

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

C.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New York, NY, Employer)

**Docket No. 17-1998
Issued: March 5, 2018**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 25, 2017 appellant filed a timely appeal from an August 9, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the last merit decision, dated March 15, 2017, 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 this case.³

¹ Appellant submitted additional evidence after OWCP rendered its August 9, 2017 decision. The Board's jurisdiction, however, 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); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

² 5 U.S.C. § 8101 *et seq.*

³ 20 C.F.R. § 501.3(e).

ISSUE

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

FACTUAL HISTORY

On June 15, 2016 appellant, then a 43-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that, on June 13, 2016, he stepped on a crack on a sidewalk and sprained his right knee. He first received medical treatment on the date of injury and stopped work on June 14, 2016.

In an accompanying narrative statement, appellant reported that on June 13, 2016 he was delivering mail on his route when he stepped into a crack/hole in the ground and turned his right ankle causing his right knee to shift to the right. He related that he tried to smack his kneecap back into the middle of his knee which resulted in his left knee giving out and causing him to fall. Appellant immediately notified his supervisor and called for an ambulance to seek emergency medical treatment at St. Barnabas Hospital.

In a June 13, 2016 St. Barnabas Hospital emergency department report, Dr. Paul Boyer, a treating physician, reported that appellant stepped on a cracked floor and twisted his bilateral knees. He recommended x-rays and diagnosed bilateral knee pain.

In medical and work status reports dated June 15 through 30, 2016, Dr. Louis Rose, a Board-certified orthopedic surgeon, reported that on June 13, 2016 appellant was delivering mail when he stepped into a hole covered by grass causing his right ankle to turn and his knee to shift. He diagnosed bilateral knee pain and bilateral derangement of unspecified medial meniscus due to old tear or injury.

In a development letter dated July 12, 2016, OWCP notified appellant that his claim was initially administratively handled to allow medical payments, as it appeared to involve only a minor injury resulting in minimal or no lost time from work. However, the merits of his claim had not been formally considered and his claim had been reopened for consideration of the merits because he had not returned to work. OWCP informed him that the evidence of record was insufficient to establish his traumatic injury claim. It advised appellant of the medical and factual evidence needed and afforded him 30 days to submit the additional evidence.

On August 9, 2016 appellant noted submission of additional medical evidence based on OWCP's development letter. In support of his claim he submitted an August 9, 2016 medical report from Dr. Rose.

By decision dated August 12, 2016, OWCP denied appellant's claim, finding that the evidence of record failed to establish that his diagnosed condition was causally related to the accepted June 13, 2016 employment incident.

On September 10, 2016 appellant requested an oral hearing before an OWCP hearing representative and argued that the June 13, 2016 incident caused his injury.⁴ In support of his claim, appellant submitted medical reports dated September 20 through December 12, 2016 from Dr. Rose documenting treatment for internal derangement of the right and left knee.

A hearing was held on January 12, 2017. Appellant testified that he had a prior work-related left knee injury from December 17, 2007 under OWCP File No. xxxxxx714. He underwent surgery for his left knee conditions on August 28, 2008 and February 18, 2010, subsequently returning to part-time light-duty work on May 10, 2012. Appellant noted no prior right knee injuries. He recounted the June 13, 2016 employment incident, explaining that he was delivering mail and walking on the sidewalk which was covered with cracks and holes. As appellant was walking, he stepped into a crack/hole in the ground that was covered by grass, causing him to turn his ankle and shift his right knee to the right. He attempted to smack his right kneecap back in when his left knee gave out, causing him to fall to the floor. The hearing representative noted that it was unclear whether appellant stepped in a crack or a hole as he was citing both. Appellant stated that it was a crack in the ground. The hearing representative asked for clarification as to why he sometimes referenced it as a hole. Appellant reported that he went back to the site of the employment incident with an attorney who took pictures of where he fell and saw that grass was covering the crack in the ground. When the grass was pulled out it was revealed to be a hole in the ground. The record was held open for 30 days.

By letter dated February 10, 2017, counsel noted submission of a pleading, appellant's January 16, 2017 affidavit, and a January 19, 2017 medical report from Dr. Joshua Macht, Board-certified in internal medicine, in support of his traumatic injury claim. In the pleading, counsel reported that appellant was delivering mail on June 13, 2016 when he stepped in a hole in the pavement, resulting in his right ankle to turn and his right knee to shift. He noted that the hole was covered with grass so it only appeared to be a crack at the time of the injury. Counsel further noted submission of additional medical evidence in support of appellant's claim, including a medical report from Dr. Macht who provided a comprehensive medical history with regard to appellant's prior left knee injury, discussion of diagnostic testing, and an opinion on causal relationship relating to appellant's bilateral knee sprain as a result of the June 13, 2016 employment incident.

In a January 16, 2017 affidavit, appellant reported that on June 13, 2016 he was delivering mail when he stepped in a hole in the pavement, resulting in his right ankle to turn and right knee to shift to the right side of his leg. He noted that the hole was covered with grass so it only appeared to be a crack at the time. Appellant discussed the employment incident and his subsequent course of treatment.

In a January 19, 2017 medical report, Dr. Macht discussed the January 13, 2016 employment incident when appellant was delivering mail and stepped into a hole in the ground on the sidewalk. He diagnosed bilateral knee sprain and discussed appellant's medical history, diagnostic reports, and physical examination findings.

