

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

_____)	
E.G., Appellant)	
)	
and)	Docket No. 18-0270
)	Issued: August 24, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Bronx, NY, Employer)	
_____)	

Appearances:
*Paul Kalker, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 20, 2017 appellant, through counsel, filed a timely appeal from a September 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated October 7, 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 over the merits of the claim.

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 October 7, 2016 appellant, then a 51-year-old city carrier, filed an occupational disease claim (Form CA-2) for a left knee injury. She stated that, while delivering mail on June 18, 2016, she began to feel a pain in her left knee. Appellant identified June 18, 2016 as the date she first became aware of her claimed condition and its relation to her federal employment. A supervisor noted that appellant had not reported to work since June 20, 2016.

Appellant submitted a diagnostic report dated June 27, 2016, but the second page containing the remainder of the findings, impressions, and the physician's signature was omitted.³ In a statement dated June 27, 2016, she explained that on June 18, 2016 she came into work as she was delivering the mail and felt a pain in her left knee towards the end of her route. Upon arrival to her station, appellant had a slight limp due to the pain. On June 20, 2016 she went to work and told her acting manager that her knee hurt. Appellant completed her route that day and left at 6:00 p.m. She called out of work the next day, June 21, 2016, due to the pain in her knee. Appellant visited her physician on June 22, 2016, and informed her supervisor the next day about her physician's findings.

By development letter dated August 12, 2016, OWCP informed appellant that she had not submitted sufficient evidence to support her claim. It noted that she had not submitted evidence of a diagnosis from a physician of a condition resulting from an employment activity, and that she had not provided an explanation of how employment activities caused, contributed to, or aggravated her medical condition. OWCP also requested additional information regarding employment factor(s) allegedly responsible for her claimed condition(s), as well as information regarding any outside activities, and/or prior injuries to her left lower extremity, and to clarify whether she was claiming for a traumatic injury or an occupational disease. It afforded appellant at least 30 days to submit the requested factual and medical evidence.

Appellant responded by letter on September 6, 2016. She explained that, from October 15, 2005 through June 20, 2016, she had been a mail carrier, with duties including walking approximately four to eight hours per day, sometimes walking up and down stairs with heavy mail and packages in her hands. Appellant noted that over the years, her left knee would hurt, and she would take over-the-counter medications to treat it. She stated that she had not experienced any prior problems with her left knee, and that, on her time off, she would sit and watch television, use the computer, go to the movies or a restaurant, or read a book. Appellant clarified that she was claiming an occupational disease. In an accompanying cover letter dated September 9, 2016, counsel noted that appellant's responses to the questionnaire were enclosed, and that narrative medical evidence from her attending physician followed under a separate cover.

³ Appellant later resubmitted this report, including the missing page with the remainder of the findings and containing a physician's signature, on June 21, 2016.

By decision dated October 7, 2016, OWCP denied appellant's claim. It found that, although she had established the factual component of her claim, she had not established the medical component of her claim, as she had not submitted a medical report containing a diagnosis in connection with her claimed injury. OWCP pointed out that appellant had not submitted any medical evidence in support of her claim, noting that while counsel's September 9, 2016 letter indicated that a medical report was to follow under a separate cover, OWCP had not received such medical evidence.

A June 27, 2016 magnetic resonance imaging (MRI) scan of the left knee revealed moderate suprapatellar joint effusion; a multiloculated cystic-appearing structure in the intercondylar notch; a horizontal tear of the posterior horn of the medial meniscus reaching the inferior articular surface; a radial tear of the mid-posterior horn; medial extrusion of the body of the posterior horn; mild blunting of the inner rim of the root ; osteoarthritic changes of the medial compartment; irregular thinning of posterior lateral articular cartilage of the medial femoral condyle; mild thinning of the articular cartilage of the medial tibial plateau; a bone marrow edema of the medial aspect of the medial femoral condyle, extending into a moderate medial marginal osteophyte; mild lateral osteophytes of the lateral femoral condyle and lateral tibial plateau; mild patella alta and lateral tilt of the patella; thinning of the patellar articular cartilage; mild thinning of the trochlear articular cartilage; an osteophyte of the trochlea of the lateral femoral condyle; and mild soft tissue edema of the proximal lateral patella tendon.

In a report dated December 20, 2016, Dr. Caridad Fresneda, a Board-certified family practitioner, stated that appellant had been seen in her office on 13 occasions between June 22, 2016 and February 22, 2017. Appellant had been referred to specialists and underwent a left knee arthroscopy on July 27, 2016 with a partial medial and lateral meniscectomy, debridement, and chondroplasty. Dr. Fresneda noted that appellant had undergone an MRI scan on June 27, 2016 and noted that appellant's trochlea of the lateral femoral condyle may be due to a friction syndrome from abnormal patellar tracking. She stated that the tears found in this MRI scan were results of heaving/lifting of heavy objects, such as mailbags and boxes, and further noted that sudden turns, stops, and pivoting motions while climbing stairs contributed to the finding of tears. Dr. Fresneda observed that posterior horn medial meniscus tears are very specific to people who stand for long periods of time, putting more stress on the workload of the knee. With regard specifically to appellant, she noted that appellant carried sacks of mail and packages, stood and walked for long periods of time, and loaded and unloaded mail at various locations, on a daily basis for 11 years. Dr. Fresneda stated, "I have no doubt that this caused my patient to have a work[-]related injury while performing her job at the [employing establishment]. This is my medical opinion."

