

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

_____)	
L.W., Appellant)	
)	
and)	Docket No. 22-0546
)	Issued: January 20, 2023
U.S. POSTAL SERVICE, EDEN POST OFFICE,)	
Eden, NC, Employer)	
_____)	

Appearances:
Misty L. Wenger, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 1, 2022 appellant, through her representative, filed a timely appeal from a September 2, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 18, 2020, 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 her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 12, 2016 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 16, 2015 she sustained a tear of the posterior horn of her right knee medial meniscus when an automobile backed into her parked employing establishment vehicle while she was sitting inside preparing mail for delivery. She did not initially stop work. Appellant underwent a right knee surgical procedure on May 2, 2016 and returned to work on June 20, 2016.³

In support of her current claim, appellant submitted February 18, 2015 and September 12, 2016 statements, an accident report, photographic evidence, and a September 20, 2015 right knee magnetic resonance imaging (MRI) scan report.

In a February 19, 2016 report, Dr. Stephanie Jane Myers, a Board-certified internist, and in a June 9, 2016 report, Dr. John Hubbard, Board-certified in orthopedic sports medicine, indicated that performing certain aspects of appellant's job (walking, climbing in and out of postal truck, and climbing stairs) could have affected her right knee medial meniscal tear, which required surgery. Dr. Hubbard also opined that the June 16, 2015 employment incident exacerbated a preexisting condition which required the May 2, 2016 right knee arthroscopy for right medial meniscus tear. Progress notes from Dr. Myers dated May 18, September 1, 23, and 29, 2015 concerning appellant's back and knee pain were also provided.

Unsigned return to work notes dated May 7 and September 23, 2015 were received along with return to work notes dated August 18 and October 1, 2015 from a licensed social worker.

In a July 20, 2016 return to work note, Dr. Hubbard opined that appellant could return to regular duty with no restrictions.

In letters dated September 13 and 16, 2016, the employing establishment controverted appellant's claim. It related that appellant had not contemporaneously advised that she had injured her right knee following the June 16, 2015 incident.

In a September 28, 2016 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

³ The record reflects that under OWCP File No. xxxxxx856, appellant has an occupational disease claim (Form CA-2) dated May 4, 2015 for right knee and back conditions which she claimed resulted from repetitive factors of her federal employment. By decision dated December 9, 2016, OWCP denied the claim as appellant had not established causal relationship between the diagnosed conditions and the factors of her federal employment.

In an October 27, 2016 response to OWCP's development questionnaire, appellant indicated that she sustained a right knee bruise from the impact of the vehicle collision on June 16, 2015. She related that she had called off work for a few days because she was sore. Appellant also noted that she had an occupational disease claim under OWCP File No. xxxxxx856, and she opined that the June 16, 2015 vehicle accident exacerbated her preexisting right knee condition.

OWCP received a September 28, 2015 note from a physician assistant.

In an October 15, 2015 attending physician's report (Form CA-20), Dr. Hubbard noted a 2013 date of injury and related that appellant had reported sustaining an employment injury two years prior. He indicated by an affirmative check mark that appellant's right knee medial meniscus tear was caused or aggravated by the described employment activity.

By decision dated November 1, 2016, OWCP denied appellant's traumatic injury claim as she had not established that the incident occurred, as alleged. Thus, it concluded that she had not met the requirements to establish an injury as defined by FECA.

On October 24, 2017 appellant requested reconsideration. In support of her request for reconsideration, she submitted an October 27, 2016 statement, an undated statement from B.C, a January 30, 2017 statement from J.S., vehicle photographs, and a June 16, 2015 police accident report.

By decision dated February 2, 2018, OWCP modified the November 1, 2016 decision to accept that the June 16, 2015 incident occurred as alleged, but the claim remained denied as causal relationship was not established between the accepted incident and the diagnosed medical conditions.

On February 1, 2019 appellant requested reconsideration.

Reports dated May 7 and October 3, 2018 from Dr. Myers were received along with an October 11, 2018 right knee x-ray. In her May 7, 2018 report, Dr. Myers indicated that appellant's right knee arthritis was visualized in a June 2015 x-ray. She advised that she could not specifically comment on the June 2015 work injury as she did not evaluate appellant at that time. Dr. Myers noted that when she next saw appellant in September 2015, she referred appellant to an orthopedic specialist due to concerns of a meniscal injury. In the October 3, 2018 report, she reviewed appellant's record and opined that x-rays of appellant's lumbar spine and right knee confirmed degenerative changes reflecting osteoarthritis prior to the work-related incident.

