

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

D.S., Appellant)	
)	
and)	Docket No. 24-0015
)	Issued: February 14, 2024
U.S. POSTAL SERVICE, NORTH HOUSTON)	
POST OFFICE, North Houston, TX, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 8, 2023 appellant filed a timely appeal from a May 17, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated October 12, 2022, 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 17, 2023 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.*

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 August 8, 2022 appellant, then a 37-year-old city delivery specialist, filed a traumatic injury claim (Form CA-1) alleging that on July 9, 2022 he sustained heat exhaustion and fatigue, which caused him to pass out in his mail truck while in the performance of duty. He stopped work on July 9, 2022 and returned on August 1, 2022.

In a letter dated August 16, 2022, the employing establishment controverted the claim, asserting that appellant's last day at work was July 6, 2022.

An unsigned duty status form (Form CA-17) dated August 17, 2022, noted a July 9, 2022 injury date and provided work restrictions. The injury was described as heat related.

In a development letter dated September 7, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish the claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated October 12, 2022, 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 described. It noted that he had not responded to its September 7, 2022 development questionnaire or otherwise provided information further describing the alleged July 9, 2022 employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received a request for leave for the period July 7 through August 4, 2022. The form noted that appellant's condition for the requested leave commenced on June 30, 2022 and would last approximately five weeks.

OWCP also received an undated release-to-work note, and an undated report from Dr. Nick S. Pomonis, an osteopath specializing in family medicine. In his report, Dr. Pomonis noted an injury date of July 6, 2022, which he attributed to work-related heat illness. He described that appellant passed out in his mail truck while on his mail route. Appellant stated that prior to passing out he felt dizzy and lightheaded, upon regaining focus he stood inside an ice cooler of a nearby store to cool his body down. Dr. Pomonis concluded that appellant suffered heat exhaustion based on his symptoms of extreme dizziness, excessive sweating, dehydration, and headaches. He diagnosed exacerbation of chronic pain due to trauma, headaches, muscle spasms, insomnia with sleep disturbance, depression, and anxiety, which he attributed to the alleged July 6, 2022 employment incident. Dr. Pomonis, in the undated note, advised that appellant could return to work on July 11, 2022 with restrictions due to his dizziness. He noted that appellant had been under his care from July 7 to 10, 2022.

A November 9, 2022 form report indicated that diagnostic tests performed that day were within normal range.

On April 12, 2013 OWCP received an undated, partially illegible, handwritten note from appellant discussing his attempted return to work on July 11, 2022.

On May 3, 2023 appellant requested reconsideration. He subsequently submitted a January 12, 2023 note from Dr. Pomonis, stating that appellant had been under his care since July 11, 2022 and that he had released appellant to full-duty work that day.

By decision dated May 17, 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 does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

Upon receipt of a timely application, OWCP exercises its discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which either: (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.⁶

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁷

³ This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *W.W.*, Docket No. 21-0740 (issued January 18, 2023); *W.P.*, Docket No. 22-0396 (issued July 19, 2022); *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *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.

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

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's May 3, 2023 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. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant submitted a January 12, 2023 note, an undated report, and return-to-work notes from Dr. Pomonis. He also submitted a copy of a request for leave. OWCP also received results of diagnostic tests performed on November 9, 2022. None of these documents, however, are relevant to the underlying merit issue, which is factual in nature, *i.e.*, whether the July 9, 2022 incident occurred as alleged. While Dr. Pomonis, in an undated report, explained that appellant passed out in his mail truck while on his mail route from heat illness, he noted an incorrect injury date. OWCP also received a statement from appellant addressing his attempted return to work on July 11, 2022. Appellant did not address the date of his alleged injury or provide any further explanation of his claim. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.⁸ As appellant failed to provide relevant and pertinent new evidence with his request for reconsideration, he 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's request for reconsideration did not meet 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).

⁸ *R.M.*, Docket No. 23-0666 (issued September 26, 2023); *G.T.*, Docket No. 21-1276 (issued September 8, 2022); *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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