

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

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M.M., Appellant

and

U.S. POSTAL SERVICE, COLUMBIA  
PROCESSING & DISTRIBUTION CENTER,  
Columbia, SC, Employer

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**Docket No. 15-1622  
Issued: September 27, 2016**

*Appearances:*

Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 21, 2015 appellant, through counsel, filed a timely appeal of a January 30, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated June 19, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On April 28, 2014 appellant, then a 63-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained a concussion, subdural hematoma, three rib fractures, pulmonary contusion, as well as multiple head and body traumas and abrasions on the right side due to a work-related accident on April 1, 2014 at 12:35 p.m.. He noted, "No one saw the accident. Spouse was also told ... may have been going in and another person was coming out of the door of the building and may have lost hold of the door handle." On the reverse side of the claim form, appellant's supervisor noted that appellant's blood sugar level was high when it was checked.

In a letter dated May 16, 2014, OWCP requested additional factual and medical evidence in support of appellant's claim for traumatic injury. It asked that he provide evidence that he actually experienced the incident, in a narrative form, as well as supporting medical documentation. OWCP allowed 30 days for a response.

Appellant's supervisor, Robert H. Williams, III, completed a statement dated April 1, 2014. He reported that, on that date, he was requested to accompany appellant to the hospital. Appellant informed medical personnel that the middle of his back hurt. He was otherwise incoherent and unable to describe the events that led to his injury. Appellant wore a pulse oximeter on his belt. Appellant's wife came to the hospital and noted that she spoke with appellant around noon. Mr. Williams noted, "She said he sounded strange on the phone and she asked him if he had checked his blood sugar level. He replied no, so she said she told him he needed to check it." The emergency technicians checked appellant's blood sugar in the ambulance and told the nurses that it was high. Mr. Williams then reported a conversation between appellant and his wife regarding the events of the day. He claimed that appellant recalled passing out and falling over a railing. Mr. Williams asserted that the railing at that location at the employing establishment was over four feet high.

The employing establishment controverted appellant's claim on May 12, 2015. It claimed that appellant lost consciousness due to a nonemployment-related medical condition, *i.e.*, diabetes. The employing establishment noted that appellant was sitting outside on a break smoking a smokeless cigarette when he lost consciousness and fell. Appellant was wearing a pulse oximeter. It noted that Mr. Williams had overheard appellant state that he passed out and fell over a railing.

By decision dated June 19, 2014, OWCP denied appellant's traumatic injury claim. It found that appellant only provided a very brief statement on his Form CA-1 indicating that he "may have been coming through a door or an incident with a door." OWCP concluded that appellant had failed to provide a description of how the injury occurred and failed to provide any factual evidence of the injury. It further noted that appellant failed to provide any medical evidence in support of his claim.

Counsel requested reconsideration in a letter dated December 30, 2014. He submitted medical evidence in support of this request. On April 1, 2014 appellant received treatment from the Lexington Medical Center and Dr. Nicholas A. Limperos, a Board-certified surgeon. His history of the injury was listed as a fall from four feet landing on concrete. Dr. Limperos noted that appellant had reported landing on his buttocks, but he found that inconsistent with appellant's injuries. Appellant denied loss of consciousness and noted that his fall was not witnessed. Dr. Limperos diagnosed subdural hematoma, rib fractures, pulmonary contusion, pneumothorax, and diabetes mellitus.

On April 24, 2014 appellant was admitted to the HealthSouth Rehabilitation Hospital for a traumatic brain injury. Dr. Curtis Bair, an internist, reported that appellant had fallen from a height of six feet at work landing directly on his head on a concrete floor. He diagnosed traumatic brain injury and diabetes mellitus. Dr. Bair noted that appellant's wife had reported that appellant was a "brittle diabetic."

Dr. W. Daniel Westerkam, a Board-certified physiatrist, evaluated appellant on April 25, 2014 and discharged him on May 16, 2014. Dr. Westerkam noted that appellant had fallen off a six foot ladder, landing on his head and ribs. He diagnosed traumatic brain injury and multiple rib fractures. Dr. Westerkam further noted that appellant's diabetes was extremely difficult to control during his hospitalization. He noted that appellant's blood sugars had fluctuated for years.

By decision dated January 30, 2015, OWCP declined to reopen appellant's claim for consideration of the merits. It noted that appellant's claim had been denied because he had failed to submit the necessary factual evidence to establish the incident. OWCP found that the medical evidence submitted in support of appellant's request for reconsideration was not relevant and had no bearing on the factual issue for which appellant's claim was denied.

### **LEGAL PRECEDENT**

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>3</sup> Section 10.606(b)(3) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.<sup>5</sup> Section 10.607(a) of OWCP's regulations provide that to be considered timely an application for reconsideration must be

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.608.

received by OWCP within one year of the date of OWCP's merit decision for which review is sought.<sup>6</sup>

It is well established that the requirement for reopening a claim for further merit review before OWCP does not require a claimant to submit all evidence necessary to discharge his burden of proof. Rather, the requirement for reopening a case specifies only that the evidence be relevant, pertinent and not previously considered by OWCP. The presentation of such new evidence creates the necessity for review of the full case record in order to properly determine whether the newly submitted evidence warrants modification of an earlier decision.<sup>7</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

By decision dated June 19, 2014, OWCP denied appellant's traumatic injury claim because he had not submitted sufficient factual and medical evidence to establish an employment injury. It found that the record did not support that the incident occurred as alleged and that there was no medical evidence of record supporting a condition resulting from the alleged incident. As previously noted, the Board does not have jurisdiction over the merits of this claim and the sole issue on appeal is whether OWCP properly denied appellant's reconsideration request.

Counsel submitted a timely request for reconsideration of the June 19, 2014 merit decision received by OWCP on December 30, 2014. He did not argue that OWCP erroneously interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered. In support of the request for reconsideration, counsel submitted medical records including reports from Drs. Limperos, Bair, and Westerkam.

The Board finds that these medical reports, while new, are not relevant or pertinent to the underlying factual issue of whether the employment incident occurred as alleged. As the underlying issue in the June 19, 2014 decision was factual in nature, the submission of medical evidence is not relevant to the issue for which OWCP denied appellant's claim.<sup>8</sup> Furthermore, while the physicians provided varying histories of appellant's injuries in the reports, these histories are not based on personal knowledge. As appellant has not provided relevant and pertinent new evidence not previously considered, OWCP properly declined to reopen his claim for consideration of the merits under 20 C.F.R. § 10.606(b)(3).

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<sup>6</sup> *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

<sup>7</sup> *F.D. (S.D.)*, 58 ECAB 413 (2007).

<sup>8</sup> *See Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board