

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

A.E., Appellant)	
)	
and)	Docket No. 21-0853
)	Issued: April 18, 2023
U.S. POSTAL SERVICE, NETWORK)	
DISTRIBUTION CENTER, Des Moines, IA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 19, 2021 appellant filed a timely appeal from a May 7, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated December 28, 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 over the merits of this case.²

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.*

² The Board notes that, following the May 7, 2021 decision, OWCP received additional evidence. 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.*

FACTUAL HISTORY

On November 19, 2020 appellant, then a 44-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 2020 at 2:30 p.m. he injured the front of his foot when it was hit by a pallet jack while in the performance of duty. On the reverse side of the claim form, an employing establishment supervisor asserted that the injury was caused by appellant's willful misconduct, intoxication, or intent to injure self or another. She indicated that an investigation revealed that he intentionally stepped in the path of the powered industrial vehicle (PIV). Appellant stopped work on November 15, 2020, and returned to work on November 19, 2020.

In a development letter dated November 23, 2020, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding the claimed employment incident, including comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations and explaining areas of disagreement. OWCP afforded both parties 30 days to respond.

In a November 15, 2020 statement, Z.A., appellant's supervisor, explained that appellant was assigned to drive that day, per his request. She indicated that around 2:15 p.m. she heard him scream "do you want to hit me?" at R.M., another coworker. Z.A. related that she watched appellant get out of his pallet jack and stand next to some boxes. R.M. then drove his pallet jack and slid between appellant's feet. Z.A. instructed both employees to stop as they continued screaming at each other. She called J.J., another supervisor, who spoke to both employees. Appellant then claimed that R.M. hit appellant's foot with a pallet jack and requested that an ambulance be called. Z.A. asserted that she did not see the pallet jack touch appellant's feet.

In a separate statement also dated November 15, 2020, R.M. explained that around 2:20 p.m. he was going to pick up another pallet when appellant cut in front of him and caused him to hit his pallet jack. He alleged that appellant began yelling at him, so he attempted to go around him to grab another pallet. R.M. asserted that appellant then got off of his pallet jack and ran to the side where he was and claimed that he ran over his foot. He attested that he did not believe he ran over appellant's foot.

In a November 15, 2020 medical note, Dr. Brian Jennett, Board-certified in emergency medicine, noted that appellant was seen that day in the emergency department and advised that he could return to work on November 18, 2020. He diagnosed left foot pain and attached treatment instructions for foot pain.

In a diagnostic report of even date, Dr. Rory Karibo, a Board-certified radiologist, performed an x-ray scan of appellant's left foot, finding no acute fracture or dislocation.

In a November 19, 2020 statement, appellant asserted that on November 15, 2020 at 2:30 p.m. he called R.M. stupid after R.M. hit his pallet jack. He indicated that he had previous encounters with R.M. and that he was "always talking crap" about him. Appellant believed that R.M. had animosity towards him and informed his supervisor that he no longer wanted to drive due to R.M.'s attitude. He asserted that Z.A. also witnessed the incident and that J.J. was not worried about him or his injury.

In a November 26, 2020 statement, T.G., appellant's coworker, noted that she was asked by another employee if she would be retraining appellant as he was observed falling off of a pallet jack as it dragged him with his hands still on the controls. She indicated that she did not have any other knowledge of the incident, and no other employees requested that appellant be retrained.

In response to OWCP's development letter, J.J. submitted an undated statement in which she indicated that at approximately 2:00 p.m. on November 15, 2020 R.M. spoke to her about the alleged employment incident in which appellant got off of his pallet jack and stepped in between the tires of the pallet jack. She observed that his left shoe was off when he spoke with her. Appellant informed her that he could not walk and asked for medical services. J.J. then called 911 to assist. She noted that appellant had previously been subject to disciplinary actions for failing to follow instructions. J.J. also detailed dates in which he changed work shifts and submitted paperwork to perform light-duty assignments concerning a nonwork-related injury. She also noted an October 6, 2019 employment incident in which appellant injured his left hand.³ J.J. explained that he initially believed that appellant was in the performance of duty when his injury occurred, but after an investigation it was revealed that he intentionally stepped in the path of the PIV. When appellant was questioned as to why he stepped in front of the PIV, he explained that he was going to get a box of mail and was not allowing the other PIV operator to take it. He asserted that he did not let the other PIV operator take the box because it was his and he was not going to let him have it. J.J. also alleged that the PIV driver and another witness both claimed that appellant's foot did not come into contact with the pallet jack. She insisted that there was discord between appellant and R.M. J.J. indicated that a copy of the investigation would be attached; no investigation report was received.

By decision dated December 28, 2020, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as appellant described. It explained that he had not provided a detailed account of the alleged November 15, 2020 employment incident and noted that it had received witness statements indicating that he got off of his pallet jack and stepped in between the tires of another pallet jack. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. In a November 15, 2020 medical report, Dr. Jennett indicated that appellant injured his foot when a loading pallet slid into his foot. On evaluation and review of an x-ray scan of appellant's left foot, he diagnosed left foot pain.

On March 2, 2021 appellant requested reconsideration of OWCP's December 28, 2020 decision.

In a February 17, 2021 medical report, Dr. Jennifer Fejfar, Board-certified in family medicine, evaluated appellant for the November 15, 2020 employment incident in which a heavy pallet was dropped on his foot. On evaluation, she diagnosed pain of the toe of the left foot and a subungual hematoma of the great toe of the left foot. Dr. Fejfar explained that there was no need

³ Appellant has a previously-accepted traumatic injury claim under OWCP File No. xxxxxx919 for an October 6, 2019 crushing injury of the left hand and left hand contusion.

for appellant to undergo a magnetic resonance imaging (MRI) scan of his left foot, explaining that it was clear that there was a bruise of the bone because he was still experiencing pain.

In a February 19, 2021 letter, Dr. Fejfar recounted the events of the November 15, 2020 employment incident in which appellant injured his left foot, as well as his subsequent medical treatment that day. She indicated that his symptoms became worse and that he was reevaluated on February 3, 2021 by Brett Stewart, a physician assistant, who observed evidence of a subungual hematoma that had developed from the original injury. Dr. Fejfar diagnosed a bone contusion and subungual hematoma, opining that appellant's conditions were caused by the November 15, 2020 employment incident.

By decision dated May 7, 2021, 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.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.⁸

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 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).

⁶ *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 the merit 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.

⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *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 his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that he is not entitled to a review of the merits based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁹

Additionally, appellant did not submit relevant and pertinent new evidence in support of his March 2, 2021 request for reconsideration. The underlying issue in this case is whether he has met his burden of proof to establish a traumatic injury in the performance of duty on November 15, 2020, as alleged. This is a factual issue which must be addressed by new and relevant factual evidence.¹⁰ The newly-submitted medical evidence is, therefore, irrelevant and insufficient to warrant merit review. Consequently, appellant is not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹¹

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.

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).

⁹ *Supra* note 5.

¹⁰ *I.J.*, Docket No. 19-1278 (issued December 30, 2019).

¹¹ 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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