

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

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W.N., Appellant)	
)	
and)	Docket No. 19-0690
)	Issued: August 16, 2019
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Camp Hill, PA, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 11, 2019 appellant, through counsel, filed a timely appeal from a January 8, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 26, 2018, 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.

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 February 3, 2017 appellant, then a 48-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she underwent left knee arthroscopy for microfracture of a bone fragment, meniscus tear, and arthritis due to factors of her federal employment. She indicated that she first became aware of her conditions on August 8, 2016 and first realized that they were caused or aggravated by her federal employment on December 29, 2016. In a supplemental statement dated January 31, 2017 appellant noted that she previously sustained left knee and rib injuries and a torn muscle on the right side when she fell while delivering mail on January 2, 2014.³ She alleged that subsequently in July 2016 her knee pain became unbearable.

Appellant sought medical treatment in August 2016 from Dr. Timothy S. Ackerman, an attending Board-certified orthopedic surgeon, who found that a magnetic resonance imaging (MRI) scan of the left knee showed arthritis and advised that arthroscopic surgery would provide some relief. Dr. Ackerman also advised that a full or partial knee replacement would eventually be required. Appellant underwent arthroscopic surgery on September 16, 2016. During a follow-up evaluation on September 26, 2016, Dr. Ackerman informed her that he had removed arthritis and microfracture of a bone fragment and cleaned up a meniscus tear. Appellant was released to return to work without restrictions on December 19, 2016. She related that on December 29, 2016 Dr. Ackerman advised her that her bone fragment could have been caused by the January 2, 2014 fall and damaged her knee. Appellant indicated that she sustained a similar nonwork-related injury in December 2002 and had a meniscus tear repaired. At that time, a physician informed her that she had arthritis in her knee, which he cleaned out during surgery.

On the reverse side of appellant's claim form K.H., an employing establishment supervisor, indicated that, while appellant claimed that her pain was unbearable by late July 2016, she had not worked since June 4, 2016. In addition, appellant's new supervisors were unaware of when she told anyone about her claimed conditions.

In a development letter dated February 15, 2017, OWCP notified appellant of the factual and medical deficiencies of her claim. It provided a questionnaire for her completion regarding the factual elements of her claim. OWCP also requested that appellant provide a narrative medical report from her physician, which contained a detailed description of findings and diagnoses, explaining how her work activities caused, contributed to, or aggravated her medical condition. In a development letter of even date, it requested that the employing establishment respond to appellant's allegations and provide information regarding her work stoppage, work activities, and job description. OWCP afforded both parties 30 days to respond.

³ Appellant had filed a prior traumatic injury claim (Form CA-1) for a left knee injury, which was assigned OWCP File No. xxxxxx425. The record indicates that OWCP accepted the claim for left knee contusion.

In a statement dated March 12, 2017, appellant responded to OWCP's development questionnaire. She claimed that, as previously stated, her left knee discomfort started long before her last day of work on June 4, 2016. Appellant further claimed that she actually stopped work on June 7, 2016 and not on June 4, 2016 due to severe migraines that were later determined to be caused by her neck and back issues. She maintained that she did not become aware of her meniscus tear until her follow-up visit with Dr. Ackerman on September 26, 2016. Appellant provided her employment history at the employing establishment and listed her activities outside her federal employment. She also submitted medical evidence and an official description of her city letter carrier position.

In letters dated March 15 and April 21, 2017, K.F., a human resource management specialist, responded to OWCP's development letter. She noted appellant's annual and sick leave balance and number of hours worked from January 14, 2012 through 2016 and contended that they did not reflect excessive amounts of work. K.F. further noted that her claim for her January 2, 2014 employment-related injury under OWCP File No. xxxxxx425 had been accepted for left knee contusion. She asserted that appellant had not submitted medical evidence to establish her instant claim or immediately report her claimed injury. K.F. further asserted that appellant's new supervisor was unaware of the reason for her work stoppage on June 4, 2016 when her surgery was not performed until September 9, 2016. She questioned how appellant maintained that she first became aware of her claimed work-related left knee condition on August 8, 2016 when she had related that she started having knee pain in January 2014 that increased in March/April 2016. K.F. noted that she did not stop work until June 2016 and did not seek medical treatment until August 2016.

