

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

C.S., Appellant)	
)	
and)	Docket No. 19-0484
)	Issued: August 1, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Bakersfield, CA, Employer)	
)	

Appearances:
Erik B. Blowers, Esq., for the appellant¹
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 January 2, 2019 appellant, through counsel, filed a timely appeal from a September 11, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from OWCP's last relevant merit decision, dated February 26, 2018, to

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 The September 11, 2018 decision denied further merit review of OWCP's February 26, 2018 decision, which denied wage-loss compensation for temporary total disability beginning May 1, 2015. The Board notes that the record also includes a July 23, 2018 decision that granted appellant a schedule award for 25 percent permanent impairment of her left lower extremity. Although OWCP's July 23, 2018 schedule award decision falls within 180 days of the filing of the current appeal, neither appellant nor counsel specifically challenged that decision. Accordingly, the Board will not exercise jurisdiction over the July 23, 2018 decision.

the filing of this 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 reconsideration of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 8, 2014 appellant, then a 63-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging that she aggravated and/or exacerbated her left knee osteoarthritis due to factors of her federal employment. She first became aware of her left knee condition on June 4, 2013, and first realized it was related to her employment on June 19, 2014. On December 23, 2014 appellant underwent left total knee arthroplasty performed by Dr. Brian Solberg, a Board-certified orthopedic surgeon. In an April 29, 2015 progress report, Dr. Solberg indicated that appellant was status post left total knee arthroplasty and "doing well." He advised that no additional physical therapy was necessary, and that appellant "[could] walk and stand as tolerated without restriction." Effective May 1, 2015, appellant retired from her position with the employing establishment.

OWCP initially denied the claim. However, on June 9, 2015, it accepted appellant's claim for temporary aggravation of left lower leg localized primary osteoarthritis. On August 9, 2016 OWCP expanded the accepted condition to reflect permanent aggravation of left knee osteoarthritis. It also retroactively authorized appellant's December 23, 2014 left total knee arthroplasty. OWCP paid wage-loss compensation for temporary total disability on the supplemental rolls for the period February 6 through April 29, 2015.

On January 11, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for the period beginning May 1, 2015 and continuing.

OWCP had previously referred appellant for a second opinion evaluation by Dr. Ernest Miller, a Board-certified orthopedic surgeon and internist. In a report dated April 14, 2016, Dr. Miller reviewed appellant's medical history and patient records. In response to the question of when appellant ceased to be totally disabled, he reported that a reasonable period of disability would have ended May 1, 2015, and that the temporary aggravation resolved "without industrial disability." Dr. Miller further wrote that actual disability has significantly resolved with the knee replacement and that current restrictions would include preclusion from prolonged running or jumping, kneeling, or squatting activities, and that standing in excess of two to three hours at a time should be accommodated with a two-hour rest. In an accompanying work capacity evaluation (Form OWCP-5c) he indicated his belief that appellant could work for eight hours per day with restrictions on walking, standing, bending/stooping, and squatting and kneeling.

OWCP had also previously inquired whether the employing establishment had work available on or after April 30, 2015 that would accommodate appellant's limitations as described

³ 5 U.S.C. § 8101 *et seq.*

by Dr. Solberg and Dr. Miller. In a reply received on October 27, 2016, a representative from the employing establishment responded indicating that they could have accommodated appellant if she had not [retired].

In a development letter dated January 30, 2017, OWCP advised that the medical evidence of record did not demonstrate that appellant experienced a period of temporary disability from a worsening of her condition such that she was no longer able to perform the duties of her position. OWCP explained that the evidence indicated that light/limited duty was available during the claimed period of disability. Accordingly, it requested that appellant submit rationalized medical opinion evidence to support the period of disability, and/or evidence explanatory of why appellant did not work the light/limited-duty assignment. OWCP afforded her 30 days to submit the requested evidence.

In a letter dated February 8, 2017, appellant, through counsel, argued that no evidence is contained in the record to support the employing establishment's assertion that work was offered or available prior to appellant's retirement on May 1, 2015. Counsel also argued that the medical evidence of record, namely Dr. Miller's second opinion report, imposed restrictions that were incompatible with appellant's job duties prior to the injury. Finally, he asserted that appellant's voluntary retirement had not precluded her from continuing wage-loss compensation benefits. With the letter brief, appellant included an attached e-mail thread with her supervisor, B.B. In an e-mail dated December 21, 2016, appellant notified B.B. that she had been cleared to return to work with restrictions, and that details regarding the light-duty assignment in place for her prior to her absence could be provided by her transportation security manager. By response dated January 3, 2017, B.B. indicated that he required more details concerning the injury and claim number, and that additional clearance would be required from headquarters because appellant had previously retired. Based on this e-mail thread, counsel argued in the alternative that even if she was cleared to work, no work was available on December 21, 2016, and that she was entitled to wage-loss compensation until she received an offer of suitable employment.

