

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

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L.T., Appellant)	
)	
and)	Docket No. 21-0322
)	Issued: June 28, 2021
U.S. POSTAL SERVICE, ARLINGTON STATION, Riverside, CA, Employer)	
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<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Roxann M. Gonzalez, for the appellant¹</i>	
<i>Office of Solicitor, for the Director</i>	

ORDER REMANDING CASE

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

On January 4, 2021 appellant, through her representative, filed a timely appeal from an August 27, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 21-0322.

On June 26, 2015 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 24, 2015 she sustained a right ankle sprain, left knee contusion, and left knee scrape when she fell while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx517.² It initially accepted the claim for right ankle sprain and left knee contusion. OWCP subsequently expanded its acceptance of the claim to include complex tear of the medial meniscus and sprain of the anterior cruciate ligament and medial collateral of the left

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 Appellant has a prior occupational disease claim (Form CA-2) filed on May 18, 2011 under OWCP File No. xxxxxx952, which OWCP accepted for chondromalacia patellae and effusion of the joint of the left lower leg.

knee, sprain of the tibiofibular ligament and calcaneofibular ligament of the right ankle, calcific tendinitis of the right ankle and foot, and other specific joint derangements not elsewhere classified of the right ankle. On October 17, 2016 appellant underwent OWCP-authorized left knee arthroscopy to treat her accepted medial meniscus tear. OWCP paid her wage-loss compensation on the periodic rolls as of that date. Appellant returned to part-time, modified-duty work on February 6, 2017.

By decision dated November 7, 2018, OWCP denied expansion of the acceptance of appellant's claim to include left knee osteoarthritis and authorization for the requested total left knee replacement. It found that the weight of the medical evidence rested with a July 6, 2017 medical report of Dr. Michael Einbund, a Board-certified orthopedic surgeon and OWCP referral physician, and an October 4, 2018 report of Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), who both opined that appellant's preexisting left knee arthritis was not aggravated or contributed to by her accepted June 24, 2015 employment injury. Moreover, OWCP accorded the weight of the medical evidence to Dr. Einbund's opinion that, while the requested left knee total replacement was medically necessary, it was not causally related to the accepted work injury.

On February 6, 2019 appellant requested reconsideration and submitted a January 8, 2019 supplemental report from Dr. Charles Herring, a Board-certified orthopedic surgeon. Dr. Herring reviewed the findings of Dr. Einbund and OWCP's DMA and opined that her accepted complex tear of the medial meniscus permanently aggravated her preexisting osteoarthritis and that the left knee total replacement was medically necessary and causally related to her accepted employment-related condition.

On March 11, 2019 OWCP again referred appellant to Dr. Einbund for another second opinion evaluation to determine whether her preexisting left knee condition was aggravated by the accepted factors of her federal employment under OWCP File Nos. xxxxxxx517 and xxxxxxx952.

In a March 27, 2019 supplemental report, Dr. Einbund noted a review of the medical evidence in OWCP File Nos. xxxxxxx517 and xxxxxxx952. He advised that appellant's accepted left leg chondromalacia predated the development of the medial joint space, and therefore, there was no basis for an aggravation injury. Dr. Einbund further advised that even the natural progression of the chondromalacia would not be expected to affect the medial joint compartment. Additionally, he related that his prior opinions that appellant's June 24, 2015 employment injury did not cause, accelerate, or aggravate her preexisting left knee osteoarthritis and that the requested left total knee replacement was medically necessary, but not causally related to either work-related injury remained unchanged.

OWCP, by decision dated May 29, 2019, denied modification of its November 7, 2018 decision based on Dr. Einbund's March 27, 2019 opinion as the weight of the medical evidence.

On May 29, 2020 appellant requested reconsideration. In support of her reconsideration request, she submitted a January 15, 2020 letter, in which Dr. Edward Mittleman, a family medicine specialist, opined that her accepted conditions under OWCP File Nos. xxxxxxx517 and xxxxxxx952 and authorized October 17, 2016 left knee surgery permanently aggravated her preexisting left knee osteoarthritis. Dr. Mittleman advised that the acceptance of appellant's claim

should be expanded to include the diagnosis of permanent aggravation of left knee osteoarthritis and that the requested left knee total replacement was warranted.

By decision dated August 27, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly considered the matter and finds that appellant's May 29, 2020 request constituted a timely request for reconsideration. Section 10.607(a) of OWCP's implementing regulations provides that a request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.³ When determining the one-year period for requesting reconsideration, the last day of the period should be included unless it is a Saturday, Sunday, or a legal holiday.⁴ One year following OWCP's May 29, 2019 merit decision was May 29, 2020. Because OWCP received appellant's request on May 29, 2020, the Board finds that it was timely filed.⁵ The clear evidence of error standard utilized by OWCP in its August 27, 2020 decision is appropriate only for untimely reconsideration requests.⁶ Therefore, the Board will set aside OWCP's August 27, 2020 decision and remand the case for an appropriate decision applying the correct standard for timely requests for reconsideration.

³ 20 C.F.R. § 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 OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (February 2016).

⁴ Federal (FECA) Procedure Manual, *id.*

⁵ *J.H.*, Docket No. 18-1367 (issued July 17, 2019); *R.M.*, Docket No. 17-0473 (issued June 6, 2017); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

⁶ *See* 20 C.F.R. § 10.607(b).

IT IS HEREBY ORDERED THAT the August 27, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: June 28, 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
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