

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

M.R., Appellant)

and)

**DEPARTMENT OF INTERIOR, FISH &
WILDLIFE SERVICE, Farmerville, LA,
Employer**)

**Docket No. 12-1136
Issued: December 5, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2012 appellant filed a timely appeal from a November 3, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days elapsed from the most recent merit decision dated August 10, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 8, 2009 appellant, then a 35-year-old fish and wildlife biologist, filed a traumatic injury claim alleging that on September 1, 2009 while operating his all terrain vehicle (ATV) at work, he rolled off into a washout and was ejected from his ATV. He reported injuries to his neck, upper to mid back, left shoulder and left thigh. No evidence was submitted with the claim.

In a September 23, 2009 letter, OWCP advised appellant of the deficiencies in his claim. It requested that additional factual and medical evidence be submitted within 30 days. This included a report from a qualified physician which contained a well-rationalized opinion as to how the reported work incident caused or aggravated a medical condition.

Appellant provided a statement together with diagnostic and treatment notes from Wayne Rutledge, a family nurse practitioner.

By decision dated October 27, 2009, OWCP denied the claim on the grounds that the medical evidence did not establish his claim.

On November 19, 2009 appellant requested a review of the written record by an OWCP hearing representative. A partial Form CA-16 from Mr. Rutledge was provided with the diagnostic tests. The employing establishment indicated that it had no reason to doubt the alleged injury reported by appellant.

By decision dated March 22, 2010, OWCP's hearing representative affirmed the denial of appellant's claim. The hearing representative noted that the only medical evidence submitted was by a nurse practitioner and medical evidence must be from a physician. The reports from the nurse practitioner did not constitute medical evidence sufficient to establish a claim under FECA.

On April 26, 2010 appellant requested reconsideration. He stated that Dr. Keith Calhoun, Board-certified in family practice, had reviewed and initialed the previously submitted September 11, 2009 report from Mr. Rutledge. Appellant's supervisor had also noted that appellant was on official duty when the incident occurred. The September 11, 2009 report of Mr. Rutledge, contained illegible initials along with a separate sheet instructing Dr. Calhoun to "please sign everywhere Wayne did."

By decision dated August 10, 2010, OWCP denied modification of the March 23, 2010 decision. It found that the second copy of the September 11, 2009 clinic notes of Mr. Rutledge had no legible name or signature from a physician and did not constitute probative medical evidence.

On July 6, 2011 appellant requested reconsideration. He noted that neither his supervisor nor the employing establishment had controverted the claim. Appellant resubmitted an April 26, 2010 letter from George Chandler, a supervisor, certifying that appellant was in an official work capacity when the incident occurred on September 1, 2009; the September 11, 2009 report and partial Form CA-16 from Mr. Rutledge and a diagnostic test. The employing establishment provided a completed Form CA-16 from Mr. Rutledge.

By decision dated November 3, 2011, OWCP denied appellant's reconsideration request on the grounds that his request was insufficient to warrant further review of the merits. The evidence submitted was found cumulative in nature and previously considered.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.² Section 10.608(b) of OWCP's regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.³ The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁴

ANALYSIS

Appellant requested reconsideration of OWCP's August 10, 2010 decision which denied his claim finding that the medical evidence was not sufficient to establish his claim. On reconsideration, he noted that the employing establishment and his supervisor had not controverted the claim, but this was not disputed or a basis for the denial of his claim. OWCP accepted that the incident of September 1, 2009 occurred. Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by OWCP. Appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered. He submitted a statement from Mr. Chandler, a supervisor, certifying that the September 1, 2009 event occurred in the performance of duty. OWCP accepted that the incident occurred as alleged; thus, this evidence is not relevant to the issue on whether the claim was denied. Appellant submitted a Form CA-16 and partial Form CA-16 signed by Mr. Rutledge, a nurse, with illegible initials. The September 11, 2009 report from Mr. Rutledge also contained illegible initials. It is well established that nurses and physician assistants are physicians as defined under FECA. This evidence was previously reviewed by OWCP and was not sufficient to warrant merit review.⁵ As the evidence submitted is duplicative of that already in the case

² 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141 (2007).

³ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

⁴ *See Daniel Deparini*, 44 ECAB 657 (1993).

⁵ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

record, it does not constitute relevant and pertinent new evidence. Therefore, appellant has not established a basis for reopening his case.⁶

The evidence submitted by appellant on reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by OWCP. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.⁷

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant stated that the resubmitted medical documentation and Form CA-16 contained Dr. Calhoun's signature. The Board notes that this evidence contains illegible initials. The Board has held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined at 5 U.S.C. § 8101(2). Reports lacking proper identification do not constitute probative medical evidence.⁸ As the initials are illegible, this evidence is not probative to the underlying medical issue. Appellant did not submit any evidence or argument in support of his reconsideration request that warrants a reopening of his claim for merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁶ See *D.K.*, 59 ECAB 141 (2007).

⁷ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

⁸ *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board