

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

M.M., Appellant	)	
	)	
and	)	Docket No. 19-1741
	)	Issued: May 5, 2020
DEPARTMENT OF THE NAVY, NAVAL	)	
WEAPONS CENTER, China Lake, CA,	)	
Employer	)	
	)	

*Appearances:*  
Stephanie N. Leet, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 16, 2019 appellant, through counsel, filed a timely appeal from a June 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated April 4, 2018, which became final 30 days after issuance, and is not subject to further review.<sup>2</sup> As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup>

---

<sup>1</sup> 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.

<sup>2</sup> 20 C.F.R. § 501.6(d). *See P.H.*, Docket No. 19-1354 (issued 03/13/20); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

### **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.<sup>4</sup> The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On December 21, 2005 appellant, then a 55-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on that day she was descending stairs when her left foot got caught on a garden hose, she stumbled and fell to the sidewalk injuring her right knee, right hand, and wrist while in the performance of duty. OWCP initially accepted the claim for contusions of the right knee and right wrist/hand.<sup>5</sup> It subsequently expanded acceptance of the claim to include right carpal tunnel syndrome, enthesopathy of the right wrist and carpus, right knee lateral meniscus tear, and psychogenic pain. On June 18, 2009 OWCP again expanded acceptance of the claim to include aggravation of degenerative joint disease of the right knee.

In May 2007, appellant underwent the first of several OWCP-authorized right knee surgical procedures.<sup>6</sup> OWCP also authorized a right total knee arthroplasty<sup>7</sup> and a right knee revision arthroplasty<sup>8</sup> and paid her wage-loss compensation beginning July 24, 2008. It placed appellant on the periodic compensation rolls effective August 31, 2008.

On July 13, 2009 counsel initially requested that OWCP expand the acceptance of the claim to include left knee degenerative joint disease (osteoarthritis) as an accepted condition, alleging that appellant had also injured her left knee when she fell on December 21, 2005.

After further development of the claim, OWCP determined that a conflict in medical opinion existed between appellant's treating physician and OWCP's second opinion physician

---

<sup>4</sup> Docket No. 16-1655 (issued April 4, 2018), *petition for recon. denied* (issued August 17, 2018).

<sup>5</sup> Appellant also has an accepted claim (OWCP File No. xxxxxx096) for nose laceration and soft tissue injury to both knees and right hand, and cervical strain due to an employment-related fall on January 6, 1989. OWCP combined the two traumatic injury claims and designated OWCP File No. xxxxxx350, the current file, as the master file.

<sup>6</sup> On May 31, 2007 Dr. Mohamed Z. Lameer, an orthopedic surgeon, performed an arthroscopic right knee synovectomy, and partial medial and lateral meniscectomies.

<sup>7</sup> Dr. Lameer performed the procedure on August 12, 2009.

<sup>8</sup> On May 23, 2012 Dr. Paul D. Burton, a reconstructive orthopedic surgeon, performed a right knee revision arthroplasty.

regarding whether appellant's left knee osteoarthritis/degenerative joint disease was medically connected to the 2005 employment injury by aggravation.

OWCP referred appellant to Dr. John D. Kaufman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion. Dr. Kaufman opined that there was no connection between her left knee conditions and the December 21, 2005 employment injury.

By decision dated February 18, 2016, OWCP denied appellant's request to expand the acceptance of the claim to include additional left knee diagnoses. It found the special weight of the medical evidence, as represented by Dr. Kaufman's impartial medical opinion, established that the left knee conditions were unrelated to the accepted December 21, 2005 employment injury.

Appellant appealed OWCP's February 18, 2016 decision to the Board and, by decision dated April 4, 2018, the Board affirmed the February 18, 2016 decision.<sup>9</sup> The Board found that OWCP properly declared a conflict in medical opinion and had properly referred her to Dr. Kaufman for a new referee examination to resolve the ongoing conflict in medical opinion evidence. The Board further found that Dr. Kaufman's report represented the special weight of the medical evidence with regard to the issue of whether the acceptance of appellant's claim should be expanded to include a consequential left knee condition.

The record reveals that OWCP expanded acceptance of the claim to include major depressive disorder, recurrent, severe without psychotic features, and localized primary osteoarthritis of right leg as accepted conditions.

