

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

_____)	
T.W., Appellant)	
)	
and)	Docket No. 18-0821
)	Issued: January 13, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Pueblo, CO, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 6, 2018 appellant filed a timely appeal from a January 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 2, 2017, 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 to review the merits of the claim.

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.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On November 4, 2015 appellant, a 45-year-old retired city carrier, filed an occupational disease claim (Form CA-2) alleging that he experienced leg pain in December 2006 due to factors of his federal employment including delivering mail on his route. He alleged that he needed surgery and was subsequently forced to retire. The employing establishment represented that appellant was currently retired, but did not identify the effective date of his retirement.³

In a January 21, 2010 right knee x-ray report, Dr. John C. Lemon, a Board-certified radiologist, noted a history of a previous surgery and current findings that could represent postoperative periosteal new bone formation in the area of the medial femoral condyle.

OWCP also received a November 12, 2015 attending physician's report (Form CA-20) from Dr. Alex Constantinides, a family practitioner. Dr. Constantinides diagnosed status post July 2007 total knee arthroplasty.⁴ He reported a 2006 injury, which appellant described as a gradual onset of pain while walking normal routes. Dr. Constantinides explained that appellant had not been his patient in 2006, and it was not until 2014 that he began providing primary care follow-up treatment. He noted having seen appellant on four occasions between January 9 and June 22, 2015. Dr. Constantinides also noted that appellant had suffered a traumatic brain injury and multiple orthopedic injuries in 2007 and 2009, but these injuries reportedly postdated appellant's symptoms of knee pain.

OWCP received a position description for city carrier, as well as a job analysis/essential functions report that described a letter carrier's delivery and casing duties.

M.H., appellant's former supervisor through March 2008, provided an undated statement on December 28, 2015 describing appellant's duties on his former mail route. He noted that appellant's delivery duties consisted of about 45 minutes standing at a neighborhood box unit, and about five and one-quarter hours walking on a park and loop. M.H. also noted that appellant was required to case mail for about two hours while standing and that he frequently worked overtime carrying for another route. He recalled that appellant had issues with his knee, but did not recall the extent. M.H. also indicated his belief that appellant had not filed a Form CA-2 form at the time.

By decision dated January 21, 2016, OWCP denied appellant's occupational disease claim as he had not established the implicated employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

² Docket No. 16-0727 (issued June 7, 2016).

³ The employing establishment provided OWCP a copy of a February 14, 2005 rating decision from the Department of Veterans Affairs, which found that appellant had a 10 percent rating for service-connected tinnitus, but also found that his right knee condition and bilateral hearing loss were not service connected.

⁴ Dr. Constantinides did not specify whether the arthroplasty involved the left or right knee.

On March 1, 2016 appellant appealed the January 21, 2016 merit decision to the Board. In a June 7, 2016 decision, the Board found that appellant had not met his burden of proof to establish an occupational disease in the performance of duty, as he had not specified specific employment factors that he believed caused or contributed to his claimed leg condition, nor had he submitted medical evidence establishing an employment-related diagnosis.⁵

Dr. James I. Piko, a Board-certified diagnostic radiologist, noted in a right knee magnetic resonance imaging (MRI) scan dated September 13, 2007 that appellant had a motorcycle incident on March 4, 2007 that resulted in chronic injury, pain, and decreased range of motion. He noted findings of a heterogeneous mass extending along the anterior medial femoral condyle, a subjacent marrow edema of the medial femoral condyle, a small joint effusion, and no meniscus tear.

Appellant underwent a radical excision of heterotropic ossification of the right knee and distal femur along with lysis of the internal adhesions to the right knee on August 15, 2007 with Dr. Wallace K. Larson, an orthopedic surgeon. In an attached history of injury and report of physical examination, Dr. Larson noted that he had been involved in a hit-and-run motorcycle incident on March 4, 2007 and was admitted to the hospital with a closed head injury. He indicated that appellant had stiffness in his right knee and reduced range of motion.

Appellant responded to OWCP's inquiries on September 29, 2016. He stated that the employment-related activity that contributed to his condition was "doing [his] route and bumps." Appellant noted that he engaged in this activity five to six days per week for four to five hours per day. He noted that he first noticed the condition in January 2006 and that he had to walk with a cane. Appellant stated that he had to have surgery and his right knee swelled up.

In a letter dated October 15, 2007, Dr. Mark B. Hazuka, a Board-certified radiation oncologist, noted that appellant was involved in a motorcycle incident in March 2007 and that he had been in a coma for a month and a half and had sustained a deep bruise and contusion to his right lower thigh. As a result of this injury, he developed immobility involving his right knee. Dr. Larson requested consultation with Dr. Hazuka regarding immediate postoperative irradiation to the surgical bed for prevention of further heterotropic bone formation. Dr. Hazuka administered irradiation to appellant on that date.

On December 6, 2016 appellant filed a request for reconsideration. With his request, he attached a February 24, 2004 report from Dr. Larson in which he indicated that appellant initially noted right knee pain in 1994 and had worked as a letter carrier, primarily driving a truck, without doing much walking in his job. On examination appellant noted no medial or lateral joint line tenderness, no lateral patellofemoral tenderness, and stable collateral and cruciate ligaments. Dr. Larson noted that a right knee MRI scan indicated some chondromalacia of the anterior weight-bearing portion of the medial femoral condyle. Appellant's x-rays were normal. Dr. Larson recommended exercises for retropatellar knee pain.

By decision dated March 2, 2017, OWCP denied modification of its January 21, 2016 decision. It found that he had not provided specific employment factors, and that stating "doing my route" was not sufficiently detailed.

⁵ *Supra* note 2.

On December 20, 2017 appellant requested reconsideration. With his request, he attached an October 25, 2017 statement from M.H. describing appellant's employment duties. M.H. stated that appellant spent 1.5 hours casing or sorting mail, after which he would load his vehicle and drive 15 to 20 minutes daily. Appellant would spend the remainder of his day walking and was required to carry a satchel on his shoulder of up to 70 pounds. M.H. also noted that he climbed stairs up to three to four hours per day and worked overtime.

By decision dated January 23, 2018, 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.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷

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.⁸ 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.⁹ 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.¹⁰

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹¹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹² If the request is timely, but fails to meet at least one

⁶ 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).

⁷ 20 C.F.R. § 10.607.

⁸ *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 the OWCP 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.

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

¹¹ *Supra* note 8.

¹² *Id.* at § 10.608(a); *see also A.P.*, Docket No 19-0224 (issued July 11, 2019).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹³

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.¹⁴ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹⁵ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁶

ANALYSIS

In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).¹⁷

Appellant also failed to submit relevant and pertinent new evidence in support of his request for reconsideration. The underlying issue in this case is whether appellant has provided specific factors of his federal employment alleged to have caused his diagnosed right knee conditions. On reconsideration, appellant submitted a statement from M.H., his former supervisor, detailing duties of appellant's federal employment. OWCP had previously received a substantially similar letter from M.H. on December 28, 2015, detailing the duties of appellant's federal employment. Providing additional evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹⁸ Because appellant did not provide relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹⁹

The Board therefore 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 his claim pursuant to 5 U.S.C. § 8128(a).

¹³ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

¹⁴ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁵ *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹⁶ *P.L.*, *supra* note 14; *Annette Louise*, 54 ECAB 783 (2003).

¹⁷ 20 C.F.R. § 10.606(b)(3)(i) and (ii).

¹⁸ *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹⁹ 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 2020
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