

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

_____)	
R.R., Appellant)	
)	
and)	Docket No. 19-1142
)	Issued: November 14, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Scarborough, ME, Employer)	
_____)	

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
JANICE B. ASKIN, Judge

JURISDICTION

On April 22, 2019 appellant filed a timely appeal from a March 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 May 11, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the March 8, 2019 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.*

FACTUAL HISTORY

On February 7, 2017 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he lifted a full capacity sack, twisted to throw it into a hamper, and injured his right hip while in the performance of duty. On October 13, 2017 OWCP accepted appellant's claim for right inguinal hernia.

On November 28, 2017 appellant underwent authorized laparoscopic right inguinal hernia repair.

In reports dated February 1 and 16, 2018, Dr. Michael Regan, a Board-certified orthopedic surgeon, indicated that he examined appellant for right knee pain that had worsened after his hernia surgery. He noted that there was no history of substantial trauma to his knee and related that x-rays revealed no evidence of fracture, bony abnormalities, or degenerative changes. Dr. Regan indicated that a magnetic resonance imaging (MRI) scan of appellant's right knee revealed small joint effusion, no internal derangement, and no acute bony pathology. He diagnosed right knee pain, noted no clear surgical etiology, and opined that the injury was likely due to a soft tissue sprain.

In a report dated February 26, 2018, Dr. Benjamin Russell, an osteopathic physician Board-certified in general surgery, indicated that he examined appellant for continued right inguinal pain that radiated to the medial aspect of his right knee. He noted that upon returning to work following his hernia repair, appellant reported a transient sharp pain radiating from the right groin to the medial aspect of the right knee when performing certain movements. Dr. Russell also indicated that, after appellant underwent surgery, he walked with an antalgic gait favoring his right leg. He noted that plain film imaging and a right leg MRI scan did not reveal arthritis. Dr. Russell diagnosed right knee pain, noted that appellant had some degree of inflammation within the right knee, and opined that this symptom was a result of his antalgic gait for a prolonged period of time prior to his hernia surgery.

In reports dated March 16 and 30, 2018, Dr. Jeffrey Bush, a Board-certified orthopedic surgeon, indicated that he examined appellant for right knee pain. He noted that appellant had undergone hernia surgery, and shortly thereafter he developed right knee pain. Dr. Bush noted the possibility of a torn meniscus even though the MRI scan did not show a clear tear. On March 30, 2018 he requested authorization for knee arthroscopy/surgery.

In a development letter dated April 6, 2018, OWCP advised appellant that the evidence of record was insufficient to authorize the proposed treatment. It informed him of the evidence needed to authorize the surgery requested and afforded him 30 days to submit the necessary evidence for consideration.

In a letter dated May 1, 2018, Dr. Bush indicated that during appellant's right knee surgical procedure, performed on April 24, 2018, he discovered a torn medial meniscus as well as arthritic degenerative changes. He noted that he could not determine the age or mechanism of injury based on his intra-operative findings or photos. Dr. Bush opined that, since appellant reported having no pain prior to his February 7, 2017 employment incident, that he injured his knee at the time of that incident. He further opined that the arthritis discovered in surgery was chronic, and not related to the February 7, 2017 employment incident.

By decision dated May 11, 2018, OWCP denied appellant's request for authorization of right knee surgery, finding that the evidence of record did not support that it was medically necessary to address the effects of his accepted employment-related condition.

On May 30, 2018 appellant requested reconsideration of OWCP's May 11, 2018 decision.

In support of his request for reconsideration, appellant submitted copies of documents previously of record and considered in OWCP's previous decision, including his completed Form CA-1, Dr. Bush's May 1, 2018 letter, and multiple hospital records. He also submitted an unsigned and undated medical report which noted that appellant was having difficulty walking and his knee had started to hurt.

By decision dated June 11, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

Appellant continued to submit medical evidence to the case file including multiple duplicate copies of treatment reports, as well as new postoperative reports dated September 11, 2018, from Dr. Bush regarding appellant's knee injury.

In a report dated November 13, 2018, Dr. Frank A. Graf, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and provided physical examination findings. He noted that, on February 7, 2017, appellant was throwing 40- to 50-pound priority sacs into the back of his postal vehicle and sustained a twisting injury to his right hip and right knee. Dr. Graf related that appellant underwent right inguinal hernia repair, which resolved his groin and hip symptoms, and that during this time he developed right knee pain, swelling, and catching. He diagnosed meniscal tear medial meniscus and synovitis of the right knee, objectively documented by direct visualization at arthroscopy, and medial compartment degenerative osteoarthritis of the right knee, postinjury. Dr. Graf opined that these diagnoses were directly causally related to the twisting motion during appellant's February 7, 2017 employment incident.

On January 18, 2019 appellant again requested reconsideration of OWCP's May 11, 2018 decision.

By decision dated March 8, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain

³ This section provides in pertinent part: the 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).

limitations in exercising its authority.⁴ 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.⁵

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.⁶ 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.⁷

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at 20 C.F.R. § 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.¹⁰

ANALYSIS

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

On January 18, 2019 appellant filed a timely request for reconsideration, of the May 11, 2018 merit decision. In support of his request for reconsideration, he submitted a new report dated November 13, 2018 from Dr. Graf. Dr. Graf noted appellant's history of injury regarding the February 7, 2017 employment incident, and related that he underwent right inguinal hernia repair, which resolved his groin and hip symptoms, but that he had developed right knee pain, swelling, and catching. He diagnosed right knee tear of the medial meniscus, chronic synovitis, and medial compartment degenerative osteoarthritis. Dr. Graf opined that these diagnoses were directly causally related twisting motion during appellant's February 7, 2017 employment incident.

Dr. Graf provided an opinion supportive of causal relationship, between appellant's right knee condition and his accepted employment injury. Since OWCP denied appellant's request for authorization of right knee surgery based on a finding that his right knee condition was not causally

⁴ 20 C.F.R. § 10.607.

⁵ *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.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

⁹ *M.S.*, Docket No. 19-0607 (issued September 6, 2019); *see also Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Supra* note 7 at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

related to the accepted employment injury, Dr. Graf's opinion is relevant to the underlying issue on reconsideration.¹¹ As the current record includes relevant and pertinent evidence not previously considered by OWCP in its May 11, 2018 decision, appellant has met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3). Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608.

The case will be remanded for OWCP to properly conduct a merit review of the claim. Following this and such other additional development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 14, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹¹ See *K.J.*, Docket No. 19-0146 (issued July 10, 2019); see also *E.R.*, Docket No. 17-1055 (issued August 17, 2017).