

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

V.M., Appellant)	
)	
and)	Docket No. 22-0010
)	Issued: November 8, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Indianapolis, IN, 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, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 4, 2021 appellant filed a timely appeal from a July 21, 2021 merit decision and a September 29, 2021 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 29, 2021 decision, OWCP received additional evidence. 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury in the performance of duty, as alleged; 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).

FACTUAL HISTORY

On June 1, 2021 appellant, then a 44-year-old rural carrier associate, filed an occupational disease claim (Form CA-2) alleging that he injured his low back due to factors of his federal employment. He indicated that he was making deliveries on his route and felt a "glitch" and "some pain" in his back, thigh and calf. Appellant noted that he first became aware of his condition on March 30, 2020 and realized its relation to his federal employment on May 17, 2021. He did not stop work.

In a development letter dated June 3, 2021, OWCP informed appellant that it had not received any evidence in support of his claim. It advised him of the type of medical and factual evidence needed, including a detailed factual description of the alleged employment factors, and provided a questionnaire for his completion. OWCP also asked that appellant clarify whether he was claiming an occupational disease or a traumatic injury. It afforded him 30 days to submit the requested evidence.

OWCP thereafter received an undated statement by appellant, which outlined various dates that he received medical care from March 20 through April 2, 2021.

A report of magnetic resonance imaging (MRI) scan of the lumbar spine dated March 31, 2021 noted a history of severe low back pain radiating down the right leg. The findings included loss of disc hydration at L4-5 and L5-S1, degenerative changes at L5-S1, a tear of the central annulus at L4-5, and a diffuse disc bulge with bilateral paracentral disc extrusions at L5-S1 resulting in impingement of the traversing S1 nerve root.

In a note dated April 9, 2021, Dr. Ramesh Kunuru, a Board-certified anesthesiologist, noted that appellant had received an epidural steroid injection on April 8, 2021 and could return to work on April 15, 2021, as tolerated.

In a note dated May 12, 2021, Dr. Kunuru released appellant to return to light-duty work with no lifting over 5 to 10 pounds and no bending or twisting.

A note dated May 24, 2021 bearing an illegible signature recommended that appellant remain out of work until June 12, 2021.

By decision dated July 21, 2021, OWCP denied appellant's claim, finding that he had not established the claimed work factors. It noted that he had not responded to its June 3, 2021 development questionnaire. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive medical evidence, including an April 1, 2021 report by Dr. Kunuru, who noted that appellant presented with complaints of acute back pain. Dr. Kunuru

performed a physical examination, which revealed reduced sensation on the right at L4-5 and L5-S1, reduced strength on the right from L1 through L5, shooting pain in the right leg at 35 degrees with straight leg raising, and a limp with dragging of the right foot. He diagnosed low back pain, right lumbar radiculopathy, a bulging disc at L4-5, and a herniated disc at L5 and S1.

In an operative report dated April 8, 2021, Dr. Kunuru noted that he performed right-sided transforaminal epidural steroid injections under fluoroscopy at L4 and L5. He diagnosed lumbar radiculopathy, lumbar disc displacement, and a bulging lumbar disc.

In a follow-up medical report dated April 28, 2021, Dr. Kunuru related that appellant felt 75 percent pain relief for a few days after the April 8, 2021 injections. He performed a physical examination and recommended medication and physical therapy.

In an initial examination report dated April 30, 2021, Henry Akinbobuyi, a physical therapist, indicated that appellant reported a history low back pain for the past 10 days. An attached plan of care reflected an “injury/onset change of status date” of April 21, 2021.

In a medical report dated May 24, 2021, Dr. Kunuru noted that appellant related ongoing complaints of pain in the lower lumbar area that radiated to the right leg. He performed a physical examination and recommended medication and core exercises.

Dr. Kunuru, in a medical report dated September 13, 2021, noted ongoing acute back pain in the right lower lumbar area radiating down the back of the right leg with numbness in the right heel. He also indicated that appellant related that he had begun to experience pain down the back of the left leg. Dr. Kunuru examined appellant and recommended that he remain out of work until September 20, 2021.

On September 23, 2021 appellant requested reconsideration.

By decision dated September 29, 2021, OWCP denied appellant’s request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128.

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 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

³ *Supra* note 1.

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).

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 establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty, as alleged.

On his claim form, appellant indicated that he injured his low back due to factors of his federal employment, including that he felt a glitch and pain while delivering his route.

OWCP, in its June 3, 2021 development letter, requested that appellant clarify his claim and provide a detailed factual description of the alleged employment factors. Appellant, however, did not respond to OWCP's June 3, 2021 development letter or otherwise provide a factual statement identifying employment factors alleged to have caused or contributed to a medical condition.⁸ Furthermore, the medical evidence of record did not identify any employment factors alleged to have caused the diagnosed conditions.

As the evidence of record is insufficient to establish the alleged employment factors, the Board finds that appellant has not met his burden of proof.

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.

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.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

⁸ *Id.*

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.⁹

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.¹⁰

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹² 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.¹³

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).

Appellant's September 23, 2021 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. Accordingly, appellant 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).¹⁴

⁹ 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).

¹⁰ 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).

¹¹ *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 (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.

¹² *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

¹³ *Id.* at § 10.608(b); *J.V.*, Docket No. 21-0252 (issued September 23, 2021); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁴ *See J.V.*, *id.*; *C.C.*, Docket No. 19-1622 (issued May 28, 2020); *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, *supra* note 10.

In support of his request for reconsideration, appellant submitted medical evidence including reports of Dr. Kunuru dated April 1 through September 13, 2021 and an initial physical therapy examination report dated April 30, 2021. While this medical evidence was new, it is not relevant because it does not address the underlying issue of the present case which is factual in nature, *i.e.*, whether he submitted probative factual evidence supporting that he injured his low back in the performance of duty, as alleged. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ Therefore, appellant also failed to satisfy the third 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).¹⁶ 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 an injury in the performance of duty, as alleged. 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).

¹⁵ *D.J.*, Docket No. 21-0371 (issued November 24, 2021); *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁶ *R.R.*, Docket No. 20-0378 (issued March 9, 2021); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the September 29 and July 21, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 8, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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