

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

_____))
R.L., Appellant))
))
and)	Docket No. 21-0220)
)	Issued: October 19, 2021)
U.S. POSTAL SERVICE, POST OFFICE,))
Santa Ana, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 1, 2020 appellant filed a timely appeal from a September 15, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated January 29, 2020 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 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

On April 24, 2018 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral knee conditions due to factors of her

¹ 5 U.S.C. § 8101 *et seq.*

federal employment, including standing and walking for seven hours per day, and entering and exiting her vehicle 160 times per day. She noted that she first became aware of her condition and its relation to her federal employment on November 1, 2013.

In a May 16, 2018 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded her 30 days to submit additional evidence and to respond to its inquiries.

In an undated statement, appellant responded to OWCP's development questionnaire and indicated that she believed her knee pain was caused by continuous hopping in and out of her long life vehicle (LLV), ascending and descending stairs, bending and lifting parcels, standing and walking, and pushing hampers up ramps.

OWCP received reports of radiographs of the knees dated April 24, 2018, which indicated femorotibial arthrosis throughout both joints, chronic quadriceps tendinopathy on the right, and medial displacement of the distal femur relative to the tibia on the left.

Magnetic resonance imaging (MRI) scan studies of the right knee dated May 3, 2018 revealed partial tearing and degeneration of the anterior cruciate ligament (ACL), a large tear of the posterior root insertion with moderate peripheral extrusion of the body of the medial meniscus, undersurface fraying of the anterior horn of the lateral meniscus, and full-thickness cartilage loss of the medial and patellofemoral compartments with marrow edema. MRI scan studies of the left knee of even date revealed a tear of the ACL and the body and posterior horn of the medial meniscus, and a medium sized Baker's cyst. Both studies documented the presence of advanced osteoarthritis throughout the joints.

In a medical report dated June 5, 2018, Dr. Basimah Khulusi, a Board-certified physical medicine and rehabilitation specialist, noted that appellant related complaints of bilateral knee pain that she attributed to her work duties over the past 28 years, including casing mail, loading and pushing hampers, frequently entering and exiting her LLV, carrying a 35-pound satchel, and prolonged walking on uneven and wet surfaces and stairs. She further noted a history of onset of bilateral knee pain in 2011 followed by bilateral meniscus repairs in 2012. Thereafter, appellant began to have increasing pain in both knees in 2013, which worsened as she continued to work, and she ultimately underwent viscosupplementation injections in 2017 by her knee surgeon. On physical examination Dr. Khulusi found that appellant was unable to fully extend either knee while standing, and that she had varus alignment of both knee joints, right greater than left, with an antalgic gait. She reviewed x-ray and MRI scan studies and diagnosed acceleration of degenerative disease of both knees, bilateral meniscus tears, full thickness tear of the ACL of the left knee, partial tear of the ACL of the right knee, and permanent aggravation of degenerative joint disease of both knees. Dr. Khulusi opined that these conditions were caused by appellant's work duties, which involved repetitive spraining and straining which led to the acceleration of the degeneration of the structures of the knee joints. She noted that appellant continued to engage in the same work activities after her 2012 bilateral meniscus surgeries, which accelerated the degeneration of her joints, because she no longer had the protective function of intact menisci.

By decision dated July 11, 2018, OWCP denied appellant's claim, finding that it was untimely filed. It explained that the evidence of record did not establish that her claim was filed within three years "of the date of injury," or that her "immediate supervisor had actual knowledge within 30 days of the date of injury."

On August 28, 2018 appellant filed a request for reconsideration of the July 11, 2018 decision.

By decision dated September 28, 2018, OWCP denied appellant's request for reconsideration.

On October 24, 2018 appellant requested reconsideration of OWCP's July 11, 2018 decision. In support of the request, she submitted an October 4, 2018 report of Dr. Khulusi who noted that on her Form CA-2 appellant had indicated that she delayed filing the claim because she hoped she could withstand her pain, and that she continued to work without restrictions until her pain became disabling.²

By decision dated January 2, 2019, OWCP denied modification of the July 11, 2018 decision.

On June 11, 2019 appellant again requested reconsideration. In support of the request, she submitted a letter dated June 4, 2019 from her then-authorized union representative, P.C., who noted that she mistakenly indicated that she became aware of her condition and its relationship to her federal employment on November 1, 2013. He explained that appellant should have indicated April 23, 2018 as the date of injury, because that was the date her medical provider advised her that her employment duties had aggravated her conditions.

On August 21, 2019 OWCP referred appellant's case to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he evaluate Dr. Khulusi's opinions as contained in her June 5, 2018 report. It noted that "the DMA may only state whether an accepted incident was competent to produce the injury claimed." (Emphasis in the original.)

In a September 19, 2019 report, Dr. Hammel opined that appellant had progressive degenerative arthritis, which was not caused or aggravated by her employment duties. He further explained that the primary cause for arthritis is familial predisposition. Dr. Hammel noted that, while some intense work activities can contribute to the development of arthritis, weight bearing exercise had been shown to be protective against the development of arthritis. He concluded that the only historical element in appellant's case, which had been proven to accelerate knee arthritis, was her prior non-occupational meniscal surgeries.

By decision dated September 23, 2019, OWCP found that appellant had established the timely filing of her claim, but the claim remained denied as the medical evidence of record was

² Appellant retired on December 1, 2018.

insufficient to establish that her diagnosed medical conditions were causally related to the accepted factors of her federal employment.