In a May 1, 2017 letter addressed to the employing establishment, OWCP inquired as to whether the duties of appellant's date of injury position were consistent with Dr. Miller's restrictions in the second opinion evaluation. It afforded the employing establishment 30 days to respond.

In a June 1, 2017 response, a human resources specialist from the employing establishment indicated that, prior to the injury, appellant was a part-time employee who worked 5 hours per day, with two 15-minute breaks per shift, and that appellant had elected to receive OPM retirement benefits effective on May 1, 2015. The human resources representative denied that appellant's job duties involved running or jumping, any prolonged kneeling or squatting, or any continuous standing or walking in excess of two to three hours. She explained that appellant would not have the opportunity to engage in any prolonged standing or walking due to the rotational nature of the positions within each shift.

By decision dated September 29, 2017, OWCP denied appellant's claim for wage-loss compensation for the period beginning May 1, 2015 and continuing. It found that she was capable of performing the duties of her position with restrictions as a modified assignment with the

employing establishment was available and therefore appellant was not entitled to disability compensation as the condition had not prevented her from earning her preinjury wages.

On October 6, 2017 appellant, through counsel, requested reconsideration of the September 29, 2017 decision. In her request, counsel first argued that appellant was not provided a copy of the June 1, 2017 letter from the employing establishment and should have been offered the opportunity to respond. Second, he contended that the description provided in the June 1, 2017 letter was inconsistent with the prior statement of accepted facts (SOAF), and in any event, the employing establishment's handbook for the position listed many required activities which fall outside the restrictions listed in Dr. Miller's second opinion report. Counsel asserted that Dr. Miller's restrictions in his April 14, 2016 second opinion report should not be applied retroactively, but rather his restrictions should only apply to the period following the report, entitling appellant to wage-loss compensation between May 1, 2015 and the date of the second opinion evaluation on April 14, 2016. He further asserted that the January 4, 2017 report of Dr. Irene Sanchez, a Board-certified occupational medicine specialist, had restricted appellant from standing more than 30 minutes continuously without a break, and had created a conflict with Dr. Miller requiring a referee examination.⁴ Counsel concluded the letter by reiterating that the employing establishment had not submitted evidence supporting its assertion that work was available or that an offer was made, and that it was incorrect under Board precedent to deny wage-loss compensation based on appellant's voluntary retirement.

In her January 4, 2017 report, Dr. Sanchez checked a box marking her belief that appellant could not return to her usual occupation. She issued restrictions against repetitively lifting more than 25 pounds, pushing or pulling more than 50 pounds, squatting, kneeling, or standing for more than 30 minutes at a time without a break to sit down.

By decision dated February 26, 2018, OWCP denied appellant's claim for wage-loss compensation for the period beginning May 1, 2015. It addressed each of the arguments presented in the request for reconsideration, and determined that none merited modification of the prior decision. In addressing counsel's arguments concerning the absence of a written job offer in the record, OWCP noted that because appellant had not worked since the total knee replacement and submitted her retirement effective three days after she was released to work, it would not have been reasonable to expect a written job offer in the face of appellant's notification of retirement. Additionally, OWCP found no evidence reconciling the discrepancy between appellant's placement in a light-duty position at the time of her injury, and why such positions would be unavailable upon her release from physical therapy by Dr. Solberg.

On June 13, 2018 appellant, through counsel, requested reconsideration of the February 26, 2018 decision. In the reconsideration request, counsel alleged that because there is no evidence in the record that the employing establishment made her an offer in writing, there was no light-duty work available "as a matter of law." He argued that the cited provisions mandate the conclusion that, as a matter of law, appellant was entitled to wage-loss because there was no written job offer in the record.

⁴ The report of Dr. Sanchez was not before OWCP at the time of its September 29, 2017 decision, the decision upon which he then request for reconsideration was based.

By decision dated September 11, 2018, OWCP denied appellant's request for reconsideration, finding that the arguments on reconsideration were repetitive of the arguments previously presented which were found to be of no evidentiary value. Consequently, it denied merit review of the February 26, 2018 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸ 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.⁹

ANALYSIS

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

On October 6, 2017 appellant, through counsel, requested reconsideration of the September 29, 2017 decision denying a claim for wage-loss compensation. In the reconsideration request counsel alleged that, "as a matter of law," because there was no evidence in the record that the employing establishment had made her an offer in writing, it had been established that there was no light-duty work available. He cited specific legal precedent which he asserts mandated the conclusion that appellant was entitled to wage-loss compensation because there was no written job offer in the record.

The underlying issue on appeal was whether appellant was entitled to a period of wage-loss compensation commencing May 1, 2015. As the reconsideration request shows that OWCP

⁵ 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).

⁶ 20 C.F.R. § 10.607.

⁷ *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.

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (b).

erroneously applied or interpreted a specific point of law and advances a relevant legal argument not previously considered by OWCP, the Board finds that appellant has met the first and second requirements of section 10.606(b)(3). Therefore, she is entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.608.¹⁰

CONCLUSION

OWCP improperly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: August 1, 2019
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

¹⁰ *Id.* at § 10.608(a).