In an undated letter dated D.W., appellant's supervisor, maintained that appellant had not sustained a work-related injury. Appellant had not mentioned having a work-related injury when she requested to return to work with restrictions following her left knee surgery. D.W. noted that when she informed appellant that no work was available within her craft, appellant requested to be placed in another craft with restrictions. She replied that, since her injury was not work related, she could not put her into another craft without a grievance being filed. D.W. noted that appellant related to her that she would speak to a union representative, but instead she filed a Form CA-2.

By decision dated May 1, 2017, OWCP denied appellant's occupational disease claim finding that the evidence of record was insufficient to establish the factual aspect of her claim.

On June 2, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 14, 2017.

OWCP thereafter received additional medical evidence.

By decision dated January 26, 2018, an OWCP hearing representative affirmed the May 1, 2017 decision, as modified. She found that appellant had established the factual aspect of her claim based on her hearing testimony and evidence of record. However, the claim remained denied as appellant had not provided a rationalized medical opinion explaining how her new or preexisting left knee conditions were caused or aggravated by the accepted employment factors.

On October 11, 2018 appellant, through counsel, requested reconsideration and submitted medical evidence from Dr. Scott King, a Board-certified orthopedic surgeon. In a report dated August 17, 2018, Dr. King reviewed the physical requirements and environmental factors of appellant's city letter carrier position. He advised that appellant was not capable of performing the full duties of her position without restrictions, limitations, or accommodations.

In an employing establishment physician or practitioner certification for light-duty request form also dated August 17, 2018, Dr. King excused appellant from work for the period from August 6 through October 29, 2018 because she had undergone revision of a total left knee arthroscopy on August 6, 2018. He provided a surgical follow-up report on August 29, 2018.

Appellant also submitted an additional report dated August 30, 2018 from Dr. Ackerman. Dr. Ackerman noted that appellant related a history that she was involved in a motor vehicle accident while delivering mail on June 15, 2017. He discussed physical examination findings and diagnosed a partial rotator cuff tear, acute strain, incomplete, adhesive capsulitis, and scapular dyskinesia of the right shoulder. Dr. Ackerman recommended arthroscopic surgery.

OWCP subsequently received additional reports from Dr. King. In an August 17, 2018 report, Dr. King discussed physical examination findings and reviewed diagnostic test results. He provided an assessment of two weeks' status post total left knee replacement. Dr. King indicated that appellant would be released to return to work the following week.

Dr. King, in a state workers' compensation form dated August 17, 2018, noted that appellant's condition of revision of total left knee arthroscopy and her incapacity approximately commenced on June 20, 2018. He also noted that the probable duration of her condition was 10 days. Dr. King advised that appellant was incapacitated for the period from August 6 through October 19, 2018.

OWCP, by decision dated January 8, 2019, denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted in support of reconsideration was irrelevant or immaterial.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. It 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 which: (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

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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

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).

Appellant's October 11, 2018 timely request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, and did not advance a new and relevant legal argument not previously considered.⁸ Consequently, she is not entitled to further review of the merits of her claim based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁹

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP under 20 C.F.R. § 10.606(b)(3). The Board notes that the underlying issue in this case is whether she had established a left knee condition that required surgery and resulted in her disability due to the accepted factors of her federal employment as a city letter carrier. That is a medical issue which, on reconsideration, must be addressed by relevant medical evidence not previously considered.¹⁰

On reconsideration appellant submitted new reports from Dr. King and Dr. Ackerman. However, neither physician provided a relevant medical opinion as to causation. Although evidence submitted on reconsideration need not carry appellant's burden entirely to suffice for reconsideration, the new evidence must at least be relevant and pertinent to the issue upon which the claim was denied.¹¹ While this evidence is new, it does not address the underlying medical issue of causal relationship. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

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

⁸ *Supra* note 5 at § 10.606(b)(3)(i) and (ii); *see also M.S.*, Docket No. 19-0291 (issued June 21, 2019).

⁹ *Id.*

¹⁰ *See G.T.*, Docket No. 18-1506 (issued April 24, 2019); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *K.B.*, Docket No. 18-1392 (issued January 15, 2019).

The Board accordingly finds that appellant has not met 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.¹²

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 January 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).