

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

L.T., Appellant)	
)	
and)	Docket No. 18-1311
)	Issued: April 19, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
New Philadelphia, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 20, 2018 appellant, through counsel, filed a timely appeal from a February 5, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision, dated October 19, 2016, 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 March 2, 2016 appellant, then a 49-year-old city carrier, filed a traumatic injury claim, (Form CA-1) alleging that on that date she slipped on a step lip and fell on her right knee while in the performance of duty. She indicated that she suffered a right knee contusion and bruise. Appellant stopped work on that date. On May 16, 2016 OWCP accepted the claim for right knee contusion. Appellant received wage-loss compensation on the supplemental rolls from April 19 to May 26, 2016. On March 15, 2016 she accepted a limited-duty job offer as a full-time regular city carrier.

In a June 8, 2016 report, Dr. Thomas L. Teater, a Board-certified orthopedic surgeon, released appellant to return to full-duty work without restrictions effective June 9, 2016.

In a July 20, 2016 report, Dr. Teater requested that the acceptance of appellant's claim be expanded to include additional conditions of traumatic chondromalacia of the right knee and loose body. He opined that these conditions were a direct result of her March 2, 2016 employment injury.

In an August 3, 2016 report, Dr. Teater noted that appellant returned for follow-up related to her right knee injury of March 2, 2016. He related that appellant had recurrent pain and swelling and indicated that she had undergone previous injections, but that any benefit that was gained in the leg had dissipated. Dr. Teater diagnosed right knee contusion with joint effusion, and traumatic chondromalacia right knee, loose body. He advised that, due to her persistent symptoms despite conservative care, authorization for arthroscopy with chondroplasty would be requested. Dr. Teater saw appellant on August 12, 2015 and repeated his diagnoses and advised that appellant "may not return to work" in any capacity, but could return to work without restrictions as of September 6, 2016.

On August 19, 2016 appellant filed a notice of recurrence (Form CA-2a). She indicated that she sustained a recurrence of the March 2, 2016 employment injury on July 30, 2016 and stopped work on August 13, 2016. Appellant explained that for a brief period she had received relief to her knee from an epidural injection. However, she explained that her knee steadily began pinching and locking and became very painful to climb up and down stairs. Appellant noted that she was "not sure this is recurring, as pain was relieved from injection, but short term." She also indicated that she was awaiting authorization for a knee arthroscopy.

On August 24, 2016 OWCP received a request for authorization of right knee arthroscopy.

In a development letter dated August 25, 2016, OWCP advised appellant that additional medical evidence was necessary to establish her recurrence claim. It explained that a recurrence of disability was defined as a work stoppage caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. OWCP explained that a recurrence

could also be caused by a withdrawal of a light-duty assignment made specifically to accommodate appellant's condition due to the work-related injury. It also explained that if the evidence established that the disability was due to a new work-related injury or illness, a new claim may need to be filed/created. OWCP afforded appellant 30 days to submit the necessary requested evidence.

Appellant provided an August 28, 2016 response to the development letter. She indicated that she had been released to full duty on July 5, 2016 after a steroid injection improved her symptoms. Appellant explained that her duties as a letter carrier required that she continuously walk and climb steps for six or more hours a day, but she denied that an incident triggered a recurrence. She explained that she believed the steroid injection wore off and her knee worsened. Appellant noted that her magnetic resonance imaging (MRI) scan revealed loose fragments, which she believed were the cause of her pain. She explained that her knee was locking and pinching and her physician recommended an arthroscopic procedure.

Dr. Teater provided a series of reports from April 1 to October 7, 2016. In the April 1, 2016 report, he advised that appellant returned for follow-up of her work-related right knee injury of March 2, 2016. Dr. Teater noted that she continued to have pain and swelling. He diagnosed: right knee contusion with joint effusion; traumatic chondromalacia, right knee; and loose body. Dr. Teater explained that the MRI scan of the right knee from March 28, 2016 demonstrated a small intra-articular loose body at the anterior joint line, meniscal degeneration with no definitive tear, a question of mild popliteus tendinosis, moderate effusion, and chondromalacia patella. He opined that the diagnosis of traumatic chondromalacia was causally related to appellant's claim. Dr. Teater opined, "[i]n my medical opinion, this is a direct result of her work-related injury on [March 2, 2016]."