On March 29, 2019 appellant, through counsel, requested reconsideration of OWCP's denial of her request to expand the acceptance of her claim to include consequential left knee diagnoses, aggravation of right knee osteoarthritis, right knee reflex sympathetic dystrophy syndrome (RSD), and aggravation of lumbar spondylosis. In her March 21, 2019 letter, counsel asserted that OWCP committed various procedural errors in weighing and developing the medical evidence. Alternatively, counsel asserted that OWCP should further develop the claim with respect to those conditions as the evidence of record, including the new evidence, was sufficient to establish a *prima facie* case.

Medical reports from Dr. Shahin Sadik, a Board-certified anesthesiologist, dated April 19, June 21, August 16, and October 16, 2018 and January 7, February 4, March 7, and May 20, 2019, documented appellant's pain management treatments of her right leg and back pain. He provided an impression of complex regional pain syndrome (CRPS) RSD of right lower extremity "because of employment injury." Other conditions reported included: synovitis and tenosynovitis, right hand; traumatic tear of lateral meniscus of right knee; carpal tunnel syndrome, right upper extremity; painful total knee replacement; long term (current) use of opiate analgesic; and unilateral primary osteoarthritis, right knee. Dr. Sadik opined that appellant was totally disabled because of right knee and subsequent severe neuropathic pain and weakness.

---

<sup>9</sup> *Supra* note 5.

In an extensive narrative report dated April 8, 2019, Dr. Sadik explained that appellant had undergone right knee replacement surgery, as well as lumbar surgery which caused damage to her peroneal nerve. The resulting neuropathy caused a CRPS of the right lower extremity, which remained untreated for a period of time. Dr. Sadik related that appellant developed antalgic gait, and damage to her right hip as well. He further related that additional weight bearing to the left lower extremity and antalgic gait favoring the right side caused pain and subsequent arthritis to her left knee.

OWCP also received a May 4, 2018 report, in which Lawrence J. Coates, Ph.D., a clinical psychologist, requested adjudication of the psychiatric portion of appellant's claim. Mr. Coates indicated that he had been treating appellant for major depressive disorder and that she remains temporarily totally disabled. Also received were additional reports from Dr. Sadik referencing acupuncture and physical therapy.

Reports from Dr. Ray D' Amours, a Board-certified pain medicine specialist, from November 19, 2018, documented appellant's pain management of her back and right leg/knee CRPS. He opined that she was totally disabled as a result of her right knee and severe neuropathic pain and weakness.

By decision dated June 17, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that counsel failed to submit new and relevant legal argument or evidence in support of the March 21, 2019 request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>10</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>11</sup> 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.<sup>12</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>13</sup> This includes any hearing or review of the written record decision, any denial of

---

<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.607.

<sup>12</sup> *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 (iFECS). *Id.* at Chapter 2.1602.4(b).

<sup>13</sup> *C.H.*, Docket No. 19-0669 (issued October 9, 2019); *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Robert F. Stone*, 57 ECAB 292 (2005).

modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include precoupment hearing decisions.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

### ANALYSIS

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

In her March 29, 2019 request for reconsideration, counsel argued that appellant had established that acceptance of her claim should be expanded to include consequential left knee diagnoses, aggravation of right knee osteoarthritis, right knee RSD, and aggravation of lumbar spondylosis. In support of her argument counsel submitted a number of medical reports. The Board notes that the record is clear that OWCP received April 19, June 21, October 16, and 2018, as well as February 4 and March 7, 2019 progress reports from Dr. Sadik. OWCP, however, in its decision denying appellant's request for reconsideration, noted other reports received, but did not note receipt of these reports.

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.<sup>17</sup> Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before OWCP at the time of its final decision,<sup>18</sup> it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,<sup>19</sup> it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.<sup>20</sup>

---

<sup>14</sup> *Supra* note 12 at Chapter 2.1602.4(a) (February 2016).

<sup>15</sup> 20 C.F.R. § 10.606(b)(3); *see C.H.*, *supra* note 13; *T.M.*, Docket No. 19-0535 (issued July 25, 2019).

<sup>16</sup> *Id.* at 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>17</sup> 5 U.S.C. § 8124(a)(2).

<sup>18</sup> 20 C.F.R. § 501.2(c).

<sup>19</sup> *Id.* at § 501.6(d).

<sup>20</sup> *J.Z.*, Docket No. 19-1005 (issued December 30, 2019); *William A. Couch*, 41 ECAB 548 (1990).

The Board finds that OWCP improperly failed to consider all the relevant evidence submitted by appellant in denying her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Therefore, the case is remanded to OWCP for consideration of the evidence she submitted in connection with her reconsideration request, to be followed by the issuance of an appropriate decision regarding her reconsideration request.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 5, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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