causal relationship between his diagnosed condition and the accepted September 15, 2020 employment incident.

On January 29, 2021 appellant requested reconsideration. In support of his request, he submitted an October 14, 2020 report from Dr. Wiles, previously of record.

By decision dated March 15, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 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 the fact 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 period 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 must first be determined whether fact of injury has been established.[6] Fact of injury consists of two components that must be considered in conjunction with one another. 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.[7] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[8]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[9] A physician's opinion on whether there is causal relationship between the diagnosed condition and the accepted employment incident must be based on a complete factual and medical background. Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical

[2] *Id*.

[3] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[7] *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *L.S.*, Docket No. 19-1769 (issued July 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.[10]

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 September 15, 2020 employment incident.

Appellant was treated in the emergency room by Dr. Richardson on September 23, 2020 for right hip pain. She recounted that, while digging a grave, he accidentally rammed his leg against a piece of machinery. Dr. Richardson diagnosed right hip pain. The Board has consistently held that a diagnosis of "pain" does not constitute the basis for payment of compensation, as pain is a symptom, not a specific diagnosis.[11]

In a May 21, 2018 Form CA-20 report, Dr. Richardson affirmed that appellant's right hip pain was causally related to the accepted September 15, 2020 employment incident. Similarly, in a work excuse note dated September 23, 2020, she returned him to work on September 25, 2020. Further, on October 14, 2020 Dr. Wiles noted work restrictions of no lifting over 10 pounds, no repetitive bending or twisting, and no standing or walking for more than 1 hour without a 10-minute break. Neither Dr. Richardson nor Dr. Wiles provided an opinion as to whether a diagnosed condition was causally related to the accepted employment incident. The Board has held that medical evidence that does not include an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[12] These notes are, therefore, insufficient to establish appellant's claim.

In an October 14, 2020 report, Dr. Wiles treated appellant for an acute onset of right L4 distribution pain and numbness radiating into the right lower extremity. Appellant reported that his symptoms began on September 15, 2020 while he was at work digging a grave. Dr. Wiles diagnosed acute onset of right L4 distribution pain and numbness, absent right L4 knee reflex, and radiculopathy. He, however, did not explain how appellant digging a grave caused his diagnosed right L4 distribution pain and radiculopathy. To be of probative medical value, a medical opinion must explain how physiologically the movements involved in the employment incident caused or contributed to the diagnosed conditions.[13] As such, Dr. Wiles' report is insufficient to establish appellant's claim. Additionally, as noted above, pain is a symptom and not a compensable medical diagnosis.[14]

[10] *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] *J.P.*, Docket No. 19-0303 (issued August 13, 2019).

[12] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[13] *A.W.*, Docket No. 19-0327 (issued July 19, 2019).

[14] *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

Appellant submitted multiple diagnostic testing reports. The Board has held that diagnostic studies, standing alone, are of limited probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[15]

As appellant has not submitted rationalized medical evidence sufficient to establish that his diagnosed medical condition was caused or aggravated by the accepted September 15, 2020 employment incident, the Board finds that he has not met his burden of proof.[16]

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 does not entitle a claimant to review of an OWCP decision as a matter of right.[17] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[18] 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.[19]

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.[20] When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[21]

[15] *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

[16] *See T.J.*, Docket No. 19-1339 (issued March 4, 2020); *F.D.*, Docket No. 19-0932 (issued October 3, 2019); *D.N.*, Docket No. 19-0070 (issued May 10, 2019); *R.B.*, Docket No. 18-1327 (issued December 31, 2018).

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.607.

[19] *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 (September 2020). 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.

[20] *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

[21] *Id.* at § 10.608.

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).

On reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Consequently, he is not entitled to a review of the merits of his claim under the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[22]

In support of his request for reconsideration, appellant resubmitted the October 14, 2020 report of Dr. Wiles. As this report repeats evidence already of record, it is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits.[23] Because appellant did not provide relevant and pertinent new evidence not previously considered by OWCP, he was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).[24]

The Board, therefore, 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 appellant has not met his burden of proof to establish a medical condition causally related to the accepted September 15, 2020 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[25]

[22] *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

[23] *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[24] *See* 20 C.F.R. § 10.606(b)(3)(iii).

[25] The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2020 and March 15, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 25, 2021
Washington, DC

Alec J. Koromilas, 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