By decision dated March 27, 2019, OWCP denied modification.

On March 24, 2020 appellant requested reconsideration.

In a November 11, 2019 report, Dr. Dawn Quashie, a Board-certified family practitioner, noted that appellant's work duties included walking, kneeling, squatting, lifting heavy packages. She opined that these work duties contributed to the aggravation of appellant's preexisting osteoarthritis. Dr. Quashie explained that physiologically repetitive movements could stress the

knee and cause a shift of the load bearing surface of the joint to a region not conditioned to the new load, which could result in the aggravation of the osteoarthritis condition.

By decision dated June 18, 2020, OWCP denied modification.

On June 17, 2021 appellant requested reconsideration. She argued that the evidence of file and Dr. Quashie's December 9, 2019 report established that she sustained the condition of right knee osteoarthritis as a result of her employment activities. Appellant contended that OWCP had the authority to convert her claim from a traumatic injury to an occupational disease claim if the evidence of record supports that the claimant had filed the incorrect claim form.

In a December 9, 2019 report, Dr. Quashie diagnosed right knee unilateral primary osteoarthritis. She noted appellant's duties in delivering mail and indicated that the process could last 8 to 10 hours per day. Dr. Quashie explained that appellant's job required excessive walking, standing, kneeling and driving. She reviewed appellant's medical records and indicated that they demonstrated a chronic worsening of her condition over several years that was directly attributable to repetitive movement and stress placed on her right knee. Dr. Quashie provided rationale for the rate of progression of osteoarthritis associated with increased load during ambulation and concluded that appellant's employment and work duties contributed to, aggravated, and/or caused appellant's right knee osteoarthritis. She also provided light-duty work restrictions.

By decision dated September 2, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously

⁴ 5 U.S.C. § 8128(a).

⁵ *Id.* Section 8128(a) provides in pertinent part: "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁶ 20 C.F.R. § 10.607.

⁷ *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 its decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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.

considered by OWCP.⁸ 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 review on the merits.⁹

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹¹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.¹²

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).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument not previously considered by OWCP. She alleged that OWCP had the authority to convert her claim from a traumatic injury to an occupational disease claim if the evidence of file indicated that the claimant filed the incorrect claim form. A traumatic injury is defined as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift.¹³ The evidence in this case clearly supports that appellant's traumatic injury claim was based on the June 16, 2015 traumatic incident when an automobile backed into her parked LLV. Thus the traumatic injury claim form was properly filed for this event and OWCP properly adjudicated the case as a traumatic injury. Accordingly, appellant's argument that her claim should have been adjudicated as that as an occupational disease claim lacks a reasonable color of validity.¹⁴ Where a legal argument presented has no reasonable color of validity, OWCP is not required to reopen

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

¹⁰ *See L.O.*, Docket No. 21-0030 (issued May 19, 2022); *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹¹ *See L.O., id.*; *Mark H. Dever*, 53 ECAB 710 (2002).

¹² *L.O., id.*; *Annette Louise*, 54 ECAB 783 (2003).

¹³ *Id.* at § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

¹⁴ As noted, appellant had previously filed an occupational disease claim for her right knee condition under OWCP File No. xxxxxx856.

the case for merit review.¹⁵ Consequently, appellant 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).¹⁶

In support of her request for reconsideration, appellant submitted a December 9, 2019 medical report from Dr. Quashie wherein she opined that appellant's employment and work duties contributed to, aggravated, and/or caused appellant's right knee osteoarthritis. Dr. Quashie, however, did not mention the June 16, 2015 work incident or provide an opinion on whether or not the June 16, 2015 work incident contributed to, aggravated, and/or caused appellant's right knee osteoarthritis. While this medical evidence is new, it is not relevant because it does not address the underlying issue of the present case of whether the accepted June 16, 2016 work incident contributed to, aggravated, and/or caused appellant's right knee osteoarthritis. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷ Consequently, appellant is not entitled to a review of the merits based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board, therefore, finds that appellant has not met 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.

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).

¹⁵ See *S.B.*, Docket No. 20-0708 (issued February 11, 2022); *C.N.*, Docket No. 17-1475 (issued May 23, 2018); see *D.F.*, Docket No. 17-0694 (issued June 22, 2017); *D.T.*, Docket No. 14-1239 (issued December 9, 2014); *Constance G. Mills*, 40 ECAB 317 (1988).

¹⁶ Appellant may consider filing an occupational disease claim (Form CA-2), with supporting medical evidence, alleging that continued employment factors caused her right knee osteoarthritis.

¹⁷ *L.O.*, *supra* note 10; *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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