

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

S.C., Appellant)
)
and)
)
U.S. POSTAL SERVICE, POST OFFICE,)
Fountain, CO, Employer)
_____)

Docket No. 15-0964
Issued: December 28, 2015

Appearances:
Thomas P. Fochs, Esq., for the appellant
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 27, 2015 appellant, through counsel, filed a timely appeal from a February 20, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from January 31, 2014, the date of the most recent merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 27, 2013 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that on or before November 30, 2010 she sustained a left

¹ 5 U.S.C. § 8101 *et seq.*

knee condition requiring total arthroplasty. She attributed her condition to prolonged walking, standing, mounting and dismounting her postal vehicle, and pushing and pulling a nutting cart to load and unload her vehicle.

In a December 12, 2013 letter, OWCP advised appellant of the type of additional evidence needed to establish her claim, including factual corroboration of the identified work factors, and an opinion from her attending physician supporting that those factors caused the claimed condition. In an attached questionnaire, it requested that she provide a detailed description of the work activities which she believed contributed to her condition, and the frequency and duration of these tasks. OWCP also requested that appellant describe all activities outside of her federal employment, including sports, hobbies, computer usage, musical instruments that she played, non-federal employment, volunteer, or recreational activities. It afforded her 30 days to submit such evidence. Appellant did not respond to the injury.

In a second December 12, 2013 letter, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements. Appellant's supervisor responded on January 3, 2014, explaining that appellant's assigned delivery route required "entering and exiting a motor vehicle" as many as 500 times a work shift. Appellant was also required to lift up to 70 pounds, and push and pull equipment loaded with up to 250 pounds of mail and parcels. The supervisor emphasized that he had "no reason to doubt [appellant's] statement relative to this claim." He provided a position description confirming the duties appellant described.

By decision dated January 31, 2014, OWCP denied appellant's claim, finding that she did not establish the described work factors as factual because she did not respond to the December 12, 2013 questionnaire. It further found that she failed to submit medical evidence.

In an October 13, 2014 letter, appellant asserted that an enclosed April 7, 2014 report from Dr. Jack L. Rook, an attending Board-certified physiatrist, addressed "all the requirements needed by [OWCP]." She did not request reconsideration.

Dr. Rook's April 7, 2014 report noted that appellant had worked as a letter carrier for the previous 19 years, assigned to walking routes. As of September 2011, appellant cased and delivered a route requiring her to dismount her postal vehicle approximately 450 times a work shift. Dr. Rook related her complaints of progressively worsening bilateral knee pain since approximately 2004, exacerbated by dismounting her postal vehicle and walking while delivering mail. Appellant underwent bilateral medial meniscus repairs using her private health insurance. Her symptoms abated for several years, but eventually returned. A 2010 magnetic resonance imaging (MRI) scan "demonstrated tricompartmental osteoarthritis with severe patellofemoral changes and advanced degeneration of the remaining compartments." Since 2010, appellant underwent bilateral total knee arthroplasties. OWCP accepted her right knee condition based on the identical work factors and pathophysiologic mechanisms.² Dr. Rook opined that casing mail and walking while delivering mail placed "significant stress on [appellant's] left knee joint," causing "a direct impact with the femoral condyles against the

² Under File No. xxxxxx522, OWCP accepted an aggravation of right knee arthritis, culminating in a total right knee arthroplasty.

menisci and tibial plateaus,” eroding “the cartilage on the opposing surfaces,” and accelerating the development of osteoarthritis. Entering and dismounting appellant’s postal vehicle approximately 450 times a work shift required contraction of the quadriceps musculature to straighten her left leg, forcing the patella into the groove formed by the femoral condyles. This process led to “progressive erosion of the opposing cartilaginous surfaces which include the undersurface of the patella and the femoral condyle.” Dr. Rook noted that appellant had no nonoccupational factors that would cause the left knee condition.

In a January 15, 2015 letter received on January 26, 2015, appellant requested reconsideration, asking that OWCP review the April 7, 2014 report from Dr. Rook.

By decision dated February 20, 2015, OWCP denied appellant’s request for a review of the merits of the claim, as the evidence submitted was irrelevant or immaterial to the claim. It found that as her claim was denied based on fact of injury, Dr. Rook’s medical opinion was irrelevant and did not warrant a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provide that 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁶ Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant’s application for reconsideration and any evidence submitted in support thereof.⁸

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

Appellant claimed that she sustained a left knee condition. In her November 27, 2013 claim form, the only document of record containing her direct description of work factors, she attributed her condition to walking, standing, pushing and pulling a loaded nutting cart, and entering and exiting her delivery vehicle. On December 12, 2013 OWCP requested that appellant submit a detailed statement specifying the frequency and duration of the tasks listed on her claim form. Although appellant's supervisor provided a job description and generally corroborated appellant's remarks on her claim form, appellant did not provide the information OWCP requested. Due to the lack of appellant's factual statement, OWCP issued its January 31, 2014 decision denying the claim, finding that appellant failed to establish factual component of fact of injury, as the claimed work incidents were not established.

Appellant requested a merit review on January 26, 2015, asserting that a medical report from Dr. Rook, an attending Board-certified physiatrist, was sufficient to establish fact of injury. However, OWCP denied reconsideration by decision dated February 20, 2015, finding that the evidence submitted in support of the request was irrelevant to the claim. The issue now before the Board is whether OWCP properly denied appellant's January 26, 2015 request for a merit review. This entails examining the evidence submitted, and determining whether it showed that OWCP committed a legal error in its January 31, 2014 decision, or whether it constituted new, relevant evidence or argument on the critical issue of whether the work incidents were established.

In support of her reconsideration request, appellant submitted Dr. Rook's April 7, 2014 report, relating her account of prolonged walking, and climbing in and out of her delivery vehicle approximately 450 times a work shift. However, Dr. Rook is not qualified as a finder of fact in this case as there is no evidence that he had direct knowledge of her duties. His repetition of appellant's account is not competent factual evidence.⁹ Dr. Rook's medical opinion is irrelevant to the underlying factual issue. The Board has held that evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for a review of the merits of the claim.

On appeal counsel asserts that OWCP improperly rejected appellant's uncontroverted explanation of events. As set forth above, appellant failed to provide the detailed description of her work factors requested by OWCP. Counsel also contends that OWCP improperly rejected Dr. Rook's opinion as it relied on him to accept a right knee condition and arthroplasty in one of appellant's other claims. However, as OWCP denied the claim based on failure to establish a factual basis for the claim, Dr. Rook's medical opinion is irrelevant. Additionally, counsel

⁹ 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).

¹⁰ *E.O.*, Docket No. 15-0635 (issued June 5, 2015). See also *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

alleges that OWCP did not meet its obligation to assist in the development of the evidence. The Board finds that OWCP properly developed appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 20, 2015 is affirmed.

Issued: December 28, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board