United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 17-1186**
	)	**Issued: June 11, 2018**
DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD & DRUG ADMINISTRATION, Fort Myers, FL, 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 May 9, 2017 appellant filed a timely appeal from a November 15, 2016 merit decision and an April 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury causally related to the accepted September 22, 2016 employment incident; and (2) whether OWCP

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence after OWCP issued its April 7, 2017 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 26, 2016 appellant, then a 55-year-old investigator, filed a traumatic injury claim (Form CA-1) alleging that, on September 22, 2016, he sustained injuries to his trapezoid muscles (neck and shoulder) and lower back when he was involved in a car accident at 2:20 p.m. while in the performance of duty. Specifically he stated that the injury occurred when "driving through intersection vehicle 1 driven by claimant impacted vehicle 2 on the driver side." The employing establishment did not dispute that appellant was injured in the performance of duty.

A travel document submitted with the claim indicated that appellant was on travel status in Brooksville, Florida from September 19 through 23, 2016 to perform a work-related inspection.

In a September 24, 2016 form report, Dr. Jeffrey Johns, an osteopath and Board-certified family practitioner, diagnosed trapezius muscle spasm bilaterally for the September 22, 2016 motor vehicle accident, which he indicated was work related.

By development letter dated October 5, 2016, OWCP advised appellant of the deficiencies in his claim. It requested additional factual and medical evidence to support his claim, to include a report from a qualified physician explaining that the diagnosed condition was causally related to the employment incident. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant subsequently submitted an October 13, 2016 narrative statement and a duplicate copy of the previously submitted travel document.

In a September 24, 2016 progress note, Dr. Johns noted that appellant was involved in a motor vehicle accident on September 22, 2016. He was the driver and was wearing a shoulder belt. Appellant was tossed forward and backward during the impact. He was not seen in the emergency room that day. Dr. Johns indicated that appellant exhibited tenderness, pain, and spasm in the cervical region and the lumbar back. A diagnosis of trapezius muscle spasm was provided. A duplicate copy of Dr. Johns' September 24, 2016 form report was also submitted.

In an October 3, 2016 progress note, Carolyn Hoffman, an advanced registered nurse practitioner, noted that appellant was involved in a motor vehicle accident when he accidently t-boned another car while traveling for his job. A diagnosis of motor vehicle accident sequela, left shoulder strain, and neck muscle strain was provided along with work restrictions. An accompanying October 3, 2016 form report from Ms. Hoffman provided work restrictions. Additional progress reports and form reports from Ms. Hoffman dated October 10, 19, and 24, 2016 were provided. She continued to diagnose motor vehicle accident sequela, left shoulder strain and neck muscle strain. The form reports also noted appellant's work restrictions.

By decision dated November 15, 2016, OWCP accepted that the September 22, 2016 incident occurred as alleged, but denied the claim finding that the medical component of fact of injury had not been established. It found that while the evidence contained a diagnosis, the reports had not been signed by a physician. OWCP additionally noted that even if appellant submitted

medical evidence which contained a diagnosis, medical evidence which established causal relationship must also be submitted.

On January 5, 2017 appellant requested reconsideration.

In an October 28, 2016 progress report, Ms. Hoffman continued to report on appellant's status following the injuries sustained in the motor vehicle accident. Diagnoses of motor vehicle accident, sequela, left shoulder strain and neck muscle strain were provided. Work restrictions were also provided in an accompanying form report.

In a November 14, 2016 progress note, Ms. Hoffman referred appellant to physical therapy for his diagnosed left shoulder strain, motor vehicle accident, sequela, and neck muscle strain. She indicated that appellant was discharged from care and was released to full duty, with no restrictions. Accompanying November 14, 2016 form reports were also submitted along with a November 14, 2015 referral to physical therapy, all signed by Ms. Hoffman.

By decision dated April 7, 2017, OWCP denied appellant's reconsideration request. It found that the evidence submitted, while new, was considered cumulative and thus substantially similar to the evidence already contained in the case file that was previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical

[3] *Supra* note 1.

