

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

M.M., Appellant)	
)	
and)	Docket No. 23-0651
)	Issued: October 18, 2023
U.S. POSTAL SERVICE, GARSIDE POST)	
OFFICE, Las Vegas, NV, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 3, 2023 appellant filed a timely appeal from a February 13, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 28, 2021, 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.

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).

FACTUAL HISTORY

On March 10, 2021 appellant, then a 56-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on that date he felt a "pop" in his right calf muscle when walking

¹ 5 U.S.C. § 8101 *et seq.*

on a flat floor while in the performance of duty. He stopped work on March 10, 2021 and returned on March 11, 2021.

In reports dated March 10, 12, and 16, 2021, Dr. Allen Schwartz, a Board-certified internist, treated appellant for right calf pain. Appellant reported walking at work and experiencing a strain in his right calf. He noted findings on physical examination of posterior and proximal tenderness of the right lower leg. Dr. Schwartz diagnosed paresthesia of the right lower extremity. In work activity status reports dated March 10, 12, and 16, 2021, he diagnosed paresthesia of the right lower extremity and returned appellant to modified-duty work. In a March 23, 2021 report and work activity status report, Dr. Schwartz diagnosed paresthesia of the right lower extremity and returned appellant to full-duty work. In an April 20, 2021 report and work activity status report, he diagnosed strain of the right calf muscle, resolved and discharged him from his care. In a duty status report (Form CA-17) of even date, Dr. Schwartz released appellant to full-time work without restrictions.

On March 12, 2021 appellant was treated in the emergency room by Dr. Elad Bicer, Board-certified in emergency medicine, for right leg pain. He reported hearing a pop in the right calf and pain in the right lower leg. An ultrasound of the right lower extremity of even date was unremarkable.

On March 20, 2021 appellant accepted a limited-duty position as a modified city carrier effective the same day.

On March 29, 2021 Dr. Ryan-Niko Hickman, a Board-certified family practitioner, evaluated appellant for right lower extremity pain. Appellant reported that when walking up a flight of stairs he felt a cramping sensation in his right calf and later while walking on a flat surface he felt a pop and immediate pain. Dr. Hickman diagnosed strain of the left calf muscle. On April 5, 2021 he treated appellant in follow up for right lower leg pain. Dr. Hickman diagnosed strain of the right calf muscle. In work activity status reports dated March 29 and April 5, 2021, he diagnosed strain of right calf muscle and continued modified-duty work.

An April 5, 2021 x-ray of the right lower extremity revealed no evidence of acute muscle strain or tear and no occult fracture or bone marrow edema.

On April 13, 2021 Dr. Gregory B. Hoversten, an osteopath specializing in emergency medicine, evaluated appellant for right lower extremity pain. On examination he noted right leg swelling, posterior tenderness. Dr. Hoversten diagnosed strain of the left calf. He returned appellant to modified-duty work. In a work activity status report of even date, Dr. Hoversten diagnosed strain of right calf muscle and continued modified-duty work.

In an August 23, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated September 28, 2021, OWCP denied appellant's traumatic injury claim, finding that the medical evidence submitted was insufficient to establish causal relationship between his diagnosed conditions and the accepted March 10, 2021 employment incident. It

concluded, therefore, that the requirements had not been met to establish an injury or condition due to the accepted employment factors.

On August 24, 2022 appellant requested reconsideration. He reiterated the factual description of his injury and subsequent medical treatment.

OWCP received additional evidence. Appellant submitted a narrative statement dated March 10, 2021, previously of record.

On March 12, 2021 the employing establishment conducted an investigative interview. Appellant indicated that on March 10, 2021 while delivering mail he was walking upstairs and felt tightness in his right calf and a cramping sensation. He stretched out his calf and made several more deliveries when he experienced right calf pain while walking. Appellant continued his route for 15 more minutes and then brought his mail back to the station.

In a January 29, 2022 statement, appellant reiterated the factual description of his injury on March 10, 2021. He submitted copies of several black and white photographs of where the incident took place.

On August 24, 2022 Beth Moreno, a registered nurse, treated appellant for injuries sustained at work in 2021. She opined that the injuries were directly related to his job duties. Ms. Moreno described appellant's work injury as related to his "left" calf. She explained that appellant was carrying heavy parcels up and down stairs without handrails and pulled a muscle/tendon in his "left" calf.

By decision dated February 13, 2023, 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 or her 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 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.³

² 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

³ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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).

With his request for reconsideration, appellant provided statements dated March 10, 2021, and January 29 and August 24, 2022, and reiterated the factual description of his injury noting that on March 10, 2021, while delivering mail and walking on a flat floor he felt a pop and pain in his left calf. He referenced narrative statements dated March 10, 2021 and January 12, 2022 and an investigative interview dated March 12, 2021. Appellant's reconsideration request does not advance a new legal argument not previously considered, nor show that OWCP erroneously applied or interpreted a specific point of law. While this evidence is new, the underlying issue in this case is medical in nature. Therefore, this evidence is irrelevant and is insufficient to warrant a merit review as OWCP had already accepted the incident occurred as alleged. Thus, 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).⁷

In support of his request for reconsideration, appellant submitted a March 12, 2021 investigative interview conducted by the employing establishment, copies of several black and white photographs, and an August 27, 2022 route inspection report performed by his supervisor. The underlying issue in this case is medical in nature, but appellant did not submit relevant and pertinent new evidence in support of his request for reconsideration. 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.⁸ As such, this evidence is insufficient to warrant merit review.

Appellant also submitted a note from Ms. Moreno, a registered nurse, dated August 24, 2022. However, certain healthcare providers such as nurses and nurse practitioners are

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

⁵ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁶ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁷ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

⁸ *J.R.*, Docket No. 19-1280 (issued December 4, 2019); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

not considered physicians as defined under FECA.⁹ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁰ As such, this evidence is insufficient to warrant merit review. As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹¹

The Board, accordingly, finds that appellant did not meet any of the requirements under 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 Section 8101(2) 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) (September 2020); *M.M.*, Docket No. 23-0475 (issued July 27, 2023) (nurses are not considered physicians as defined under FECA); *B.B.*, Docket No. 09-1858 (issued April 16, 2010) (nurse's reports are of no probative medical value as nurses are not physicians under FECA); *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).

¹⁰ *Id.*

¹¹ *See* 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2023
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