On June 21, 2017 appellant, through counsel, requested reconsideration of OWCP's October 7, 2017 decision. Counsel argued that the June 27, 2016 MRI scan of the left knee diagnosed a horizontal tear of the medial meniscus, a radial tear of the mid-posterior horn, medial extrusion of the body, and blunting of the inner rim of the root. As such, he contended that appellant had submitted sufficient evidence to satisfy the medical component of fact of injury.

By decision dated September 19, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the medical evidence submitted in support of her timely reconsideration request was irrelevant and immaterial to the underlying issue of her case. OWCP noted that the left knee MRI scan was insufficient to

support her reconsideration request because it provided only interpretive information, which had to be corroborated and explained by a qualified physician in a narrative medical report. It stated that diagnostic reports, alone, could not establish a diagnosis. OWCP further noted that Dr. Fresneda's report dated December 20, 2016 did not contain any diagnosis, referring only to "specific types of tears noted in the MRI [scan] report," and that her report was insufficient because it merely restated the MRI scan findings without indicating any specific diagnosis.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁴

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (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.⁵ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ For OWCP decisions issued on or after August 29, 2011, the date of the request for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System (iFECS).⁹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *Id.* at § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also* *C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987, there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP's decision for which review is sought.

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. The Board finds that she met the requirements of 20 C.F.R. § 10.606(b)(3) in her June 12, 2017 request for reconsideration, and OWCP incorrectly denied merit review.

In her June 12, 2017 request for reconsideration, 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. Thus, she is not entitled to a review of the merits of her claim based upon the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether appellant has submitted sufficient medical evidence to establish a diagnosis in connection with her claimed left knee injury. A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, and in the present claim, appellant submitted pertinent new and relevant evidence that was mischaracterized as irrelevant by OWCP.

In a report dated December 20, 2016, Dr. Fresneda, having the benefit of both pages of the MRI scan report, stated that appellant's trochlea of the lateral femoral condyle may be due to a friction syndrome from abnormal patellar tracking, and that posterior horn medial meniscus tears are very specific to people who stand for long periods of time, putting more stress on the workload of the knee. She noted that appellant had undergone an MRI scan on June 27, 2016. Dr. Fresneda stated that the tears found in this MRI scan were results of heaving/lifting of heavy objects, such as mailbags and boxes, and further noted that sudden turns, stops, and pivoting motions while climbing stairs contributed to the finding of tears. She also noted that appellant carried sacks of mail and packages, stood and walked for long periods of time, and loaded and unloaded mail at various locations, on a daily basis for 11 years.

By decision dated September 19, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted that Dr. Fresneda's report dated December 20, 2016 did not contain any diagnosis, referring only to "specific types of tears noted in the MRI [scan] report," and that her report was insufficient because it merely restated the MRI scan findings without indicating any specific diagnosis.

The Board notes that at the time of Dr. Fresneda's report of December 20, 2016 she had the benefit of reviewing the last page of the MRI scan report which was entered into the record containing further conditions. Dr. Fresneda refers to both trochlea of the lateral femoral condyle and a posterior horn medial meniscus tear as diagnoses for appellant's conditions. To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed.¹¹ As the complete MRI scan report Dr. Fresneda reviewed contained two further conditions relative to appellant's left knee in her report of December 20, 2016, and as the complete two-page report was not before OWCP at the time of its October 7, 2016

¹¹ *Victor J. Woodhams*, 41 ECAB 345 (1989).

decision, appellant has submitted evidence not previously considered and relevant to the issue of establishing further conditions in connection with her claimed left knee injury.

As such, the Board finds that OWCP improperly denied appellant's request for reconsideration of the merits in its decision of September 19, 2017. The complete MRI scan report of June 27, 2016 contained further conditions related to the claimed injury, contrary to OWCP's characterization of her report in its September 19, 2017 decision. The underlying issue in this case was establishing the presence or existence of a left knee injury, for which compensation was claimed. Therefore, OWCP was required to reopen the case for merit review upon reconsideration.

The Board accordingly finds that appellant met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3) in her reconsideration request of June 23, 2017. Appellant submitted relevant and pertinent new evidence not previously considered. Thus, pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review.

CONCLUSION

The Board finds that OWCP improperly 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 September 19, 2017 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: August 24, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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