

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

Y.R., Appellant)	
)	
and)	Docket No. 20-1236
)	Issued: January 13, 2021
U.S. POSTAL SERVICE, BURBANK POST)	
OFFICE, Burbank, CA, Employer)	
)	

Appearances:
Brett Elliot Blumstein, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 1, 2020 appellant, through counsel, filed a timely appeal from an April 15, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 24, 2019, to 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 over the merits of this case.

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 5 U.S.C. § 8101 *et seq.*

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).

FACTUAL HISTORY

On December 11, 2018 appellant, then a 53-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral degenerative arthritis of the knees due to factors of her federal employment. She noted that she first became aware of her condition and first realized it was caused or aggravated by her federal employment on July 27, 2015. Appellant explained that, as a letter carrier, she worked eight hours per day and for approximately one and a half hours she would stand to case mail and was required to lift and carry trays of mail to her work vehicle. She indicated that she would bend, stoop and kneel repeatedly in order to load her vehicle, and walk while carrying approximately 35 pounds for six and a half hours. Appellant claimed the continuous walking on uneven ground and up and down stairs caused both of her knees to weaken. She indicated that she did not file her claim within 30 days because she did not know she needed to file a Form CA-2. On the reverse side of the claim form appellant's supervisor indicated that her last day of working as a carrier was on July 27, 2015 and that she returned to modified work with no carrier duties on January 27, 2016. Appellant stopped work and retired on disability effective December 8, 2016.

The employing establishment attached offers of modified assignment (limited duty) dated from January 27 to November 14, 2016 where appellant primarily performed sitting duties.

In an August 24, 2018 supplemental medical report, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, noted that he was responding to a June 27, 2018 inquiry from counsel. He detailed his history of treatment of appellant. Dr. Tauber referenced an August 23, 2016 report where he indicated that he had obtained x-rays of appellant's knees which evidenced bilateral knee arthritis. In an October 31, 2017 report, he reviewed medical documents that showed objective findings of crepitus. Dr. Tauber explained that appellant sustained an employment injury to her left knee on July 27, 2015³ and noted her duties as a letter carrier since 1989. He opined that her knee conditions were clearly contributed to and caused by her years of working in the employing establishment. Dr. Tauber explained that appellant's job duties, including casing mail, driving, delivering mail, loading and unloading her vehicle, carrying a mail bag that weighed up to 75 pounds and walking up to 5 miles per day were all activities that clearly contributed to the arthritis in her knees. He detailed appellant's July 27, 2015 left knee injury noting her knee buckled, causing her to fall forward and strike her left knee. Dr. Tauber concluded that appellant's knee conditions were due to both the repetitive motion duties and the demanding continuous trauma to her knees, as well as the July 27, 2015 employment injury.

³ Appellant previously filed a traumatic injury claim (Form CA-1) on July 27, 2015, claiming she injured her left leg when she was walking and her left knee gave way causing her to fall and hit her leg under OWCP File No. xxxxxx857. On January 5, 2016 OWCP accepted her claim for a contusion of the left lower leg. It has not administratively combined the claims.

In a development letter dated December 20, 2018, OWCP advised appellant of the deficiencies of her claim and instructed her as to the factual and medical evidence necessary to establish her claim. It asked her to complete a questionnaire regarding the timeliness of her claim and afforded her 30 days to respond.

In a letter dated December 20, 2018, the employing establishment controverted appellant's claim, contending that her claim was untimely as her last exposure to her federal employment factors was July 27, 2015 and that her supervisors had no knowledge of her injury until "December 12, 2018."

By decision dated January 24, 2019, OWCP denied appellant's occupational disease claim, finding that it had not been filed within the applicable time limits of 5 U.S.C. § 8122. It noted that she first became aware of her condition in July 2015 and she did not file her claim until December 11, 2018, which was more than three years later.