[4] *Gary J. Watling*, 52 ECAB 278 (2001).

[5] *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

ANALYSIS -- ISSUE 1

The Board finds that appellant has submitted insufficient medical evidence to establish his claim.

Appellant filed a claim for a traumatic injury alleging that he sustained injury on September 22, 2016 as a result of a work-related motor vehicle accident. He first sought medical treatment on September 24, 2016 with Dr. Johns and continued treatment thereafter with advanced registered nurse practitioner, Ms. Hoffman.

OWCP accepted that appellant was involved in the September 22, 2016 motor vehicle accident in the performance of duty. It found, however, that the medical evidence of record was insufficient to establish that appellant had a diagnosed medical condition causally related to the accepted September 22, 2016 employment incident.

In his September 23, 2016 report, Dr. Johns reported the history of the September 22, 2016 motor vehicle accident and indicated that appellant exhibited tenderness, pain, and spasm in the cervical spine and lumbar back. A diagnosis of trapezius muscle spasm and motor vehicle accident was provided. The Board finds that Dr. Johns failed to specifically address how the motor vehicle accident caused or aggravated a diagnosed medical condition. Noting that appellant was experiencing bilateral trapezius muscle spasm without explanation of the condition causing the spasm or pain, is a description of a symptom rather than a firm diagnosis of a compensable medical condition.[8] Dr. Johns failed to address how the September 22, 2016 motor vehicle incident caused or aggravated a diagnosed medical condition. Thus, this report is insufficient to discharge appellant's burden of proof.[9]

Progress notes dated October 3, 10, 19, and 24, 2016 and form reports from Ms. Hoffman were also submitted. Ms. Hoffman noted the history of the September 22, 2016 motor vehicle accident and diagnosed motor vehicle accident sequela, left shoulder strain, and neck muscle strain. However, these reports have no probative medical value as they were signed by a nurse practitioner.[10] A nurse practitioner is not considered a physician as defined under FECA.[11] As the

[7] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *C.F.*, Docket No. 08-1102 (issued October 10, 2008). Similarly, spasm has been found to be a symptom, not a diagnosis. *J.C.*, Docket No. 14-1002 (issued December 19, 2014).

[9] *M.R.*, Docket No. 16-0380 (issued October 12, 2016).

[10] *K.J.*, Docket No. 16-0611 (issued May 13, 2016).

[11] *L.D.*, 59 ECAB 648 (2008) (a nurse practitioner is not considered a physician as defined under FECA). The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2).

underlying issue is medical in nature,[12] reports from a layperson, such as a nurse practitioner, do not constitute medical evidence and their findings and opinions do not suffice for purposes of establishing FECA benefits.[13]

Consequently, appellant has submitted insufficient medical evidence to establish his claim and, thus, has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, 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.[14] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[15] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[16]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim.

Appellant's January 5, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he 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 the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant submitted additional progress reports and form reports from Ms. Hoffman dated October 28 and November 14, 2016. The Board finds that, while these reports are new, they have no probative medical value as they were signed by a nurse practitioner. As previously noted nurse practitioners are not considered physicians as

[12] *See Carol A. Lyles*, 57 ECAB 265 (2005) (causal relationship is a medical issue which must be resolved by competent medical opinion).

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

[14] 20 C.F.R. § 10.606(b)(3).

[15] *Id.* at § 10.607(a).

[16] *Id.* at § 10.608(b).

defined under FECA.[17] Therefore, these reports are of no relevance to the underlying issue of medical fact of injury and do not comprise a basis for reopening the case for a merit review.[18] A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence, and thus, he failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

As appellant failed to meet any of the three regulatory criteria for reopening a claim, he was not entitled to further merit review of his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury causally related to the accepted September 22, 2016 employment incident. The Board also 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 7, 2017 and November 15, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 11, 2018
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] *See supra* note 10.

[18] *Supra* note 10; *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).