

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

_____)	
L.B., Appellant)	
)	
and)	Docket No. 18-0170
)	Issued: August 28, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Warminster, PA, Employer)	
_____)	

Appearances:
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 30, 2017 appellant, through counsel, filed a timely appeal from a May 4, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated February 2, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the case.

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 5 U.S.C. § 8101 *et seq.*

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 December 20, 2003 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2003 she injured her right knee while in the performance of duty. She reported feeling a twinge and cramping in her right knee, as well as a burning sensation. OWCP accepted appellant's claim for right knee strain and right knee medial meniscus tear. It also authorized right knee arthroscopic surgery, which she underwent on March 25, 2004.³ OWCP paid appellant wage-loss compensation for temporary total disability for the period March 25 through May 3, 2004. Appellant resumed her regular, full-time letter carrier duties effective May 4, 2004. Between July 2004 and February 2011 there was minimal activity with respect to her claim.

On October 15, 2014 appellant, through counsel, filed a claim for a schedule award (Form CA-7). In support of the claim, counsel submitted a July 22, 2014 narrative report from Dr. David Weiss, an osteopath Board-certified in clinical orthopedic surgery, who provided an impairment rating of the right lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.⁴ Dr. Weiss diagnosed post-traumatic internal derangement to the right knee with a medial meniscus tear, chronic post-traumatic patellofemoral pain syndrome of the right knee, post-traumatic osteoarthritis of the right knee, status post arthroscopic surgery with a history of partial medial meniscectomy in 2004, and recurrent injury to the right knee on May 20, 2013, with a lateral meniscus tear.⁵ He concluded that appellant reached maximum medical improvement (MMI) on July 22, 2014, and calculated that her right lower extremity permanent impairment was 13 percent based on a diagnosis of right knee medial and lateral meniscal tears.

OWCP referred Dr. Weiss' report to a district medical adviser (DMA) in order to determine whether he appropriately applied the A.M.A., *Guides* in calculating appellant's percentage of permanent impairment.

In a November 18, 2014 report, the DMA noted that Dr. Weiss rated appellant for a medial meniscal injury as well as a nonwork-related lateral meniscal injury. He noted that her claim was accepted for a medial meniscectomy and that she was status post meniscal repair. For this accepted condition, the DMA found that a final lower extremity impairment was three percent. He also provided a separate rating for the combined work-related medial meniscal injury and nonwork-related lateral meniscal injury, finding that the impairment rating for this injury was 12 percent. The DMA noted that he did not have the magnetic resonance imaging (MRI) scan report for the

³ Dr. Anthony J. Balsamo, a Board-certified orthopedic surgeon, performed a partial medial meniscectomy.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ Dr. Weiss reported that appellant sustained another work-related injury on May 18, 2013 when she "hit a ditch" and developed pain in her right knee.

latter injury, and that, if OWCP were to accept the rating for the latter injury, he recommended that OWCP obtain a copy of the MRI scan performed on June 3, 2013 in order to confirm its findings. He noted that the date of MMI was July 22, 2014, and further noted that appellant's right knee condition had stabilized at that time.

By decision dated April 16, 2015, OWCP found that appellant had three percent permanent impairment of the right lower extremity. It relied upon the DMA's calculations of her percentage of impairment, noting that it had only accepted a torn medial meniscus in her claim, and not a nonwork-related lateral meniscus injury. OWCP found that the DMA's impairment rating, taking into account the accepted condition only, was the correct calculation for schedule award purposes.

On April 22, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. The hearing was held on November 19, 2015. At the hearing, counsel argued that the medical evidence demonstrated a progression of the accepted meniscus tear into an accelerated osteoarthritis, as well as a potential contribution to a lateral meniscus tear. He argued that OWCP should accept additional conditions under appellant's claim due to the progression of her disease. Counsel alleged that there was sufficient medical evidence on file in order to support the acceptance of additional conditions on her claim. The hearing representative held the record open for 30 days for the submission of additional evidence.

By decision dated February 2, 2016, the hearing representative affirmed OWCP's April 16, 2015 decision. She found that appellant had not yet provided a medical report sufficiently explaining the basis for a higher impairment rating than three percent based on her accepted injury. The hearing representative noted that, at the hearing, counsel argued that appellant's lateral meniscus condition should be considered consequential to her accepted right medial meniscus injury. She further found that the medical evidence of record was insufficient to support acceptance of a right knee lateral meniscus injury causally related to appellant's December 19, 2003 employment injury.

On February 2, 2017 appellant, through counsel, requested reconsideration of OWCP's February 2, 2016 decision. With the request for reconsideration, counsel argued that OWCP should have further developed the evidence with regard to causation between her accepted right medial meniscus injury and her lateral meniscus injury. He noted that the DMA had not addressed causation in his report, but rather simply noted that the lateral meniscus injury was not presently accepted.

By decision dated May 4, 2017, OWCP declined appellant's request for reconsideration without reviewing the merits of her claim. It found that counsel had not established that OWCP erroneously applied or interpreted a specific point of law nor did he advance a relevant legal argument not previously considered by OWCP. As no medical evidence was received in support of the reconsideration request it determined that counsel's disagreement of the impairment rating previously awarded did not suffice as relevant or material evidence on which to grant the reconsideration request.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

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

OWCP issued a decision dated April 16, 2015 finding that appellant was entitled to a schedule award for three percent permanent impairment of her right lower extremity, based on the accepted injury of a right knee medial meniscus tear. A hearing representative upheld this decision on February 2, 2016, finding that appellant had not submitted sufficient medical evidence to accept the condition of a lateral meniscus tear consequential to her accepted injury. On February 2, 2017 appellant, through counsel, requested reconsideration of OWCP's February 2, 2016 decision. As noted above, the Board does not have jurisdiction over the merits of the schedule award claim.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. While counsel argued in the February 2, 2017 request for reconsideration that OWCP should accept or further develop the issue of whether her lateral medial meniscus tear was a consequential injury to her accepted right knee medial meniscus tear, this argument had previously been considered in the hearing representative's February 2, 2016 decision. As such, appellant is not entitled to a review

⁶ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether appellant has greater than three percent permanent impairment of the right lower extremity. On reconsideration, counsel did not submit additional medical evidence demonstrating a greater impairment due to her accepted right knee medial meniscus tear. He also did not submit any additional medical evidence that would warrant further merit review with respect to appellant's claimed right lateral meniscal injury. As such, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 28, 2018
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