

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

| | | |
|-----------------------------------|---|-----------------------|
| C.C., Appellant |) | |
| |) | |
| and |) | Docket No. 22-1240 |
| |) | Issued: June 27, 2023 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Grand Rapids, MI, Employer |) | |
| |) | |

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 August 24, 2022 appellant, through counsel, filed a timely appeal from a July 25, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days had elapsed from OWCP's last merit decision, dated July 12, 2021, 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 therefore lacks jurisdiction over the merits of the claim.

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 23, 2020³ appellant, then a 57-year-old custodial laborer, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2020 she injured her right knee when she was pushing a cleaning cart while in the performance of duty. She explained that her right knee buckled, and thereafter, she was unable to bend her right knee or use stairs without a handrail. On the reverse side of the claim form, the employing establishment controverted the claim contending that appellant was not in the performance of duty when the alleged employment incident occurred. Appellant stopped work on September 24, 2020.

In an unsigned September 23, 2020 statement, an unidentified witness related that, on that date, appellant was pushing a restroom cart at approximately 9:40 p.m. and reported that her right leg/knee gave out. An accident report of even date noted that she was injured at 9:40 p.m. on September 23, 2020 due to "pushing at [the] same level." An emergency treatment authorization of even date completed by the employing establishment related that it was unable to complete an authorization for examination and/or treatment (Form CA-16) prior to appellant seeking treatment, but that treatment had been authorized and that a Form CA-16 would be completed upon request.

A September 24, 2020 urgent care summary from Amber Juhl, a nurse practitioner, noted that appellant reported that on September 23, 2020 her right knee gave out while she was walking at work, causing appellant to fall onto her cleaning cart. She diagnosed a sprain of the right knee, unspecified ligament. In a patient information record of even date, Ms. Juhl reiterated a diagnosis of knee sprain.

A September 28, 2020 x-ray report of appellant's right knee noted an impression of mild tricompartmental right knee osteoarthritis, and a small-to-moderate knee joint effusion. A left shoulder x-ray report of even date noted an impression of mild left acromioclavicular joint osteoarthritis.

On September 29, 2020 appellant accepted an offer of modified assignment (limited duty), as a laborer custodian with physical restrictions of standing, walking, bending, stooping, and grasping for up to seven hours per day, and sitting/twisting for up to one half hour per day. OWCP also received medical authorization requests of even date for treatment of the right knee and a right knee brace.

In a September 30, 2020 progress note, Dr. Samuel Perry, an orthopedist, diagnosed chondromalacia of the right patella, primary osteoarthritis of the right knee, and subacromial impingement of the left shoulder. In a duty status report (Form CA-17) of even date, an unidentifiable healthcare provider noted that appellant's injury occurred while pushing a restroom

³ Appellant also filed a September 25, 2020 Form CA-1 alleging the same injury while in the performance of duty.

cart, provided work restrictions, and diagnosed osteoarthritis of the right knee and chondromalacia of the patella.

On October 1, 2020 appellant accepted an offer of modified assignment (limited duty), as a laborer custodian with physical restrictions that included an additional five-minute sitting break every hour, in addition to the restrictions previously noted in the September 29, 2020 offer.

In a November 4, 2020 Form CA-17, an unidentifiable healthcare provider diagnosed osteoarthritis of the right knee, subacromial impingement, and provided work restrictions of lifting up to 30 pounds.

In a letter dated November 17, 2020, appellant explained that she refused an offer of modified assignment because her attending physician erred in her weight restrictions. She related that her shoulder and knee injuries prevented her from lifting 30 pounds and her physician had since updated and corrected the Form CA-17.

In a November 17, 2020 visit summary and letter, Dr. Nicole Fremarek, an osteopath, examined appellant and prescribed medication. In a Form CA-17 of even date, an unidentifiable healthcare provider provided work restrictions of intermittent lifting up to 20 pounds.

In a December 9, 2020 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and afforded her 30 days to submit the necessary evidence.

Thereafter, OWCP received a September 24, 2020 x-ray examination report of appellant's right knee, noting an impression of medial compartment osteoarthritis.

Appellant also submitted a November 11, 2020 referral for an occupational therapy evaluation from Dr. Garrett Caldwell, an osteopath and Board-certified family practitioner. In a November 16, 2020 prescription, Dr. Caldwell referred appellant for occupational therapy functional capacity testing.

Progress notes dated December 3, 2020 from Dr. Lindsay Schichtel, an osteopath, noted that appellant reported that on September 23, 2020 her knee gave out while at work. She diagnosed chondromalacia of the right patella, primary osteoarthritis of the right knee, and subacromial impingement of the left shoulder. In letters dated December 3 and 4, 2020, appellant provided work restrictions.

On December 4, 2020 appellant accepted an offer of modified assignment (limited duty) as a laborer custodian with an additional restriction of no snow blowing.

