United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 17-1080**
	)	**Issued: July 18, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Albuquerque, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 24, 2017 appellant filed a timely appeal from an April 12, 2017 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated September 22, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

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 11, 2016 appellant, then a 51-year-old general expeditor, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2016 he sustained a right shoulder strain at

[1] 5 U.S.C. § 8101 *et seq.*

work. He asserted that he first felt pain in his right shoulder on August 9, 2016 after throwing parcels onto a moving belt for approximately 45 minutes. Appellant noted that he continued to throw parcels on that date, but favored his right arm and used his left arm more. He noticed continuing pain in his right arm later that same day and reported the injury to his supervisor. Appellant did not stop work, but he later began working in a modified-duty position.[2]

In an August 12, 2016 letter, a health and resource management specialist noted that the employing establishment was challenging appellant's traumatic injury claim because he had not submitted any medical evidence establishing that he sustained a work-related injury on August 9, 2016.

In an August 16, 2016 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted an August 15, 2016 report from an attending physician assistant, Clara Weinrach who provided a diagnosis of infraspinatus sprain (ICD-9 code 840.3) and strain of unspecified muscle, fascia, and tendon at shoulder and upper arm level (ICD-9 code S46.911A). Ms. Weinrach indicated that appellant could return to work on August 16, 2016 with restrictions, including lifting up to 20 pounds occasionally, pushing/pulling up to 25 pounds occasionally, and no reaching above his shoulders. In another August 15, 2016 report, she noted that appellant reported hearing a pop in his right shoulder after throwing mail parcels at work on August 11, 2016. In a narrative report and a work activity status report dated August 26, 2016, Ms. Weinrach indicated that appellant could return to regular duty on that date.

Appellant also submitted August 22 and 24, 2016 reports from his attending physical therapist who described the results of his periodic physical therapy sessions.

In a September 22, 2016 decision, OWCP denied appellant's claim for an August 9, 2016 work injury. It accepted that appellant established that a work incident occurred on August 9, 2016 in the form of throwing parcels onto a moving belt, but found that he failed to submit probative medical evidence establishing a causal relationship between the accepted work incident and a diagnosed medical condition. OWCP noted that appellant did not submit probative medical evidence because he did not submit a report from a physician within the meaning of FECA.

In a letter dated February 7, 2017 and received on February 15, 2007, appellant requested reconsideration of OWCP's September 22, 2016 decision.

In support of his reconsideration request, appellant submitted copies of August 15 and 26, 2016 reports from his attending physician assistant, Ms. Weinrach, and August 22 and 24, 2016 reports from his attending physical therapist, Tomas R. Romero, which he previously submitted to OWCP.

[2] In an August 9, 2016 handwritten statement, appellant provided a similar account of his claimed August 9, 2016 work injury.

In an April 12, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It noted that the evidence submitted by appellant in support of his February 15, 2017 reconsideration request was repetitious and irrelevant to the main issue of the present case. OWCP indicated that the reports submitted by appellant, consisting of previously submitted reports of a physician assistant and physical therapist, did not constitute probative medical evidence of a physician within the meaning of FECA. Therefore, the reports were not relevant to the question of whether appellant submitted sufficient medical evidence in support of his claim for an August 9, 2016 work injury.

LEGAL PRECEDENT -- ISSUE 2

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] A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[6] When a timely application 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.[7]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[8] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[9] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[10]

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

[4] 20 C.F.R. § 10.607.

[5] *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 (February 2016). 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] 20 C.F.R. § 10.606(b)(3).

[7] *Id*. at § 10.608(a), (b).

[8] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[9] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[10] *John F. Critz*, 44 ECAB 788, 794 (1993).

ANALYSIS -- ISSUE 2

OWCP issued a merit decision on September 22, 2016 denying appellant's claim for an August 9, 2016 work injury. Appellant requested reconsideration of this decision in a letter received by OWCP on February 15, 2017.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did he advance a new and relevant legal argument not previously considered by OWCP.

The underlying issue in this case is whether appellant met his burden of proof to establish an August 9, 2016 injury due to the accepted work incident of throwing parcels on that date. This is a medical issue which must be addressed by probative and relevant medical evidence.[11] A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.[12]

In support of his reconsideration request, appellant submitted copies of August 15 and 26, 2016 reports from his attending physician assistant, Ms. Weinrach, and August 22 and 24, 2016 reports from his attending physical therapist, Mr. Romero, which had been previously submitted to OWCP and rejected as insufficient to establish his claim for an August 9, 2016 work injury. As noted above, the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[13] Moreover, this evidence is not relevant to the main issue of the case, *i.e.*, whether appellant submitted medical evidence establishing an August 9, 2016 work injury, because it does not constitute probative medical evidence from a physician within the meaning of FECA.[14] Under FECA, the report of a nonphysician, including a physician assistant, does not constitute probative medical evidence.[15] Physical therapists are not physicians under FECA and therefore their opinions do not constitute medical opinion evidence and have no weight or probative value on medical matters.[16]

[11] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[12] *See supra* note 6.

[13] *See supra* note 9.

[14] *See id.*

[15] *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-829 (issued August 20, 2013). *See* 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[16] *C.E.*, Docket No. 14-710 (issued August 11, 2014); *Jane A. White*, 34 ECAB 515 (1983).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[17]

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).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

[17] On appeal appellant asserts that he sustained an injury at work. However, the merits of his case are not currently before the Board and, for the reasons explained above, OWCP properly denied his request for reconsideration of the merits of his claim.