

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

S.K., Appellant)	
)	
and)	Docket No. 20-1246
)	Issued: July 13, 2021
U.S. POSTAL SERVICE, OSHKOSH POST)	
OFFICE, Oshkosh, WI, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 1, 2020 appellant filed a timely appeal from a January 8, 2020 merit decision and a March 31, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issues are: (1) whether appellant has met his burden of proof to establish a left ankle condition causally related to the accepted November 5, 2019 employment incident; and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the March 31, 2020 decision, 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.*

(2) 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 November 5, 2019 appellant, then a 54-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a left ankle sprain when delivering mail he slipped and tripped over a stick covered in leaves while in the performance of duty. He stopped work that day.

In a November 5, 2019 return-to-work report, Angela Obermeier, a certified physician assistant, diagnosed an anterior talofibular ligament sprain of the left ankle.

In a November 6, 2019 medical report, Dr. Timothy J. Bergan, an occupational medicine specialist, indicated that appellant sustained a work-related injury on November 5, 2019 and diagnosed an anterior talofibular ligament sprain of the left ankle. He advised that appellant could return to work with restrictions on November 6, 2019.

In a development letter dated November 22, 2019, OWCP informed appellant that, when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and; therefore, payment of a limited amount of medical expenses was administratively approved without formal consideration of the merits of his claim. It had now reopened appellant's claim for consideration of the merits. OWCP informed him of the deficiencies of his claim and requested additional medical evidence. It afforded appellant 30 days to respond.

In a November 20, 2019 medical report, Dr. Bergan again indicated that appellant sustained a work-related injury on November 5, 2019 and reiterated his diagnosis of an anterior talofibular ligament sprain of the left ankle. He revised his opinion that appellant could return to work with restrictions on November 20, 2019.

By decision dated January 8, 2020, OWCP denied appellant's traumatic injury claim, finding that he had not submitted medical evidence containing a diagnosis in connection with the accepted November 5, 2019 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On January 21, 2020 appellant requested reconsideration.

By decision dated March 31, 2020, 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 FECA³ has the burden of proof to establish the essential elements of his or her claim, including 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

³ *Supra* note 2.

limitation of FECA,⁴ 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.⁵ 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.⁷

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.⁸ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment incident identified by the employee.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a left ankle condition causally related to the accepted November 5, 2019 employment incident.

In medical reports dated November 6 and 20, 2019, Dr. Bergan indicated that appellant sustained a November 5, 2019 work-related injury and diagnosed an anterior talofibular ligament sprain of the left ankle. While Dr. Bergan provided a diagnosis, he failed to provide a specific history of injury or any explanation of how the accepted November 5, 2019 employment incident caused appellant's left ankle sprain. The Board has held that a medical opinion should reflect a correct history and offer a medically-sound explanation by the physician regarding how the specific employment incident caused or aggravated the diagnosed conditions.¹⁰ Without

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *S.J.*, Docket No. 20-0157 (issued April 1, 2020).

explaining, physiologically, how the accepted employment incident caused or contributed to the diagnosed conditions, Dr. Bergan's reports are of limited probative value.¹¹ Accordingly, the Board finds that the reports are insufficient to establish appellant's claim.

Appellant also submitted a November 5, 2019 report from Ms. Obermeier, a physician assistant. The Board has held, however, that medical reports signed solely by a physician assistant are of no probative value as physician assistants are not considered physicians as defined under FECA.¹² As such, this evidence is of no probative value and is also insufficient to establish appellant's claim.

As there is no evidence of record that establishes a causal relationship between his diagnosed left ankle condition and the accepted November 5, 2019 employment incident, the Board finds that appellant has not met his burden of proof.¹³

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴

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.¹⁵

¹¹ See *J.J.*, Docket No. 19-1783 (issued March 30, 2020); *J.G.*, Docket No. 19-1116 (issued November 25, 2019); *E.G.*, Docket No. 19-0914 (issued October 18, 2019); *A.B.*, Docket No. 16-1163 (issued September 8, 2017).

¹² Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2). See also *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *M.W.*, Docket No. 19-1667 (issued June 29, 2020) (physician assistants are not considered physicians under FECA).

¹³ *J.L.*, Docket No. 18-1804 (issued April 12, 2019); *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, *supra* note 7.

¹⁴ 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).

¹⁵ 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ 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.¹⁸

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).

With his January 21, 2020 request for reconsideration, appellant submitted no additional argument or evidence. The Board, therefore, finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP, nor did he submit relevant and pertinent new evidence not previously considered by OWCP.¹⁹

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.²⁰

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a left ankle condition causally related to the accepted November 5, 2019 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).

¹⁶ *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.

¹⁷ *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).

¹⁸ *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).

¹⁹ *Supra* note 15. *See also* *A.G.*, Docket No. 20-0290 (issued June 24, 2020); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

²⁰ *C.A.*, Docket No. 19-0160 (issued January 16, 2020); *L.E.*, Docket No. 19-0470 (issued August 12, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 31 and January 8, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 13, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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