OWCP continued to receive evidence. In a May 21, 2019 medical report, Dr. Tauber evaluated appellant's left knee pain and noted that her 28 years of federal employment and disability retirement. On evaluation and review of x-rays he diagnosed left knee degenerative arthritis and opined that she was a candidate for a total knee replacement procedure and using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,⁴ (A.M.A., *Guides*), found 15 percent permanent impairment of the left lower extremity.

Appellant also filed an additional Form CA-2 dated June 7, 2019, claiming that she first became aware of her degenerative arthritis and first realized it was caused or aggravated by her employment on June 11, 2016.

In an undated statement, appellant explained her work duties over the past 27 years and 10 months and stated that around July 2011 she began to experience pain in her knees. She noted a March 2014 employment incident⁵ where she fell and sprained her left knee. Appellant indicated that her symptoms improved, but did not resolve. She noted that, in July 2015, her left knee buckled, causing her to fall forward and hit her knees. In September 2015, appellant was referred to an orthopedic doctor, with whom she had been under the care of for a year and a half. She concluded that the condition of her knees continued to deteriorate until June 11, 2016 when she was taken off work.

On January 23, 2020 appellant, through counsel, requested reconsideration of OWCP's January 24, 2019 decision. In an attached statement, she explained that she injured herself on July 27, 2015 and called her supervisor, L.M., who came out to the street and took pictures of her injuries and location of her fall. When they returned to the employing establishment, L.M. notified her postmaster and M.K., her immediate supervisor. He then had her complete a Form CA-2.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ Appellant has a previously accepted March 8, 2014 traumatic injury claim (Form CA-1) for a left knee sprain sustained when she tripped on a set of stairs. OWCP assigned that claim File No. xxxxxx755. It has not administratively combined File No. xxxxxx755 either with the current claim or File No. xxxxxx857.

In support of her request for reconsideration, appellant also submitted a December 5, 2019 narrative medical report from Dr. Mark Bernhard, Board-certified in physical medicine and rehabilitation, who reviewed her employment history, job description, and history of injury, including her March 2014 left knee employment injury and her July 27, 2015 left leg employment injury. Dr. Bernhard advised that appellant reported her July 27, 2015 employment injury and went on her own for medical treatment. On examination and review of her medical records he noted that, in the history of her previous injuries, including the March 8, 2014⁶ employment injury, her left knee injury was consistent with the findings of ongoing arthritis and degenerative changes in her knee. Dr. Bernhard diagnosed left knee patellofemoral arthritis, left knee tibial contusions and hematoma consistent with a fall, patellofemoral arthralgia and arthritis and a magnetic resonance imaging (MRI) scan confirmation of an oblique-horizontal tear of the medial meniscus. He concluded that appellant's conditions were caused by her March 2014 and July 2015 falls.

By decision dated April 15, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the evidence of record was insufficient to warrant a merit review of its January 24, 2019 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ If the request is timely, but fails to meet at least one of the

⁶ Dr. Bernhard indicated that appellant's March 2014 traumatic injury occurred on March 20, 2014; however, this appears to be a typographical error.

⁷ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit 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.

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS

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

On reconsideration, appellant submitted a January 23, 2020 statement where she explained that after her July 27, 2015 knee injury she notified her supervisor, L.M., who came out to the location where she was injured and took pictures of her knees and the place she fell. When L.M. returned to the employing establishment he also notified appellant's postmaster, as well as her immediate supervisor, and provided her with a Form CA-2 for her knee injury. As such, this statement constitutes relevant and pertinent new evidence demonstrating that appellant's supervisors had actual knowledge of her alleged employment-related knee injury within 30 days of the date of injury. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).¹²

As appellant has advanced new and relevant evidence, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹³ On remand, for a full and fair adjudication, OWCP shall administratively combine the present claim with OWCP File Nos. xxxxxx755 and xxxxxx857.¹⁴ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

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

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² *See C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹³ *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

¹⁴ OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between files or when two or more injuries occur to the same part of the body. Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2020 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: January 13, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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