

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

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G.B., Appellant)	
)	
and)	Docket No. 21-0464
)	Issued: November 19, 2021
U.S. POSTAL SERVICE, LINN GROVE POST)	
OFFICE, Linn Grove, IA, Employer)	
_____)	

Appearances:
Appellant, pro se
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 February 2, 2021 appellant filed a timely appeal from a November 2, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 20, 2020, 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 to review 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 28, 2018 appellant, then a 64-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his left hip on August 27, 2018 when he fell on an uneven surface while in the performance of duty. He stopped work on August 27, 2018.

A bone scan obtained on April 17, 2018 demonstrated mild heterogeneous activity surrounding the femoral component of appellant's left hip prosthesis, especially at the level of the distal end of the femoral component, suggesting the possibility of a stress reaction; focal areas of abnormal uptake within multiple right ribs, consistent with right rib fractures; increased uptake in the mid-lumbar spine, which could be degenerative, postoperative, or post-traumatic; and scattered degenerative changes.

An x-ray of appellant's hips and pelvis obtained on August 27, 2018 demonstrated no indication of acute fracture or acute bony pathology, postoperative changes from left total hip replacement involving abnormal lucency at the bone-metal interface of the distal femoral stem with some bony remodeling of the lateral cortex of the proximal femoral diaphysis and with suspected underlying changes of loosening of the femoral component.

In a hospital emergency department note dated August 27, 2018, Dr. Darrel Forslund, a Board-certified family practitioner, indicated that he had examined appellant for complaints following a fall. Appellant had related a history of injury that he was at work as a rural mail carrier, stopped at a gas station, and tripped on cement, hitting his head, right hand, and right knee. Dr. Forslund noted a medical history of left and right hip replacement, use of a special shoe on the left foot to correct for height difference *versus* the right leg, prior hip fracture and revision, low back laminectomy. He diagnosed injury of the hip region.

In a report dated August 30, 2018, Dr. Jason Hough, an osteopath Board-certified in orthopedic surgery, noted that he had examined appellant for complaints of hip pain and discomfort. Appellant informed Dr. Hough that on August 27, 2018 he fell while at work. He noted that his left hip had been bothering him for quite some time and that he had undergone a revision surgery in 2006. Dr. Hough noted that appellant had subsequently fallen multiple times, which appeared to have loosened the left hip femoral component. On examination of the left hip, he observed flexion to approximately 110 degrees and extension to approximately 15 degrees, with significant complaints of pain and discomfort on log roll testing. Dr. Hough diagnosed femoral loosening of a left hip prosthetic and recommended left femoral component revision surgery. In a duty status report (Form CA-17) dated August 30, 2018, he diagnosed femoral loosening of the prosthetic left hip and recommended that appellant remain off work. A prescription note of the same date recommended referral to a specialist and remaining off work until the referral appointment.

In a report dated October 10, 2018, Dr. Corey Rothrock, a Board-certified orthopedic surgeon, examined appellant for complaints of left thigh pain. He noted that appellant had a history of total hip replacement performed in the late 1990s with revision of the replacement performed in 2005. Appellant had increasing pain and difficulty, especially with weight bearing, and severe pain in the anterior thigh. On physical examination of the left lower extremity, Dr. Rothrock noted a limp, tenderness, and difficulty with range of motion and activity. He diagnosed aseptic

loosening of the left femoral team. Dr. Rothrock recommended total hip arthroplasty revision. In a Form CA-17 of the same date, he diagnosed loosening of the left hip prosthesis and recommended work restrictions.

By decision dated December 3, 2018, OWCP denied appellant's claim for compensation, finding that appellant had not demonstrated that he was in the performance of duty at the time of the accepted incident on August 27, 2018.

Postoperative x-rays of the pelvis, left hip, and left femur obtained on November 1, 2018 demonstrated status post left hip revision arthroplasty and a cortical fracture along the lateral aspect of the left femoral diaphysis at the junction of the proximal and middle one thirds. A hospital note dated November 3, 2018 indicated that appellant had been admitted to the hospital on November 1, 2018, underwent procedures of revision of the left total hip arthroplasty and extended trochanteric osteotomy on that date, and was discharged on November 3, 2018.

In a follow-up note dated November 19, 2018, Dr. Rothrock examined appellant post-revision of the left total hip arthroplasty with trochanteric osteotomy. He noted that appellant's incision was healing nicely, passive range of motion of the hip was well-tolerated, and hip flexion to 90 degrees.

In a return to work form dated January 4, 2019, Dr. Rothrock recommended that appellant remain off work.

On January 25, 2019 appellant requested reconsideration.

In a return to work form dated May 8, 2019, Dr. Rothrock recommended that appellant return to work without limitations the next day.