In a December 15, 2020 attending physician's report (Form CA-20), Kevin Cooper, an occupational therapist, diagnosed chondromalacia of the right patella and subacromial impingement of the left shoulder. He indicated that the September 23, 2020 injury occurred at work during custodial tasks and while lifting an overfilled trash bag. Mr. Cooper checked a box marked "Yes" to indicate his belief that appellant's condition was caused or aggravated by an employment activity and recommended work restrictions of light duty and lifting up to 20 pounds.

In a functional capacity assessment and occupational therapy form of even date, he performed 180 minutes of occupational therapy testing and treatment, and recommended work restrictions.

Progress notes from a December 23, 2020 encounter with Dr. Hunter Ross, an orthopedic surgeon, noted a diagnosis of left shoulder subacromial impingement, subacromial bursitis, right knee chondromalacia patella, and right knee osteoarthritis. In a visit summary and letter of even date, he prescribed medication and recommended work restrictions.

In a December 27, 2020 Form CA-17, an unidentifiable healthcare provider diagnosed right knee chondromalacia of the patella and pain, and recommended work restrictions of lifting up to 20 pounds.

On December 29, 2020 appellant accepted an offer of modified assignment (limited duty) as a laborer custodian with the same restrictions provided in the December 4, 2020 offer.

By decision dated January 28, 2021, OWCP accepted that the September 23, 2020 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish causal relationship between her diagnosed conditions and the accepted September 23, 2020 employment incident.

On February 2, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which took place on May 6, 2021.

OWCP received a September 24, 2020 progress note in which Ms. Juhl noted that appellant reported that her right knee pain started September 23, 2020 at 9:30 p.m. when she was pushing her cleaning cart at work and her right knee gave out, causing her to fall onto the cart. Ms. Juhl diagnosed a sprain of the right knee and provided a knee brace.

In a November 17, 2020 progress note, Dr. Fremarek noted that appellant reported that her knee gave out in September 2020 and assessed chronic left shoulder pain and chronic right knee pain.

In a progress note dated March 26, 2021, Dr. Leezanne Zeng, Board-certified in family practice and osteopathic medicine, diagnosed subacromial impingement of the left shoulder.

By decision dated July 12, 2021, OWCP's hearing representative modified the January 28, 2021 decision to find that appellant had not submitted sufficient evidence to establish that the events occurred as alleged. She found that appellant had not provided sufficient details about the time and cause of the injury, and that appellant's testimony at the oral hearing was insufficiently detailed. Consequently, the hearing representative found that appellant had not met the requirements to establish an injury as defined by FECA.

On June 1, 2022 appellant, through counsel, requested reconsideration of the July 12, 2021 decision and submitted additional evidence.

In a May 23, 2022 causality examination, Dr. Sami Moufawad, Board-certified in psychiatry and pain medicine, recounted the history of injury as reported by appellant, relating that she was injured on September 23, 2020 when her right knee hit a postal container that she had to

push out of the way while cleaning the floor. He noted that she reported bumping her knee against the container as she pushed it back into place, after which she experienced right knee pain that caused her knee to give out while pushing her cleaning cart. Dr. Moufawad diagnosed a right knee sprain, chondromalacia patellae, substantial aggravation, and knee osteoarthritis, substantial aggravation. He noted that appellant had a prior knee injury 30 years ago, which had healed, and that she was likely developing arthritis of the knee, but was asymptomatic until September 23, 2020. Dr. Moufawad opined that, when she moved the mail container and pushed against it with her knee, she likely aggravated her knee osteoarthritis which caused her to experience pain that grew severe enough to induce pain inhibition of the muscles around her knee, thereby causing it to buckle. He indicated that his opinions were expressed to a reasonable degree of medical probability.

By decision dated July 25, 2022, 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 FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶ A timely application 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 considered by OWCP.⁷ When a timely application 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 a review on the merits.⁸

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).

⁴ This section provides in pertinent part: [t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *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 OWCP decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 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.

⁷ *Id.* at § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. Consequently, she was 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).

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. In support of her reconsideration request, appellant submitted medical evidence, including a May 23, 2022 causality examination in which Dr. Moufawad noted the history of injury as reported by her and diagnosed a right knee sprain, chondromalacia patellae, substantial aggravation, and knee osteoarthritis, substantial aggravation. While this medical evidence is new, it is not relevant because it does not address the underlying issue of the present case which is factual in nature, *i.e.*, whether she submitted sufficient factual evidence supporting that she injured her right knee while in the performance of duty, as alleged.⁹ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ Thus, this evidence does not constitute relevant and pertinent new evidence not previously considered by OWCP and appellant was not entitled to a review of the merits of her claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹¹

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.¹²

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).

⁹ See *F.B.*, Docket No. 18-1039 (issued December 6, 2018); *M.M.*, Docket No. 15-1622 (issued September 27, 2016); *T.E.*, Docket No. 14-1047 (issued October 9, 2014); *Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

¹⁰ *D.P.*, Docket No. 13-1849 (issued December 19, 2013).

¹¹ *Id.*

¹² See *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 27, 2023
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