

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

K.S., Appellant)	
)	
and)	Docket No. 19-0608
)	Issued: September 4, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Nyssa, OR, 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 January 25, 2019 appellant, through counsel, filed a timely appeal from a November 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated February 2, 2018, which became final after 30 days of issuance and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees'

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 20 C.F.R. § 501.6(d); *see J.R.*, Docket No. 19-0364 (issued July 3, 2019); *A.F.*, Docket No. 18-0645 (issued October 26, 2018).

Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review 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

This case has previously been before the Board.⁵ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 26, 2014 appellant, then a 53-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she hyperextended her left knee when she tripped over tubs of mail while in the performance of duty. She stopped work that day. OWCP accepted the claim for left knee sprain. Appellant received wage-loss compensation on the supplemental rolls for temporary total disability commencing May 3, 2014.⁶

On March 11, 2016 appellant filed a claim for a schedule award (Form CA-7).

By decision dated July 8, 2016, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish permanent impairment of a scheduled member due to the accepted employment injury.

On July 21, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. By decision dated May 5, 2017, an OWCP hearing representative affirmed the July 8, 2016 decision denying appellant's claim for a schedule award. He found that appellant had no residual permanent impairment due to the accepted left knee sprain.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the November 14, 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 Docket No. 17-1650 (issued February 2, 2018).

⁶ On January 21, 2015 OWCP issued a notice of proposed termination of wage-loss compensation and medical benefits, finding that a December 30, 2014 report from OWCP's second opinion physician, Dr. Paul C. Collins, a Board-certified orthopedist, established that appellant no longer had disability or residuals causally related to the accepted employment injury. By decision dated March 10, 2015, it terminated all compensation benefits, effective March 9, 2015, as the weight of the medical evidence established that appellant had no continuing disability or residuals of her accepted employment injury. On March 16, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. By decision dated December 28, 2015, an OWCP hearing representative affirmed the March 10, 2015 termination decision finding that the weight of the medical opinion evidence rested with OWCP's second opinion physician, Dr. Collins.

Appellant, through counsel, appealed to the Board on July 25, 2017. By decision dated February 2, 2018, the Board affirmed the May 5, 2017 merit decision, finding that appellant had failed to provide medical evidence sufficient to establish permanent impairment of her left knee causally related to the accepted employment injury.

OWCP received a May 8, 2018 x-ray report from Dr. Brian McMahan, a Board-certified diagnostic radiologist, who interpreted findings from appellant's left knee x-ray as showing tricompartmental osteoarthritis of the left knee, advanced in the medial compartment.

On July 2, 2018 appellant filed a claim for a schedule award (Form CA-7).

By letter dated July 13, 2018, OWCP advised appellant that her case was not in posture for decision. It noted that while appellant could request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment, radiology reports were insufficient to show progression of an employment-related condition resulting in permanent impairment or increased impairment.

In an August 6, 2018 report, Dr. Fulton S. Chen, Board-certified in pain medicine and physical medicine and rehabilitation, related appellant's history of employment injury, diagnosed left knee sprain, left knee meniscus tear and chondromalacia, and left knee osteoarthritis. He detailed the medical and factual evidence of record and provided physical examination findings. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁷ Dr. Chen determined that appellant had 7 percent permanent impairment due to her left knee strain, 2 percent impairment for a meniscal injury, and 28 percent permanent impairment for primary left knee osteoarthritis.

On October 3, 2018 appellant, through counsel, requested reconsideration, noting submission of Dr. Chen's August 6, 2018 report.

By decision dated November 14, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that Dr. Chen's report failed to provide any discussion or rationale explaining how appellant's permanent impairment rating was based on the resolved employment injury, in which it was previously determined that there were no residuals or continuing disability, and not on the preexisting left knee osteoarthritis and obesity.

LEGAL PRECEDENT

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

⁷ A.M.A., *Guides* (6th ed. 2009).

⁸ This section pertains 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.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

Upon receipt of a timely application, OWCP exercises its discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which 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

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹²

ANALYSIS

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

The underlying issue on appeal was whether appellant had met her burden of proof to establish permanent impairment of her left lower extremity due to her accepted left knee condition. With her reconsideration request, appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim, based on the first and second above-noted requirements under section 10.606(b)(3).

With respect to the remaining above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence from Dr. Chen, which addressed the relevant issue of permanent impairment.

OWCP procedures and Board precedent provide that termination of a claim for all benefits due to a finding of no residuals of the accepted condition does not bar a subsequent schedule award. Rather, the claims examiner should consider the schedule award matter separately from the

⁹ 20 C.F.R. § 10.607.

¹⁰ *J.R.*, Docket No. 19-0364 (issued July 3, 2019); *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *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 2.1602.4(b).

¹¹ *Id.* at 10.606(b)(3).

¹² *Id.* at 10.608(b).

termination of benefits issue.¹³ If a claimant applies for a schedule award after termination of compensation benefits and submits sufficient medical evidence reflecting a permanent impairment as a result of the work-related injury exposure, the claims examiner should further develop the claim.¹⁴

The Board finds that the opinion expressed in Dr. Chen's narrative, constitutes relevant and pertinent new evidence not previously considered by OWCP relative to the schedule award claim. Dr. Chen's opinion directly addressed the basis upon which OWCP denied appellant's claim as it addressed the issue of permanent impairment due to the accepted employment injury.¹⁵ 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.¹⁶ She needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹⁷ Appellant's request for reconsideration met one of the standards for obtaining a merit review of her case. Accordingly, she is entitled to a merit review.

The Board will, therefore, set aside OWCP's November 14, 2018 decision and remand the case for an appropriate merit decision on appellant's claim. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision

CONCLUSION

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

¹³ *L.T.*, Docket No. 18-1405 (issued April 8, 2019); *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

¹⁴ *Id.*

¹⁵ *T.G.*, Docket No. 18-1064 (issued April 26, 2019); *M.C.*, Docket No. 17-1983 (issued August 17, 2018).

¹⁶ *T.G.*, *id.*; *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹⁷ *See also T.G.*, *id.*; *L.S.*, Docket No. 18-0811 (issued November 13, 2018); *Mark H. Dever*, 53 ECAB 710 (2002).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 4, 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