On November 26, 2019 appellant requested reconsideration of OWCP's September 23, 2019 decision. Attached to her request was a November 14, 2019 narrative report of Dr. Khulusi who asserted that Dr. Hammel's opinions were internally inconsistent and that he was not aware of the specific physical demands of appellant's federal employment. Dr. Khulusi further noted that patients with a history of meniscus surgery do not have normal function of the menisci; and therefore, use of the leg thereafter will hasten arthritis. She opined that meniscus surgery in combination with wear and tear will hasten arthritis.

OWCP thereafter received a May 29, 2018 report of Dr. Charles Herring, a Board-certified orthopedic surgeon, who evaluated appellant for complaints of bilateral knee pain, which she attributed to duties of her occupation including entering and exiting her LLV, pushing hampers and gurneys filled with mail, and prolonged standing and walking as a letter carrier. He noted that appellant recounted a history of knee problems dating back to 2011 and bilateral meniscus repairs in 2012 followed by a course of viscosupplementation in 2017. On examination Dr. Herring noted that appellant's knees were tender at the medial and lateral joint lines with effusion bilaterally, and that she had instability on the left. He reviewed the 2018 x-ray and MRI scan studies and diagnosed her with bilateral severe tricompartmental osteoarthritis, bilateral knee medial meniscus tears, left knee ACL tear, and status post bilateral arthroscopies. Dr. Herring opined that appellant's employment for the past 28 years would hasten the development of osteoarthritis and that the meniscus tears and ACL tear are the result of wear and tear due to her job duties requiring prolonged standing, walking, stooping, and squatting. He recommended therapy, but indicated that she may require arthroscopic surgery.

In a November 13, 2019 medical report, Dr. Khulusi noted a date of injury of April 23, 2018 and that appellant related complaints of ongoing knee pain, which caused her difficulty walking and ascending and descending stairs. She conducted a physical examination and reiterated her prior diagnoses.

On December 26, 2019 OWCP referred appellant, the medical record and a statement of accepted facts to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation. It requested that he provide a well-rationalized opinion on causal relationship between any diagnosed conditions and the accepted factors of appellant's employment.

In a January 15, 2020 report, Dr. Einbund discussed appellant's factual and medical history, including undergoing bilateral meniscus surgeries in 2012. Thereafter, appellant worked in her full-duty capacity until 2018, when her bilateral knee pain worsened to the point that she could work only two to three hours per day until she ultimately retired due to her symptoms on December 1, 2018. Dr. Einbund reported the findings of his physical examination and the pertinent information in the diagnostic studies and reports of Drs. Khulusi, Herring, and Hammel. He opined that appellant's diagnosed medical conditions were not causally related to or aggravated or accelerated by the accepted factors of her federal employment. Dr. Einbund explained that her arthritic changes were related to her age and body habitus. He further explained that there were no early onset of arthritis changes that would lead him to believe that work demands would be a factor in the development or progression of her arthritic changes.

By decision dated January 29, 2020, OWCP denied modification of its prior decision, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's accepted factors of federal employment and her diagnosed medical conditions. It accorded the weight of the medical evidence to the second opinion report of Dr. Einbund.

OWCP continued to receive evidence. In a June 15, 2020 narrative report, Dr. Khulusi disagreed with OWCP's finding that she had not taken appellant's age and body habitus into consideration. She asserted that Dr. Einbund did not explain why a heavy, older person would experience more degeneration than a younger, less heavy counterpart. Dr. Khulusi further asserted that a heavier, older person who also carries up to 70 pounds while ascending and descending stairs would have three to four times the load to the knees, thereby leading to acceleration of degenerative processes.

On June 18, 2020 appellant requested reconsideration of OWCP's January 29, 2020 decision.

By decision dated September 15, 2020, OWCP denied appellant's request for reconsideration, finding that the additional evidence submitted, including the June 15, 2020 report of Dr. Khulusi, was cumulative and substantially similar to prior evidence of record.

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.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the

³ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁶ *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *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.⁷

ANALYSIS

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

In her timely request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁸

The underlying issue on reconsideration is the medical question of whether appellant's diagnosed knee conditions were causally related to the accepted factors of her federal employment. Along with her June 18, 2020 reconsideration request, appellant submitted Dr. Khulusi's June 15, 2020 report in which she disagreed with OWCP's finding that she had not taken appellant's age and body habitus into consideration, and noted that in her June 5, 2018 report, she had included appellant's height and weight. She asserted that Dr. Einbund did not explain why an older person who is heavy would experience more degeneration than a younger, less heavy counterpart. Dr. Khulusi further opined that appellant, a heavier, older person who also carries up to 70 pounds while ascending and descending stairs, would have three to four times the load to the knees, thereby leading to acceleration of degenerative processes. The Board finds that as Dr. Khulusi's June 18, 2020 report specifically addressed the underlying issue of causal relationship between appellant's diagnosed medical conditions and the accepted factors of her federal employment, the report constitutes relevant and pertinent new evidence that is not substantially similar to evidence previously of record. 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).⁹

The Board will therefore set aside OWCP's September 15, 2020 decision and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

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

⁷ *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

⁸ 20 C.F.R. § 10.606(b)(3); *see K.F.*, Docket No. 19-1846 (issued November 3, 2020); *L.D.*, *supra* note 2.

⁹ *See L.M.*, Docket No. 20-1185 (issued January 13, 2021); *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).

ORDER

IT IS HEREBY ORDERED THAT the September 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: October 19, 2021
Washington, DC

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

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

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