

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

M.E., Appellant)	
)	
and)	Docket No. 19-1298
)	Issued: March 18, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Millbrae, CA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 23, 2019 appellant filed a timely appeal from a May 7, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated November 5, 2018, which became final after 30 days of issuance and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

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 20 C.F.R. § 501.6(d); *see M.E.*, Docket No. 18-0215 (issued November 5, 2018).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ 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 October 20, 2017 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his left knee on November 11, 2014 while in the performance of duty "at a tree root in front of a house ... while delivering mail in the rain and dark." The employing establishment controverted the claim alleging that appellant's supervisor was not aware of the incident. It also controverted continuation of pay, as the injury was not reported on a Form CA-1 within 30 days following the injury.

In a development letter dated October 26, 2017, OWCP advised appellant of the factual and medical deficiencies of his claim. It informed him of the evidence necessary to establish his claim and provided a questionnaire for his completion regarding the circumstances of the injury. OWCP afforded appellant 30 days to respond.

The employing establishment submitted a statement confirming that appellant had delivered mail on November 11, 2014.

In a March 13, 2015 report, Dr. Alberto Bolanos, a Board-certified orthopedic surgeon, described February 17, 2015 left knee magnetic resonance imaging (MRI) scan findings. His diagnoses included left knee medial meniscal tear and chondromalacia of the trochlea. Dr. Bolanos performed left knee meniscus arthroscopic repair and chondroplasty on April 13, 2015. In a follow-up report dated June 11, 2015, he indicated that appellant was still having some pain in his left knee, but less than previously.

The record also contains disability notes signed by Dr. Bolanos indicating that appellant was seen on December 16, 2014, and February 13 and June 11, 2015.

By decision dated December 5, 2017, OWCP determined that appellant was not entitled to continuation of pay (COP) for the period November 12 to December 26, 2014 as his injury was not reported on a form approved by OWCP within 30 days following the alleged injury.

By decision dated December 5, 2017, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the November 11, 2014 employment incident occurred as alleged.

On December 19, 2017 appellant requested reconsideration. In an accompanying statement, he maintained that he had immediately reported his injury to his supervisor who asked him to continue working and finish delivering the mail. Appellant indicated that he had no choice, but to continue to work, and had not gone to the doctor that day because he had to pick up his children at school. He indicated that he started having severe pain, but his supervisor rejected his

³ *M.E.*, *supra* note 1.

requests for days off. Appellant alleged that his supervisor had not documented his injury when he reported it.

By decision dated January 3, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review.

Appellant filed an appeal with the Board on January 19, 2018. By decision dated November 5, 2018, the Board affirmed the January 3, 2018 and December 5, 2017 decisions regarding denial of reconsideration and performance of duty. The Board affirmed as modified the December 5, 2017 decision regarding the COP. The Board found that appellant had not met his burden of proof to establish a traumatic injury in the performance of duty on November 11, 2014, and that he was therefore not eligible for COP. The Board further found that OWCP properly denied appellant's request for reconsideration of the merits of his claim.

On April 5, 2019 appellant requested reconsideration with OWCP. He submitted additional evidence, including evidence previously of record. Newly submitted evidence consisted of an undated report in which Dr. Bolanos indicated that appellant underwent left knee surgery on April 13, 2015. Appellant also submitted a March 12, 2019 letter from him to an employing establishment supervisor asking for confirmation that he reported the November 2014 injury. In a statement dated March 15, 2019 he explained that while delivering mail on November 11, 2014, he injured his left knee on a tree that was newly cut and a branch half cut, close to a walkway in front of a house. Appellant noted that he had reported the incident to his supervisor, but was ordered to continue working. He further noted that he had not sought medical care until it became severe, and this led to his April 13, 2015 surgery.

By decision dated May 7, 2019, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶

A timely request 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

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *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. Chapter 2.1602.4b

considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ When a timely request 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.⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

With his April 5, 2019 reconsideration request, appellant submitted a statement in which he documented the events of November 11, 2014, claiming that he injured his left knee on a newly cut tree branch while delivering mail that day. He further explained that he had reported the injury to his supervisor.

The Board finds that appellant's March 15, 2019 response to the development questionnaire is new and relevant evidence on the issue of whether the November 11, 2014 incident had occurred as alleged, as it provides further detail as to the circumstances of the incident.⁹ As such, the Board finds that OWCP improperly denied a merit review in its decision of May 7, 2019. Appellant's statement is relevant and pertinent new evidence not previously considered by OWCP.¹⁰

The Board accordingly finds that appellant met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3) in his April 5, 2019 reconsideration request. Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608.¹¹ The case shall therefore be remanded to OWCP for further consideration of the merits of appellant's claim to be followed by an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

⁷ 20 C.F.R. § 10.606(b)(3); *see G.L.*, Docket No. 19-0620 (issued September 3, 2019).

⁸ *Id.* at § 10.608.

⁹ *See N.D.*, Docket No. 18-0753 (issued January 17, 2020).

¹⁰ *R.M.*, Docket No. 19-0543 (issued December 23, 2019).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 18, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board