

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

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B.H., Appellant)		
)		
and)		
)	Docket No. 19-0169	
)	Issued: June 24, 2019	
DEPARTMENT OF THE AIR FORCE,)		
INTERNATIONAL ENGINES SQUADRON,)		
TINKER AIR FORCE BASE, OK, Employer)		
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Appearances:
Christopher L. Kannaday, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 2, 2018 appellant, through counsel, filed a timely appeal from a June 27, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from OWCP's last merit decision, dated June 6, 2017, to the filing of

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 Board notes that, during the pendency of this appeal, OWCP issued a December 26, 2018 decision finding that appellant failed to demonstrate clear evidence of error of its June 6, 2017 decision denying the instant claim. This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. See *C.C.*, Docket No. 18-1769 (issued April 5, 2019); *Terry L. Smith*, 51 ECAB 182 (1999); *Douglas E. Billings*, 41 ECAB 880 (1990); see also 20 C.F.R. § 501.2(c)(3).

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.⁴

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 12, 2008 appellant, then a 53-year-old program assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 1, 2008 she injured her lower back and tail bone when she slipped, grabbed a stair rail, twisted, and fell on stairs, landing on her bottom while in the performance of duty. On February 10, 2009 OWCP accepted the claim for lumbar back sprain.⁵

In correspondence dated June 23, 2009, appellant asked that acceptance of her claim be expanded to include a knee condition, which had caused continued pain since the December 1, 2008 employment injury. She indicated that her physician found that trauma shattered a bone in her knee. A memorandum in the record dated July 15, 2009 noted that an OWCP claims examiner had reviewed all the medical evidence of record and found none that mentioned appellant's knees other than noting that she had undergone bilateral knee replacements in 2007.

On February 11, 2016 appellant filed a notice of recurrence (Form CA-2a). She noted the December 1, 2008 date of injury and related that since that time she had undergone four left knee surgeries due to the fall. Appellant's supervisor noted on the claim form that on May 20, 2014 appellant stepped in a pothole while in the performance of duty.⁶ OWCP accepted that claim for fracture of the left ankle and sprain of the left rotator cuff. In an attached statement, appellant indicated that since the December 1, 2008 employment injury she had continual problems with her left knee and had submitted sufficient medical evidence to establish that her left knee condition was caused by this injury.

In a development letter dated April 25, 2016, OWCP noted that appellant's claim was accepted for lumbar sprain. It advised that the evidence submitted was insufficient to expand acceptance of the claim to include a left knee condition and informed her of the type of evidence

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the June 27, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ The record does not indicate that appellant received any wage-loss compensation for the accepted lumbar sprain.

⁶ OWCP File No. xxxxxx675.

necessary to establish her recurrence claim. OWCP afforded appellant 30 days to submit the necessary evidence. Appellant did not respond.

By decision dated June 2, 2016, OWCP denied the recurrence claim. It noted that appellant had not responded to the April 25, 2016 development letter.

On March 28, 2017 appellant requested reconsideration.⁷ She continued to maintain that her left knee condition was caused by the December 1, 2008 employment injury.

Additional medical evidence submitted included reports dated December 1 to 31, 2008 from Dr. Edmond L. Hooks, an internist at an employing establishment clinic. He described the employment injury and noted that appellant's complaints included left leg pain. On December 15, 2008 Dr. Hooks reported that she indicated that while she had left leg pain, this was not from the fall, noting that she had left knee replacement in January 2007. He consistently diagnosed lower back sprain.

In reports dated May 18, 2009 to January 27, 2017, Dr. Michael O. Williams, a Board-certified orthopedic surgeon, described appellant's multiple left knee surgical procedures. This included an arthroscopic procedure on May 18, 2009 which showed a loose tibial component. On June 11, 2009 Dr. Williams noted appellant's complaints that following her left total knee arthroplasty she did well until she fell in December 2008. He opined that the fall caused loosening of her left knee arthroplasty, and she would require additional surgery. On December 28, 2009, December 27, 2010, and August 21, 2013 Dr. Williams revised the left total knee arthroplasty. On January 27, 2017 he described appellant's left knee medical and surgical history. Dr. Hooks reported a history that she fell down stairs on December 1, 2008 which caused trauma to the left knee.

In a December 18, 2014 report, Dr. Rory C. Dunham, a Board-certified osteopathic orthopedic surgeon, noted seeing appellant for complaints including left knee instability after total knee replacement. On February 20, 2015 Dr. Paul B. Jacob, a Board-certified osteopath specializing in orthopedic surgery, diagnosed failed total knee arthroplasty.

By decision dated June 6, 2017, OWCP denied modification of the June 2, 2016 decision. It reviewed the medical evidence of record and found it insufficient to establish a recurrence of disability and that appellant's left knee condition was caused by the December 1, 2008 employment injury.

On June 5, 2018 appellant requested reconsideration. Counsel asserted that the medical evidence established that her left knee condition was caused by the December 1, 2008 employment injury and indicated that he was submitting reports dated May 17, 2016 and March 30 and July 11, 2017 from Dr. Williams. These reports are not found in the case record.

By decision dated June 27, 2018, OWCP denied appellant's request for reconsideration, finding that she had not raised a substantive legal question or submitted new and relevant evidence.

⁷ Appellant also submitted a March 22, 2017 recurrence claim for medical treatment only.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ 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.¹⁰

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.¹¹ 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.¹²

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 timely request for reconsideration 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 by OWCP. The underlying issues on appeal involved whether she established a left knee condition and recurrence of disability caused by her accepted December 1, 2008 employment injury. These are medical issues which must be determined by rationalized medical evidence.¹³ Counsel's assertion that the medical evidence established the claim was duplicative of arguments made in the past and does not constitute medical evidence. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁴ Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ *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. *Id.* at Chapter 2.1602.4b

¹¹ *Id.* at § 10.606(b)(3); *see J.B.*, Docket No. 18-1531 (issued April 11, 2019).

¹² *Id.* at § 10.608.

¹³ *S.M.*, Docket No. 18-1158 (issued January 16, 2019).

¹⁴ *J.B.*, *supra* note 11.

Furthermore, appellant failed to submit relevant and pertinent new evidence in support of her request for reconsideration.¹⁵ While counsel wrote on the June 5, 2018 reconsideration request that he was forwarding three new medical reports, these are not found in the record before the Board. Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹⁶

As to counsel's assertion on appeal that OWCP indicated in its June 6, 2017 decision that some medical records were duplicative of evidence previously reviewed, whereas these reports were not reviewed in its June 2, 2016 decision, this argument relates to the merits of appellant's claim and, as noted, the Board lacks jurisdiction to review the case on the merits.¹⁷ Counsel did not raise this argument in his June 5, 2018 reconsideration request.

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.

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).

¹⁵ *Id.*

¹⁶ *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

¹⁷ 20 C.F.R. §§ 501.2(c) and 501.3.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board