⁴ Following his request for an oral hearing, appellant submitted an authorization for representation from Stephen J. Dunn, Esq. to handle all matters arising out of his workers' compensation claim.

Following the hearing, appellant submitted additional medical evidence in support of his claim, including a June 6, 2009 left knee MRI scan, August 28, 2008 and February 18, 2010 left knee operative reports, and reports dated November 15, 2016 through March 1, 2017 documenting treatment with Dr. Rose.

By decision dated March 15, 2017, the hearing representative affirmed the August 12, 2016 decision, as modified, finding that the evidence of record failed to establish that the June 13, 2016 employment incident occurred as alleged. It noted that appellant had provided contradictory statements and testimony pertaining to the history of injury and whether he stepped in a crack or a hole covered by grass.⁵ The hearing representative further noted that the mechanism of injury was unclear, and as such the medical evidence could not establish the claim. Upon return of the case record, the hearing representative instructed OWCP to combine the current claim with OWCP Nos. xxxxxx714 and xxxxxx288 as the claims all involved knee injuries.⁶

On April 17, 2017, appellant requested reconsideration of OWCP's decision. He noted that he would like to submit an addendum from Dr. Macht in support of his claim. Appellant further noted that he would also like to submit pictures from the site of his June 13, 2016 injury which showed the sidewalk where he was injured. He explained that the evidence would show why he called the area a hole/crack during his testimony. Appellant reported that, after the grass was removed from this area, it showed a crack in the pavement with a hole 1.5 inches deep. He argued that his previous testimony about the area where he was injured should coincide with the evidence submitted. Appellant further discussed his prior workers' compensation claims and argued that he sustained a new injury on June 13, 2016. This new evidence was received in the master file on April 17, 2017.

An April 11, 2017 medical report was received from Dr. Rose documenting appellant's course of treatment.

By decision dated August 9, 2017, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It noted that his April 12, 2017 statement was substantially similar to his June 14, 2016 statement and January 16, 2017 affidavit which were previously considered. OWCP further noted, that while his statement indicated that he was submitting new evidence, including pictures and an addendum from Dr. Macht, no such evidence was received.

⁵ OWCP's hearing representative noted a prior December 17, 2007 left knee injury when appellant slipped on a piece of ice on the stairs which was accepted for internal derangement of left knee under OWCP File No. xxxxxx714. Appellant underwent arthroscopic surgeries on August 28, 2008 and February 18, 2010. The hearing representative also noted an October 17, 2013 occupational disease claim for the left knee which was denied on January 23, 2014 for failing to establish fact of injury.

⁶ A memo to file dated April 6, 2017 notes that the three files were combined per the instructions of the hearing representative, with OWCP File No. xxxxxx714 serving as the master file.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that 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.⁷ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration 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.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.⁹

In its August 9, 2017 denial of appellant's reconsideration request, OWCP noted that the only evidence submitted was an April 11, 2017 medical report from Dr. Rose and appellant's April 12, 2017 narrative statement which was cumulative and substantially similar to evidence already contained in the case file, and previously considered. It noted that, while his statement indicated that he was submitting new evidence, including pictures and an addendum from Dr. Macht, no such evidence was received. Thus, OWCP denied merit review of his claim finding that he failed to submit any relevant and pertinent new evidence addressing fact of injury sufficient to warrant a merit review.¹⁰

However, the record reflects that OWCP received new evidence from appellant prior to the issuance of its August 9, 2017 decision. The Board notes that appellant submitted evidence in support of his claim including medical reports and documents from the employing establishment regarding modified work duties, offers of modified assignments, and notice of separation. Appellant also submitted his April 12, 2017 narrative statement requesting reconsideration, as well as photographs documenting the location of the June 13, 2016 employment incident and a March 21, 2017 medical report from Dr. Macht. The Board notes that the documents submitted in support of appellant's reconsideration request were filed under the master file, OWCP File No. xxxxxx714, and received by OWCP on April 17, 2017.

As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim, which was properly submitted to OWCP prior to the time of issuance of its final decision, be reviewed and addressed by OWCP.¹¹ In its

⁷ 20 C.F.R. § 10.606(b)(3); *see also D.K.*, 59 ECAB 141 (2007).

⁸ *Id.* at § 10.608; *see also K.H.*, 59 ECAB 495 (2008).

⁹ *J.W.*, Docket No. 13-1666 (issued August 18, 2014).

¹⁰ *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

¹¹ *See Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where OWCP did not consider a medical report received on the date of its decision).

August 9, 2017 decision, OWCP did not review the additional evidence submitted in support of appellant's claim as it found that the record did not contain an addendum report from Dr. Macht or pictures as indicated in appellant's April 12, 2017 reconsideration request. Because OWCP did not consider the new evidence submitted by appellant on reconsideration, the Board cannot review such evidence for the first time on appeal.¹²

The Board finds that this case is not in posture for a decision. This case will be remanded to OWCP to review and consider appellant's evidence which was properly submitted prior to the August 9, 2017 decision. Following this and such other development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: March 5, 2018
Washington, DC

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

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

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

¹² 20 C.F.R. § 501.2(c).