

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

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<b>L.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0004</b>
	)	<b>Issued: April 14, 2023</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VA MEDICAL CENTER, Martinez, CA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On October 1, 2021, appellant filed a timely appeal from a July 12, 2021 merit decision and an August 31, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish a medical condition causally related to the accepted April 30, 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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 13, 2021 appellant, then a 54-year-old medical instrument technician, filed a traumatic injury claim (Form CA-1) alleging that on April 30, 2021 she sustained abrasions to her hands and right knee and a broken radial bone after stepping on broken concrete and falling on her hands and knees while in the performance of duty. She stopped work on April 30, 2021.

In an after-visit summary dated April 30, 2021, Mark Tarshis, a registered nurse, noted that appellant was seen in the emergency room on that date and should remain off work pending an evaluation by an orthopedic specialist.

In a note dated May 4, 2021, Dr. Leo A. Calafi, a Board-certified orthopedic surgeon, noted a date of injury of April 30, 2021 and diagnosed a right elbow fracture. He recommended that appellant remain off work for two weeks.

On May 14, 2021 Dr. Calafi diagnosed a right radial head fracture and recommended that appellant continue to remain off work for two to four weeks.

On May 21, 2021 Dr. Calafi released appellant to return to work.

In a development letter dated June 9, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested additional information from the employing establishment. It afforded both parties 30 days to respond.

In a June 22, 2021 e-mail, Alexandra Luckhardt, an employing establishment nurse manager, related that appellant was on the employing establishment's property taking a walk during her break at the time of her fall.

By decision dated July 12, 2021, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that his diagnosed medical conditions are causally related to the accepted April 30, 2021 employment incident.

OWCP thereafter received an April 30, 2021 after visit summary by Dr. Russell Rodriguez, a Board-certified emergency medicine specialist, who noted that appellant had undergone x-rays of the right elbow, forearm, and wrist. Dr. Rodriguez diagnosed a closed nondisplaced fracture of the head of the right radius.

On August 18, 2021 appellant requested reconsideration of OWCP's July 12, 2021 decision.

By decision dated August 31, 2021, 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 FECA 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,<sup>2</sup> that the claim was timely filed within the applicable time limitation period of FECA, 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.<sup>3</sup> 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.<sup>4</sup>

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. The first component is that 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.<sup>5</sup>

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.<sup>6</sup> 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 the specific employment incident identified by the employee.<sup>7</sup>

## **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted April 30, 2021 employment incident.

In support of her claim, appellant submitted notes by Dr. Calafi, who noted a date of injury of April 30, 2021 and diagnosed right elbow fracture/right radial head fracture. Dr. Calafi,

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<sup>2</sup> *K.R.*, Docket No. 20-0995 (issued January 29, 2021); *A.W.*, Docket No. 19-0327 (issued July 19, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>3</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>4</sup> *J.B.*, Docket No. 20-1566 (issued August 31, 2021); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>5</sup> *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).

<sup>6</sup> *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).

<sup>7</sup> *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).

however, did not provide an opinion on causal relationship. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>8</sup> Therefore, the notes of Dr. Calafi are insufficient to establish the claim.

Appellant also submitted an April 30, 2021 note by Mark Tarshis, a registered nurse. However, certain healthcare providers such as physician assistants, nurse practitioners, and physical therapists are not considered qualified physicians as defined under FECA.<sup>9</sup> Their medical findings, reports and/or opinions, unless cosigned by a qualified physician, will not suffice for purposes of establishing entitlement to FECA benefits.<sup>10</sup>

As appellant has not submitted rationalized medical evidence to establish a medical condition causally related to the accepted April 30, 2021 employment incident, the Board finds that she has not met her 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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>11</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>12</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>13</sup>

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

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<sup>8</sup> *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>9</sup> 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); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *C.G.*, Docket No. 20-0957 (issued January 27, 2021); *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).

<sup>10</sup> *K.A.*, Docket No. 18-0999 (issued October 4, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, *id.*

<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.607.

<sup>13</sup> *Id.* at § 10.607(a). 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.

considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>14</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>15</sup>

### **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).

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>16</sup>

Furthermore, appellant has not provided relevant and pertinent new evidence in support of her request for reconsideration. On reconsideration she submitted an April 30, 2021 after visit summary from Dr. Rodriguez, who reviewed x-rays of the right elbow, forearm, and wrist, and diagnosed a right radial head fracture. However, while this evidence may be new, it is substantially similar to the medical evidence previously of record. The Board has held that medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.<sup>17</sup> Therefore, appellant is not entitled to a merit review based on 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). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted April 30, 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).

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<sup>14</sup> *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>15</sup> *Id.* at § 10.608.

<sup>16</sup> *See R.L.*, Docket No. 20-1403 (issued July 21, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>17</sup> *See B.S.*, Docket No. 20-0927 (issued January 29, 2021); *M.O., id.*; *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 12 and August 31, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 14, 2023  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board