

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

V.D., Appellant)	
)	
and)	Docket No. 17-0838
)	Issued: August 24, 2017
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, New York, NY, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
Aaron B. Aumiller, Esq., for the appellant ¹	
Office of Solicitor, for the Director	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 1, 2017² appellant, through counsel, filed a timely appeal from a September 2, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision dated June 8, 2015 to the filing of this

¹ 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.

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 2, 2016, the date of OWCP's last decision was March 1, 2017. Since using March 6, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 1, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On February 14, 2001 appellant, then a 29-year-old detention enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that on January 17, 2001 she injured her lower back and knees when she slipped on a greasy floor and then grabbed a desk to prevent herself from falling. On May 15, 2001 OWCP accepted the conditions of lumbar and thoracic radiculopathy, cervical sprain, and bilateral traumatic knee chondromalacia. It also authorized left knee arthroscopic surgery, which was performed on November 15, 2001. By letter dated August 16, 2001, OWCP placed appellant on the periodic rolls for temporary total disability with the first payment beginning on July 14, 2001.

Appellant submitted reports from her treating physicians from February 19, 2001 through May 2012, which related that she remained totally disabled for work.

On February 10, 2004 OWCP referred appellant for a second opinion evaluation with Dr. Marc Kahn, a Board-certified orthopedic surgeon, to determine her medical status and her work capacity. In a report dated February 23, 2004, Dr. Lawrence I. Barr, a Board-certified orthopedic surgeon,⁴ based on a review of the medical evidence, statement of accepted facts (SOAF), employment and medical histories, and physical examination, diagnosed lumbar and thoracic radiculopathy, cervical sprain, and bilateral knee contusions. He opined that appellant was capable of returning to work as an "immigration officer" with no restrictions.

No further action was taken by OWCP until May 11, 2007 when it referred appellant for a second opinion evaluation with Dr. Robert Draper, a Board-certified orthopedic surgeon, for an evaluation of her accepted conditions and ability to work. In a May 23, 2007 report, Dr. Draper reviewed the medical evidence and SOAF, noted the employment and medical histories, and conducted a physical examination. His diagnoses included resolved cervical, lumbosacral, and thoracic strains; preexisting cervical degenerative and spondylosis; preexisting lumbar degenerative disc disease; resolved right knee contusion; and left knee traumatic injury. Dr. Draper opined that appellant had reached maximum medical improvement and required no further medical treatment for the accepted conditions. He determined that she was capable of working with restrictions which he attributed to her left knee condition and unrelated preexisting degenerative conditions.

In a December 10, 2010 report, Dr. Leonard A. Langman, a treating physician specializing in neurology, diagnosed lumbar radiculopathy and bilateral knee trauma, which he

³ 5 U.S.C. § 8101 *et seq.*

⁴ Dr. Barr and Dr. Kahn worked in the same medical practice.

attributed to the January 17, 2001 accepted injury. He opined that appellant was currently totally disabled from working due to those conditions.

On July 29, 2011 OWCP referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon for a second opinion evaluation to determine appellant's current diagnoses and disability status.

In a report dated August 12, 2011, Dr. Askin reviewed the medical evidence and history, SOAF, employment injury history, and conducted a physical examination. He diagnosed lumbar and thoracic radiculopathy, cervical sprain, and bilateral traumatic knee chondromalacia and concluded that based on the lack of current objective findings that the accepted conditions had resolved without residuals or disability. Dr. Askin determined that no further medical treatment was necessary and that appellant could return to her date-of-injury position.

On September 14, 2011 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits due to her accepted lumbar and thoracic radiculopathy, cervical sprain, and bilateral traumatic knee chondromalacia. It found, based on Dr. Askin's report, that she had no disability for work and no medical residuals requiring further treatment. OWCP allowed appellant 30 days for a response.

In a September 28, 2011 report, Dr. Alan J. Dayan, a treating Board-certified orthopedic surgeon, noted appellant's treatment history. He explained that she had been followed on a monthly basis. Dr. Dayan reviewed January 28, 2010 magnetic resonance imaging (MRI) scans of both knees which revealed a right knee grade 2 signal on the medial meniscus posterior horn with a small joint effusion and left knee grade 2 signal posterior meniscus horn. He related appellant's physical examination findings and noted that she continued to have significant right knee pain. Dr. Dayan opined that she had not returned to work and was disabled from returning to her job as an "immigration officer." He requested continued physical therapy for appellant.