By decision dated June 28, 2019, OWCP modified its December 3, 2018 decision to accept that appellant was in the performance of duty at the time of the accepted incident of October 27, 2018. However, it continued to deny the claim for traumatic injury on that date, finding that appellant had not submitted sufficient rationalized medical evidence to establish that the accepted employment incident on October 27, 2018 caused or aggravated his diagnosed left hip condition.

On October 22, 2019 appellant requested reconsideration. In an attached letter dated October 13, 2019, he stated that he was enclosing a letter from Dr. Hough. OWCP did not receive another letter from Dr. Hough with the request for reconsideration.

By decision dated November 20, 2019, OWCP denied appellant's request for reconsideration, finding that he had not submitted sufficient evidence to warrant review of the June 28, 2019 merit decision.

On December 1, 2019 appellant again requested reconsideration. Enclosed with the request was a July 11, 2019 letter from Dr. Hough. In the July 11, 2019 letter, Dr. Hough noted that appellant had undergone a revision of hip replacement secondary to multiple falls and that he apparently had falls as a mail carrier. He further noted that he saw appellant on April 10, 2018 and ordered a bone scan on April 17, 2018. Dr. Hough reported that appellant had no significant

abnormal blood flow or soft tissue activity on either side of the pelvis or hip, but that he did have mild heterogeneous activity at the distal tip of the left hip. He recalled that he discussed with appellant at that time that it “did appear that he did not have any prosthetic loosening.” Subsequently, appellant had a fall on August 27, 2018, with subsequent subsidence of the left femoral component with significant loosening. Dr. Hough opined that appellant’s current problem in 2018 was related to his previous work-related injury, as “these were due to the loosening of the prosthesis.”

By decision dated February 4, 2020, OWCP denied modification of its June 28, 2019 decision. It found that Dr. Hough’s July 11, 2019 letter did not provide a definitive diagnosis and contained speculative statements, and that as such, it did not establish a causal relationship between the accepted August 27, 2018 employment incident and a diagnosed medical condition.

On May 6, 2020 appellant requested reconsideration. With the request, he submitted an April 23, 2020 letter from Dr. Hough. Dr. Hough stated that appellant underwent a revision of hip replacement secondary to a fall at work on August 28, 2018. He opined that he believed with a high degree of medical probability that this fall was a contributing factor to appellant’s subsequent surgery. He noted that appellant underwent a bone scan on April 17, 2018 that demonstrated some heterogeneous activity at the distal tip of the left hip and that he discussed with appellant at that time that “it appear[ed] he did not have any prosthetic loosening.” Subsequent to the fall on August 27, 2018, appellant had subsidence of the left femoral component with significant loosening.

By decision dated May 20, 2020, OWCP denied modification of its February 4, 2020 decision. It found that Dr. Hough’s April 23, 2020 letter essentially reiterated the information contained in his July 11, 2019 letter and did not establish a causal relationship between the accepted August 27, 2018 employment incident and a diagnosed medical condition, in part because it did not differentiate between any preexisting conditions and appellant’s present medical condition and did not discuss appellant’s history of multiple falls.

On July 13, 2020 appellant requested reconsideration. With his request, he attached a statement explaining that at the beginning of 2018 he fell twice and that his first fall occurred at work. Appellant noted an attached letter dated September 11, 2018 under OWCP File No. xxxxxx282 concerning a fall that he had on April 2, 2018 and stated that this fall was the reason he underwent the previously-referenced bone scan in this case. He noted that the diagnosed condition under File No. xxxxxx282 was multiple fractures of the ribs on the right side, initial encounter for closed fracture and that he fell while tripping on buckled cement onto his right side. After recovering from the injury on April 2, 2018, appellant performed his work duties as scheduled until his fall on August 27, 2018. He stated that he did not have any difficulties with his hip from the time of his bone scan on April 17, 2018 to the incident of August 27, 2018.

By decision dated November 2, 2020, OWCP denied appellant’s request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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.²

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁵ 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.⁶

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).

Appellant's July 13, 2020 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant submitted a statement dated July 13, 2020 explaining his history of two separate falls in 2018. The underlying issue in this case is medical in nature, as OWCP found that appellant had not submitted sufficient rationalized medical evidence to support that the incident of August 27, 2018 caused or aggravated his diagnosed

² 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

³ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁴ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 (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.

⁵ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁶ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

conditions. As such, the underlying issue in this case can only be addressed by submission of medical evidence from a qualified physician. While appellant's statement dated July 13, 2020 is new, it is not medical evidence from a qualified physician.⁷ Therefore, he is also not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 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.

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 November 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 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

⁷ See *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *D.K.*, 59 ECAB 141 (2007).