

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

_____)	
K.L., Appellant)	
)	
and)	Docket No. 22-0434
)	Issued: August 24, 2022
U.S. POSTAL SERVICE, OGDEN PARK STATION, Chicago, IL, 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
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 29, 2022 appellant filed a timely appeal from a January 13, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated January 26, 2021, 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 October 17, 2014 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on October 8, 2014 after delivering mail to a home, she sustained lower back and left knee injuries when the porch collapsed and she fell while in the performance

¹ 5 U.S.C. § 8101 *et seq.*

of duty. She did not stop work. OWCP accepted the claim for lumbar sprain, left hand, back, and left knee contusions and left knee chondromalacia.

In a February 7, 2020 report, Dr. Thomas P. Poepping, a physician Board-certified in orthopedic surgery and sports medicine, related that he had examined appellant that day for her complaints of left knee pain. He diagnosed left knee patellofemoral chondromalacia and used a diagnosis of left patellofemoral arthritis, to rate appellant's permanent impairment under Table 16-3, page 511 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² Dr. Poepping assigned class of diagnosis (CDX) of 1 based on mild symptoms, and a grade modifier for functional history (GMFH) of 2 for moderate deficits, a grade modifier for physical examination (GMPE) of 2 for moderate palpatory findings, and a grade modifier for clinical studies (GMCS) of 2 for moderate findings. Next, he found that the net adjustment was 2, which moved the rating to the right and resulted in a final permanent impairment rating of five percent. Dr. Poepping opined that appellant had reached maximum medical improvement (MMI) on April 17, 2017.

On June 11, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On December 8, 2020 OWCP forwarded Dr. Poepping's report, the medical record, and a statement of accepted facts to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as district medical adviser. In a report dated December 29, 2020, Dr. Hammel reviewed Dr. Poepping's findings and concluded that appellant had five percent permanent impairment of the left lower extremity. He noted that she had a diagnosis of left patellofemoral arthritis, ratable under Table 16-3, page 511 of the A.M.A., *Guides*. Dr. Hammel explained that appellant's mild problems fell into CDX of 1, and that she had a GMFH of 2 for ongoing significant difficulties, and a GMPE of 2 for moderate palpatory findings, and that GMCS was not applicable since it was used to set the class. Next, he found that the net adjustment was 2, which moved the rating to the right and resulted in a final permanent impairment rating of five percent. Dr. Hammel found that the DBI section did not reference the diagnosis-based impairment (ROM) section as an alternative method for calculation of a permanent impairment rating for the diagnosis of patellofemoral arthritis and, therefore, the ROM method was not applicable. He also related that the date of MMI was February 7, 2020, the date of Dr. Poepping's examination.

By decision dated January 26, 2021, OWCP granted appellant a schedule award for a five percent permanent impairment of the left lower extremity. The award was for 4.40 weeks and the period of the award ran from February 7 to May 17, 2020.

OWCP subsequently received duty status forms (Form CA-17) covering the period May 19, 2017 through August 20, 2021 noting a diagnosis of left knee chondromalacia and providing work restrictions. It also received a series of reports covering the period September 30, 2015 through November 19, 2021 providing examination findings, injury history, and diagnosis of left knee chondromalacia from Dr. Poepping.

² A.M.A., *Guides* (6th ed. 2009).

On December 29, 2021 OWCP received an August 5, 2016 left knee magnetic resonance imaging (MRI) scan, a June 7, 2017 functional capacity evaluation, as well as medical documentation that did not address the issue of MMI.

On December 29, 2021 appellant requested reconsideration with an accompanying letter asserting that the date of MMI, February 7, 2020, was incorrect as that was the date of Dr. Poepping's report and that her MMI occurred prior to that date.

By decision dated January 13, 2022, OWCP denied appellant's request for reconsideration.

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 requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

³ 5 U.S.C. § 8128(a); *see M.M.*, Docket No. 21-0816 (issued January 12, 2022); *A.M.*, Docket No. 20-1417 (issued July 30, 2021); *J.D.*, Docket No. 19-1757 (issued April 15, 2020); *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).

⁴ 20 C.F.R. § 10.606(b)(3); *see M.M., id.; A.M., id.; J.D., id.; 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).

⁵ *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 2.1602.4(b).

⁶ *Id.* at § 10.608(a); *see also M.M., supra* note 3; *A.M., supra* note 3; *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On January 26, 2021 OWCP granted appellant a schedule award for five percent permanent impairment of her left lower extremity with a date of MMI of February 7, 2020.

The Board notes that appellant did not submit any evidence showing increased permanent impairment or additional exposure, and, therefore, OWCP properly reviewed her submission as a request for reconsideration, rather than a request for an additional schedule award.⁸

In her reconsideration request appellant did not take issue with the percentage of impairment awarded, but challenged OWCP's finding that she reached MMI as of February 7, 2020. She asserted that the date of MMI occurred prior to that date.

In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as MMI.⁹ Assuming MMI has been attained, the date of MMI is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP.¹⁰

As customarily is the case, OWCP's identified date of MMI coincided with the date of the medical evaluation that formed the basis of the schedule award, which in this case was February 7, 2020. Appellant failed to provide medical evidence and/or legal justification as to an earlier MMI date.¹¹ Thus, she did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹²

Additionally, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. Following the issuance of the January 26, 2021 decision, OWCP received Form CA-17s covering the period May 19, 2017 through August 20, 2021, reports covering the period September 30, 2015 through November 19, 2021 from Dr. Poepping, an August 5, 2016 left knee MRI scan, a June 7, 2017 functional capacity evaluation, as well as other

⁸ See *A.A.*, Docket No. 19-0939 (issued August 8, 2019); *F.K.*, Docket No. 17-0308 (issued December 21, 2017).

⁹ *Supra* note 5 at Chapter 2.808.5(b)(1) (March 2017).

¹⁰ *Id.* at Chapter 2.808.7(b)(1).

¹¹ In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as MMI. See *id.* at Chapter 2.808.5b(1). Assuming MMI has been attained, the date of MMI is usually based on the probative evidence of record. Schedule awards begin on the date of MMI, unless circumstances show that a later date should be used. A retroactive determination of the date of MMI is not *per se* erroneous. When the medical evidence establishes that the employee did in fact reach MMI by such date, the determination is proper. *Id.* at Chapter 2.808.7b.

¹² *F.R.*, Docket No. 20-1406 (issued March 2, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

medical documentation. This evidence is irrelevant as none of it addresses an increased permanent impairment or the date of MMI. The Board has held that the submission of evidence that does not address the underlying issue involved does not constitute a basis for reopening a case.¹³ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹³ *V.H.*, Docket No. 21-0910 (issued January 12, 2022); *E.J.*, Docket No. 20-0841 (issued February 12, 2021); *T.T.*, Docket No. 19-1624 (issued October 28, 2020); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁴ *See R.E.*, Docket No. 21-0172 (issued June 15, 2021); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

¹⁵ *See R.E., id.*; *J.B.*, Docket No. 20-0145 (issued September 8, 2020).