In an October 7, 2011 report, Dr. Langman diagnosed lumbar radiculopathy. Appellant continued with lower back and bilateral knee pain complaints and pain radiating into her lower extremities. Her physical examination revealed lumbar spasms, decreased left knee reflex, bilateral knee crepitus on palpation, and 20 degrees bilateral straight leg raising. Dr. Langman opined that appellant was totally disabled due to her employment injuries.

By decision dated December 22, 2011, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day.

In a letter dated December 29, 2011 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on April 20, 2012.

In a February 24, 2012 report, Dr. Dayan reported that appellant was seen for a follow-up visit regarding her right knee. Appellant complained of right knee pain. Dr. Dayan provided right knee examination findings and attributed her pain to chondromalacia patella and possible knee synovitis. He also disagreed with Dr. Askin that right knee arthroscopic surgery was unnecessary.

Dr. Dayan, in an April 4, 2012 report, detailed appellant's medical treatment provided since 2001, summarized examination findings from prior reports, and discussed findings from

diagnostic tests he reviewed. He noted his disagreement with Dr. Askin's opinion that further arthroscopic surgery was unnecessary.

By decision dated July 11, 2012, OWCP's hearing representative affirmed the December 22, 2011 termination decision finding that the weight of the medical opinion evidence rested with Dr. Askin.

On July 23, 2012 appellant, through counsel, requested reconsideration. In support of her request she submitted a May 4, 2012 report by Dr. Dayan.

In the May 4, 2012 report, Dr. Dayan provided examination findings and noted the physical duties required of an "immigration officer." He reported that appellant continued to have symptoms from her bilateral knee chondromalacia and lumbar radiculopathy. Dr. Dayan indicated that she had significant limitations from her low back and bilateral knee conditions, which rendered her disabled from performing the duties of an "immigration officer."

By decision dated October 18, 2012, OWCP denied modification. It found Dr. Dayan's May 4, 2012 report was insufficient to create a conflict with Dr. Askin. OWCP found that Dr. Dayan failed to provide a rationalized opinion explaining how the accepted employment conditions prevented appellant from performing the duties of her date-of-injury position.

In a March 28, 2013 report, Dr. R.C. Krishna, a treating Board-certified neurologist, reported that appellant continued to have pain in her neck, right arm, and low back including bilateral hand numbness due to the accepted January 17, 2001 work injury. He briefly described how the employment injury occurred and noted her medical history. Dr. Krishna reported that appellant currently had difficulty with pushing/pulling objects, climbing stairs, and bending. Under impression/recommendation, he noted that her upper extremity complaints were consistent with a diagnosis of bilateral carpal tunnel syndrome and her lumbar complaints were suggestive of possible lumbosacral radiculopathy or lumbosacral pain syndrome.

Dr. Krishna performed an electromyography study on March 28, 2013, which showed C5-6 cervical radiculopathy.

The record contains an April 3, 2013 cervical MRI scan and an April 8, 2013 lumbosacral MRI scan.

A May 4, 2013 nerve conduction study performed by Dr. Krishna supported a diagnosis of chronic L4-5 radiculitis and nerve root irritation.

In a June 17, 2013 follow-up report, Dr. Dayan referenced OWCP's hearing representative's decision and requirements of a detention enforcement officer. He went on to opine that appellant's knee conditions of significant right knee patella chondromalacia and left knee symptoms following surgery render her disabled from performing the duties of a detention officer. Dr. Dayan noted that he referred her to Dr. Krishna as Dr. Langman was no longer practicing.

In a letter dated October 17, 2013, received by OWCP on that same date, counsel requested reconsideration. He argued that the medical evidence from Dr. Krishna and Dr. Dayan showed that appellant continued to have residuals from the accepted employment injury. Next,

counsel contended that the weight of the medical opinion evidence should rest with her treating physicians rather than Dr. Askin.

By decision dated March 14, 2014, OWCP denied modification. It found that the reports from Drs. Krishna and Dayan failed to explain how appellant had continuing residuals or disability from the accepted employment conditions. As neither physician provided a rationalized opinion, OWCP found this evidence insufficient to create a conflict in the medical opinion evidence.

By correspondence dated March 17, 2015, and received by OWCP on that date, counsel requested reconsideration and submitted a January 9, 2015 report from Dr. Laura E. Ross, an examining osteopath and Board-certified orthopedic surgeon, in support of the request.

