

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

C.J., Appellant)	
)	
and)	Docket No. 20-0278
)	Issued: January 28, 2021
DEPARTMENT OF THE AIR FORCE, ROBINS)	
AIR FORCE BASE, Warner Robins, GA,)	
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 November 19, 2019 appellant, through counsel, filed a timely appeal from a May 23, 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 21, 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 her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 18, 2017 appellant, then a 58-year-old management assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2017 at approximately 9:15 a.m. she was injured when an elevator door slammed into the back of her leg and knee, causing continuous pain, while in the performance of duty. She indicated that she previously injured the same knee on a bridge at work and required surgery. Appellant did not stop work.

The employing establishment asserted that it was unknown as to whether appellant was injured while in the performance of duty because her account of the employment incident had not been corroborated by any witnesses. It was further noted that she had been off work for five months in 2017 due to left knee surgery and, thus, the alleged November 29, 2017 injury may have aggravated a preexisting knee condition.

OWCP also received a copy of appellant's July 7, 2017 request for reasonable accommodation for a work-related knee injury, which she noted required surgical treatment.

In a November 21, 2017 work note, Dr. Derrick D. Phillips, a Board-certified orthopedic surgeon, provided work restrictions of walking 500 feet or less due to appellant's knee problems.

In an undated report of work status (Form CA-3), the employing establishment noted that appellant returned to work with restrictions on the date of injury following the alleged employment incident.

Appellant's supervisor noted in a November 29, 2017 report that appellant alleged that she was on her way to an appointment when an elevator door hit her right thigh and knee, instantly causing pain in her knee.

In a December 1, 2017 statement, appellant asserted that on November 29, 2017 she was on her way to an appointment. She noted that, when she stepped into an elevator with her right foot, the elevator door started closing in on her and hit her right thigh and knee. Appellant indicated that she immediately felt pain. She noted that she limped off until the pain subsided to make it to her appointment. Appellant indicated that her pain continued and that she visited the employing establishment's occupational medicine service (OMS) the next morning. She noted that the OMS subsequently instructed her to see a physician.

In a December 1, 2017 OMS form report, an unidentifiable healthcare provider noted that appellant was treated on November 30, 2017. In an OMS medical report of even date, Jay. A. Miller, a physician assistant, indicated that appellant could return to work with temporary restrictions.

In a December 1, 2017 Occupational Safety and Health Administration (OSHA) injury and illness incident report (OSHA Form 301), appellant reported that on November 29, 2017 she was

getting ready to step into an elevator to go to an appointment by putting her right foot forward in the elevator. However, the elevator door proceeded to close before she could get the other foot in and hit the muscles on her right leg and knee. Appellant explained that the elevator door sensor did not react until the impact. In the same report, an unidentifiable healthcare provider diagnosed right thigh contusion.

In a December 4, 2017 OMS medical report, Dr. Sean L. Moore, Board-certified in public health and general preventative medicine, indicated that appellant could return to work with temporary restrictions.

In a December 6, 2017 OMS medical report, Mr. Miller again noted that appellant could return to work with temporary restrictions.

On December 21, 2017 OWCP received an official copy of appellant's management assistant position description and a July 23, 2017 notification of personnel action, (Standard Form (SF)-50).

On December 22, 2017 the employing establishment controverted appellant's claim.

In a January 16, 2018 development letter, OWCP informed appellant of the deficiencies in her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an undated statement, appellant noted that she left her work area at approximately 9:15 a.m. to go to an appointment in the building on the employing establishment's premise.

In a January 30, 2018 work note, Dr. Phillips noted that appellant could return to work without restrictions on January 19, 2019.

In a February 1, 2018 letter, the employing establishment noted that there was an error with the date of injury, indicating the correct date of injury as "November 21, 2018."

By decision dated February 21, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish causal relationship between her diagnosed right knee condition and the accepted November 29, 2017 employment incident. It mailed the decision to her current address of record.³

On May 10, 2019 appellant, through counsel, requested reconsideration. Counsel indicated that appellant did not receive OWCP's February 21, 2018 decision, nor its January 16, 2018 development letter, until May 10, 2018. He argued that, while the employing establishment controverted her claim, OWCP must accept her allegations as factual unless refuted by strong persuasive evidence. Counsel also noted that appellant had a preexisting right knee condition and requested that OWCP accept her claim as an aggravation to her preexisting condition.

³ On May 10, 2018 OWCP resent a copy of its February 21, 2018 decision to appellant.

In an accompanying May 10, 2019 response to OWCP's development questionnaire, appellant explained that on the day of her injury she was going to the Equal Employment Opportunity office to file a complaint.⁴ She asserted that the employing establishment erroneously listed November 21, 2017 as the date of injury on a few occasions and also listed the wrong mailing address on her initial Form CA-1. Appellant alleged that the elevator in question was old and constantly needed repair. She asserted that, when the elevator door hit her knee, it reversed the effects of her previous surgery. Appellant indicated that she had pain and swelling in her knee, as well as an electrical shock sensation. She noted that, while she previously experienced pain and swelling from her prior injury, the electrical shock was a new sensation.

By decision dated May 23, 2019, OWCP denied appellant's request for reconsideration of the merits of her 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 or her own motion or on application.⁵

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, 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

⁴ OWCP assigned OWCP File No. xxxxxx749 to the emotional condition claim.

⁵ *Supra* note 2 at § 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).

⁶ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *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.

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

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).

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, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). The underlying issue in this case is whether the accepted November 29, 2017 employment incident caused or aggravated her diagnosed condition. This is a medical issue that must be addressed by relevant medical evidence, including the rationalized opinion of a physician.¹¹

In support of her timely request for reconsideration, counsel argued that appellant had a preexisting right knee condition and requested that OWCP accept her claim as an aggravation of the preexisting condition. He further argued that it must accept her allegations as factual unless refuted by strong persuasive evidence. The Board finds that these arguments do not attempt to show that OWCP erroneously applied or interpreted a specific point of law relevant, nor do they advance a new and relevant legal argument not previously considered.

Appellant also submitted a May 10, 2019 response to OWCP's development questionnaire where she asserted that the elevator in question was old and constantly needed repair. She contended that, when the elevator door hit her knee, it reversed the effects of her previous knee surgery, causing pain, swelling, and an electric shock sensation. The Board finds that appellant's May 10, 2019 response to OWCP's development questionnaire does not constitute medical evidence and no medical evidence was submitted along with her request for reconsideration.

The Board, accordingly, finds that appellant's request for reconsideration did not meet 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.¹²

¹⁰ *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).

¹¹ *Supra* note 8; *D.B.*, Docket No. 19-1963 (issued July 1, 2020); *M.C.*, Docket No. 18-0841 (issued September 13, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

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).

ORDER

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

Issued: January 28, 2021
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