

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

_____)
J.R., Appellant)

and)

**U.S. POSTAL SERVICE, KETCHUM POST
OFFICE, Ketchum, ID, Employer**)
_____)

**Docket No. 22-0784
Issued: November 4, 2022**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 22, 2022 appellant filed a timely appeal from a December 13, 2021 merit decision and a January 21, 2022 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.

ISSUE

The issues are: (1) whether appellant has met her burden of proof to establish a diagnosed medical condition causally related to the accepted July 28, 2021 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 30, 2021 appellant, then a 41-year-old postal support employee, filed a traumatic injury claim (Form CA-1) alleging that on July 28, 2021 she strained her abdomen when she lifted a package that weighed approximately 45 pounds, which was not marked “heavy,” while in the performance of duty. She stopped work on that date and returned to full-time, modified-duty work on July 29, 2021.

In a July 28, 2021 emergency department report, Dr. Alexander J. Kahnweiler, an osteopath and emergency medicine specialist, evaluated appellant for complaints of right upper quadrant abdominal pain after lifting a 50-pound box at work. On examination of appellant’s abdomen he observed tenderness to palpation of right upper quadrant and epigastrium without any rebound or rigidity. Dr. Kahnweiler diagnosed right upper quadrant abdominal pain.

A computerized tomography (CT) scan of the abdomen dated July 28, 2021 revealed no acute abnormality.

In a work status note dated July 28, 2021, Dr. Brock R. Bemis, a Board-certified emergency medicine specialist, indicated that appellant was evaluated in the emergency room and should be on light-duty work until her primary care physician cleared her.

In progress notes dated August 3 and 17, September 15, and October 19, 2021, Laira L. Thomas, a nurse practitioner, indicated that appellant was evaluated for follow up of right upper quadrant pain. She described the July 28, 2021 employment incident and recounted that the pain had been constant since then. On initial examination Ms. Thomas observed tenderness to palpation in the right, lower quadrant of the abdomen. She diagnosed right abdominal muscle wall strain.

In a development letter dated November 10, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim. OWCP afforded appellant 30 days to provide the necessary evidence. No evidence was received.

By decision dated December 13, 2021, OWCP denied appellant’s traumatic injury claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the July 28, 2021 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 3, 2022 appellant requested reconsideration. She explained that she had sent both notices to her doctor’s office and was getting the paperwork together.

By decision dated January 21, 2022, OWCP denied appellant’s request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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 that 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 first must be determined whether fact of injury has been established.⁶ 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 and place and in the manner alleged.⁷ Second, the employee must submit evidence, in the form of probative medical 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. A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) 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 rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment incident.⁹

² *Id.*

³ *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁷ *R.K.*, Docket No. 19-0904 (issued April 10, 2020); *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *D.M.*, Docket No. 20-0386 (issued August 10, 2020); *John J. Carlone, id.*

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a diagnosed medical condition causally related to the accepted July 28, 2021 employment incident.

On the date of injury appellant sought emergency medical treatment with Dr. Kahnweiler, who described the July 28, 2021 employment incident and diagnosed right upper quadrant abdominal pain. As the Board has held, pain is a symptom, not a clear diagnosis of a medical condition.¹⁰ The Board has found that a medical report lacking a firm diagnosis is of no probative value.¹¹ Accordingly, Dr. Kahnweiler's finding of abdominal pain is insufficient to satisfy appellant's burden of proof.

Appellant was also evaluated by Dr. Bemis. In a July 28, 2021 note, Dr. Bemis indicated that appellant was treated in the emergency department. He did not, however, provide a medical diagnosis.¹² Also submitted was a July 28, 2021 abdominal CT scan report which revealed no acute abnormality. 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.¹³ These reports, therefore, are also insufficient to establish the medical component of fact of injury.

Appellant also submitted progress notes by Ms. Thomas, a nurse practitioner. These notes, however, are of no probative value to establish fact of injury because nurse practitioners are not considered physicians as defined under FECA.¹⁴

As the medical evidence of record lacks rationalized medical evidence establishing a diagnosed medical condition causally related to the accepted July 28, 2021 employment incident, the Board finds that appellant has not met her burden of proof to establish her claim.¹⁵

¹⁰ Findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury medical determination. *C.S.*, Docket No. 20-1354 (issued January 29, 2021); *D.A.*, Docket No. 18-0783 (issued November 8, 2018); *B.P.*, Docket No. 12-1345 (issued November 13, 2012).

¹¹ *A.T.*, Docket No. 21-0985 (issued April 27, 2022); *R.L.*, Docket No. 20-0284 (issued June 30, 2020).

¹² *R.W.*, Docket No. 22-0043 (issued April 25, 2022); *K.R.*, Docket No. 20-0995 (issued January 29, 2021); *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

¹³ *J.G.*, Docket No. 21-1334 (issued May 18, 2022); *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹⁴ Section 8102(2) of FECA provides as follows: (2) 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. § 8102(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); see also *J.D.*, Docket No. 21-0164 (issued June 15, 2021) (nurse practitioners are not physicians as defined under FECA).

¹⁵ *C.W.*, Docket No. 21-1095 (issued May 20, 2022); *D.M.*, Docket No. 21-1244 (issued March 25, 2022).

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 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.¹⁶

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.¹⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 2

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).

In her January 3, 2022 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. She merely indicated that she was getting

¹⁶ 5 U.S.C. § 8128(a); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹⁷ 20 C.F.R. § 10.606(b)(3); *see S.K.*, Docket No. 22-0248 (issued June 27, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁸ *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.

¹⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

documentation together. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).²¹

Furthermore, appellant did not submit any relevant and pertinent new evidence with her January 3, 2022 request for reconsideration. Accordingly, she was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).²²

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.²³

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a diagnosed medical condition causally related to the accepted July 28, 2021 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

²¹ *Supra* note 16; *see K.F.*, Docket No. 19-1846 (issued November 3, 2020).

²² *Supra* note 16; *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

²³ *See L.W.*, Docket No. 22-0141 (issued May 16, 2022); *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2021 and January 21, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 4, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board