In a January 9, 2015 report, Dr. Ross noted appellant's employment history, accepted diagnoses, medical treatment, and that appellant had been out of work for 14 years as a result of the injury. A physical examination demonstrated bilateral knee crepitus and tenderness along the joint line on range of motion, active quadriceps contracture, decreased bilateral L5 and S1 distributions, lumbar paravertebral muscle spasms, and limited range of motion. Diagnoses included bilateral knee chondromalacia patella, left lateral meniscus tear and synovectomy, and multiple neck and back disc protrusions. Dr. Ross explained that chondromalacia patella was a form of traumatic arthritis, which she attributed to the accepted January 17, 2001 employment injury. In addition, she determined that the accepted January 17, 2001 employment injury also damaged appellant's nerves in both legs resulting in radiculopathy and radiculitis. As a result of these conditions, Dr. Ross opined that appellant was only capable of performing sedentary work and was disabled from performing her date-of-injury position. She also concluded that appellant sustained permanent injuries from the accepted January 17, 2001 employment injury.

By decision dated June 8, 2015, OWCP denied modification. It found that the medical opinion evidence appellant submitted was insufficiently rationalized and still did not establish disability or the need for continued medical treatment due to the accepted January 14, 2001 injury.

In a letter dated and received by OWCP on June 7, 2016, counsel requested reconsideration and submitted an updated August 4, 2015 report from Dr. Ross. Dr. Ross noted OWCP's concerns regarding providing a rationalized opinion explaining how appellant continued to have residuals and disability from the accepted employment conditions. She indicated that OWCP accepted that appellant sustained lumbar and thoracic radiculopathy, cervical sprain, and bilateral traumatic knee chondromalacia as a result of the accepted January 17, 2001 work injury. Dr. Ross described appellant's work duties and noted findings from diagnostic tests which were performed. The findings from the referenced diagnostic testing showed bilateral knee chondromalacia, an L5-S1 disc herniation, an L4-5 disc bulge, cervical C3-4, C4-5, and 6-7 disc herniations, chronic L4 and L5 radiculitis, and right L5 and S1 radiculopathy. Dr. Ross explained that appellant's inability to perform her duties as a detention enforcement officer were due to the limitations caused by her accepted injuries. These limitations included difficulty with sitting, walking, and standing, which precluded appellant from performing her date-of-injury job. As a result of the injuries sustained, Dr. Ross opined that appellant had a permanent disability and was only capable of performing sedentary work.

She also noted that OWCP had accepted the condition of bilateral knee chondromalacia or type of traumatic arthritis, which she explained is a deteriorating and ongoing condition.

By decision dated September 2, 2016, OWCP denied reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision as it was cumulative of evidence previously of recorded considered by OWCP.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's 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) constitute relevant and pertinent new evidence not previously considered by OWCP.⁶ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that decision.⁷ 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.⁸

ANALYSIS

The Board finds that appellant has submitted pertinent new and relevant evidence requiring further merit review.

The Board finds that counsel submitted a relevant and pertinent new report from Dr. Ross dated August 4, 2015 warning further merit consideration.⁹ This report is relevant as she directly addresses whether appellant continued to have residuals and disability from her accepted January 17, 2001 work injury.¹⁰ Dr. Ross provided greater detail and further explanation in support of her opinion, explaining why appellant could not perform her date-of-injury position. She referenced diagnostic testing which showed bilateral knee chondromalacia, a L5-S1 disc herniation, a L4-5 disc bulge, cervical C3-4, C4-5, and 6-7 disc herniations, chronic L4 and L5 radiculitis, and right L5 and S1 radiculopathy, discussed medical treatment occurring at the time of injury, and noted the accepted conditions.

⁵ *Supra* note 3. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁶ 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-0218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁷ *Id.* at 10.607(a).

⁸ *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-0440, (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁹ *See D.W.*, Docket No. 16-1044 (issued October 20, 2016).

¹⁰ *See C.H.*, Docket No. 17-0074 (issued March 17, 2017).

Reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his or her burden of proof.¹¹ If OWCP should determine that the new evidence lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹²

Because appellant submitted pertinent new and relevant evidence in support of her June 7, 2016 reconsideration request, the Board finds that OWCP improperly denied further merit review of her case. The September 2, 2016 decision will be set aside and the case remanded for OWCP to review her claim and issue a merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2016 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: August 24, 2017
Washington, DC

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

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

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

¹¹ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹² See *Dennis J. Lasanen*, 41 ECAB 933 (1990).