

FACTUAL HISTORY

On July 24, 2009 appellant, then a 49-year-old criminal investigator, filed a traumatic injury claim alleging that he sustained lower back pain while playing tennis on July 19, 2009. He specified that the activity was part of an employer-authorized health improvement plan that prepared him to meet updated annual physical fitness standards.² In a July 22, 2009 note, Dr. Jeffrey T. Hoeck, a Board-certified internist, excused appellant from work for the period July 20 to 28, 2009. A July 28, 2009 note from Dr. Andrew S. Dobin, a Board-certified internist, discharged him to regular duty effective July 29, 2009.

OWCP informed appellant in an August 4, 2009 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a report from a qualified physician explaining how a diagnosed condition resulted from the alleged event.

In an August 21, 2009 report, Dr. Hoeck detailed that appellant injured his back while running and playing tennis on or around July 19, 2009. A July 22, 2009 physical examination revealed stiff gait, posture pain, decreased lumbosacral range of motion, right paraspinous muscle spasm and equivocal bilateral straight leg raise test. Dr. Hoeck diagnosed mechanical back pain. He pointed out that appellant previously underwent lumbar laminectomy, but opined that the present symptoms were unrelated to that procedure.

By decision dated September 9, 2009, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that the accepted July 19, 2009 employment incident caused or contributed to a back condition.

Appellant requested reconsideration on September 6, 2010, arguing that OWCP erroneously interpreted the law with respect to the medical evidence.

On December 6, 2010 OWCP denied modification of the September 9, 2009 decision.

Appellant requested reconsideration on December 5, 2011. He contended that a sworn statement from Jonathan Jones "clearly shows that it was a work related injury that caused me to seek medical attention from Dr. Hoeck, and resulted in my inability to continue with my work duties for several days."³ OWCP did not receive this statement.

By decision dated February 21, 2012, OWCP denied appellant's request on the grounds that it did not receive new and relevant evidence warranting further merit review.

² The case record contains copies of the employing establishment's annual physical fitness standards testing policy, its implementation memorandum and appellant's monthly exercise activity logs.

³ The case record does not indicate that Mr. Jones is a qualified physician.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that the evidence or argument submitted by a claimant must either: (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.⁵ Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

By merit decisions dated September 9, 2009 and December 6, 2010, OWCP denied appellant's traumatic injury claim on the grounds that the medical evidence did not sufficiently establish that the accepted July 19, 2009 employment incident caused or contributed to a back condition. Appellant requested reconsideration on December 5, 2011 and indicated that he would present new evidence, namely Mr. Jones' sworn statement. However, OWCP did not receive this statement or any other new evidence.⁷ Moreover, appellant did not assert a new legal contention. Because he failed to meet one of the standards enumerated under section 8128(a) of FECA, he was not entitled to further merit review of his claim.

Appellant raises an argument on appeal that implicates the merits of his case. The Board only has jurisdiction to consider whether OWCP properly denied his request for reconsideration based on the evidence and argument of record at the time the February 21, 2012 nonmerit decision was issued. As discussed above, appellant did not provide evidence or argument satisfying any of the three regulatory criteria for reopening a claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

⁴ 5 U.S.C. § 8128(a).

⁵ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

⁶ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

⁷ In addition, the Board points out that the issue underlying OWCP's merit decisions was whether the medical evidence sufficiently established causal relationship. A medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a qualified physician. See *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949). Since Mr. Jones was not identified as a physician, his statement would have been immaterial. See *D.K.*, 59 ECAB 141 (2007) (submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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