

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

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B.J., Appellant)	
)	
and)	Docket No. 23-0927
)	Issued: November 29, 2023
U.S. POSTAL SERVICE, GREENS NORTH)	
POST OFFICE, Houston, TX, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On June 21, 2023 appellant filed a timely appeal from a January 23, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 23-0927.

On March 28, 2013 appellant, then a 53-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury to her knees due to factors of her federal employment, including prolonged standing on a concrete floor while casing mail. She noted that she first became aware of her condition and realized its relation to her federal employment on February 28, 2013. Appellant stopped work on March 8, 2013 and returned on March 25, 2013. OWCP accepted her claim for sprains of unspecified sites of the knees and legs, aggravation of bilateral unspecified internal derangement of the knee, and bilateral lower leg localized primary osteoarthritis.

In an April 12, 2016 report and in a Form OWCP-5c of even date, Dr. Donald Lazarz, a Board-certified orthopedic surgeon, serving as an OWCP referral physician, assessed appellant's medical condition and indicated that she could work for eight hours per day with restrictions, including walking for up to one hour per day, standing for up to one hour, twisting for up to one hour, operating a motor vehicle at work for up to two hours, and handling no more 10 pounds while lifting for up to two hours, pushing for up to two hours, and pulling for up to two hours. He also

advised that appellant could not engage in bending, stooping, squatting, kneeling, or climbing. On June 7, 2018, Dr. Ian Reynolds, an attending Board-certified orthopedic surgeon, indicated that he agreed with Dr. Lazarz' work restrictions. On June 16, 2016 the employing establishment offered appellant a position as a modified city carrier, but she refused the position.

By decision dated September 22, 2016, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective that date, due to her refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). Appellant subsequently requested reconsideration. By decisions dated October 19, 2017 and May 7, 2018, OWCP denied modification.

Appellant again requested reconsideration. By decision dated July 24, 2019, OWCP vacated the May 7, 2018 decision in part, finding that she was entitled to schedule award compensation for the period September 1 to 22, 2016. However, it affirmed the May 7, 2018 decision in part, finding that appellant refused suitable work.

On August 18, 2020 appellant, through her then-representative, requested reconsideration of OWCP's July 24, 2019 decision. In an accompanying statement, the representative argued that appellant had not been able to work as a modified city carrier in 2016 or at any point thereafter.

Appellant submitted an October 7, 2019 report wherein Dr. Louis Train, a family medicine specialist, discussed her medical conditions and physical limitations.¹ Dr. Train indicated that the results of a November 17, 2017 function capacity evaluation (FCE) demonstrated that she had not completely recovered from her bilateral knee injuries and opined that "the orthopedic surgeon erred when [Dr. Train] sent [appellant] back to work" with restrictions. He asserted that appellant should have continued on workers' compensation disability. Dr. Train reported physical examination findings, including swelling in both knees, painful crepitus of the left knee, and mild wasting of the quadriceps of the right knee. He diagnosed inflammation of prosthesis of the right knee, internal derangement of the left knee, and reactive depression.

In reports dated December 11, 2019, and January 7, May 20, August 5, September 8, October 5, and November 4, 2020, Dr. Train detailed appellant's medical history, discussed her ability to work both past and present, and provided additional findings upon physical examination. He found her to be totally disabled and continued to diagnose inflammation of prosthesis of the right knee, internal derangement of the left knee, and reactive depression.

By decision dated November 16, 2020, OWCP denied appellant's August 18, 2020 request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant appealed to the Board and, by order dated November 3, 2022, the Board set aside the November 16, 2020 decision and remanded the case to OWCP. The Board found that her August 18, 2020 request for reconsideration of OWCP's July 24, 2019 decision regarding suitable work termination was untimely. The Board further found that OWCP had applied an incorrect standard of review for appellant's request for reconsideration and remanded the case for OWCP to

¹ Appellant also resubmitted reports of Dr. Train which were previously of record.

conduct a proper review under the clear evidence of error standard for untimely requests for reconsideration, followed by issuance of an appropriate decision.²

By decision dated January 23, 2023, OWCP denied appellant's request for merit review, finding that it was untimely and failed to demonstrate clear evidence of error. It noted:

“Factual information received since the [July 24, 2019] decision includes: No factual evidence/argument received.

“We have not received any evidence or argument from you that the [July 24, 2019 decision] included clear evidence of error which would render your untimely request for reconsideration acceptable.”

The Board, having duly considered this matter, finds that this case is not in posture for decision.

In the case of *William A. Couch*,³ the Board held that, when adjudicating a claim, OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. It is crucial that OWCP consider and address all evidence relevant to the subject matter properly submitted prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.⁴

In support of her August 18, 2020 request for reconsideration, appellant submitted a number of medical reports from Dr. Train dated October 7, 2019 through November 5, 2020. In these reports, Dr. Train detailed her medical history, discussed her ability to work both past and present, and provided findings upon physical examination. However, in denying appellant's reconsideration request, OWCP indicated that no additional evidence or argument was received.

As OWCP did not consider and address the evidence received on reconsideration, the Board finds that this case is not in posture for decision.⁵ On remand, it shall review all evidence of record and, following any further development as deemed necessary, it shall issue an appropriate decision. Accordingly,

² *Order Remanding Case*, Docket No. 21-0547 (issued November 3, 2022).

³ 41 ECAB 548 (1990).

⁴ *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch, id.*

⁵ *See Order Remanding Case, G.A.*, Docket No. 23-0347 (issued June 26, 2023); *T.B.*, Docket No. 22-0795 (issued September 12, 2022).

IT IS HEREBY ORDERED THAT the January 23, 2023 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: November 29, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board