Dr. Teater saw appellant on May 11, 2016 and repeated his findings and diagnoses. In a September 7, 2016 report, he repeated his prior opinion. Dr. Teater noted that appellant needed surgical intervention. He completed a duty status report on September 7, 2016 and advised that appellant could not work. In a separate work excuse dated September 7, 2016, Dr. Teater indicated that appellant could not work, but he also noted that appellant could return to work without restriction on October 10, 2016. In a September 21, 2016 report, he advised that he was providing a response to the August 25, 2016 development letter. Dr. Teater explained that appellant's current diagnosis would be post-traumatic chondral injury (chondromalacia). He opined that appellant's "pain is caused by prolonged standing and especially walking. Her current conditions and disability are caused from her original fall on March 2, 2016." Dr. Teater explained that she had failed conservative treatment and recommended a right knee arthroscopy with chondroplasty and removal of loose body.

By decision dated October 19, 2016, OWCP denied appellant's recurrence claim finding that she had not established that she was disabled due to a material change/worsening of her accepted work-related condition. It explained that Dr. Teater had diagnosed additional right knee conditions, which indicated that appellant sustained a new injury after returning to work. OWCP also explained that appellant described extensive standing, walking, and climbing stairs that would certainly have aggravated or exacerbated a degenerative condition. It explained that the medical necessity of the requested surgery was not consistent with a resolved knee contusion. OWCP found that the evidence submitted established that the disability was due to a new work-related

injury or illness, and that a new claim needed to be filed. It informed appellant that this was the case even if the new incident or exposure involved the same part of the body as previously affected.

On May 5, 2017 counsel requested reconsideration and submitted additional evidence.

Appellant resubmitted Dr. Teater's May 11, 2016 report. OWCP also received reports from Dr. Teater for the period November 2, 2016 to June 27, 2017. Dr. Teater provided findings of physical examinations and recommendations for work restrictions. He repeated his opinion that the diagnoses of right knee contusion with joint effusion, traumatic chondromalacia right knee, with loose body, were a direct result of the work-related injury. In his December 14, 2016 and February 3, 2017 reports, Dr. Teater explained that appellant made an attempt to return to her regular job, without success. He noted that "[u]nfortunately, this attempt, which was by her own request, has resulted in a denial of her claim as they felt she was 'cured' while making this attempt. [Appellant] was not asymptomatic at that time." Dr. Teater indicated that appellant should undergo arthroscopy. He also completed a duty status report (Form CA-17) on February 3, 2017 and recommended that appellant could return to full duty as of May 1, 2017.

In an April 19, 2017 report, Dr. Teater explained that on March 2, 2016 appellant sustained a work-related right knee injury while carrying mail. He noted that appellant tripped going up stairs, falling directly onto the front of her right knee, striking the patella against the distal femur. Dr. Teater indicated that appellant had an acute onset of pain and swelling. However, he explained that despite conservative care, the swelling and pain persisted, along with intermittent "clicking." Dr. Teater examined the knee and diagnosed right knee contusion with post-traumatic patella-femoral articular injury (chondromalacia) and loose body. He explained that appellant failed conservative treatment and continued to be symptomatic with pain, swelling and limited motion. Dr. Teater opined that her work-related diagnosis should include the right knee contusion and patella-femoral articular injury (chondromalacia) and an intra-articular loose body. He opined that "[b]ased upon a reasonable degree of medical certainty, it is my medical opinion that the work-related injury on March 2, 2016 is a direct and proximate cause of the above-noted diagnosis."

By decision dated February 5, 2018, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was cumulative and substantially similar to evidence or documentation already contained in the case file and previously considered. It explained that the medical reports did not provide a rationalized medical opinion explaining why appellant stopped work on July 30, 2016, due to a material worsening and/or spontaneous change in her medical condition stemming from the March 2, 2016 work injury.

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

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or

³ 5 U.S.C. § 8128(a); *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).

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 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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.

The last merit decision in this case was OWCP's October 19, 2016 decision, which denied appellant's recurrence claim as she had not established that she was disabled as of August 13, 2016 due to a material worsening of her accepted employment-related condition.

Following the October 19, 2016 decision, appellant requested reconsideration on May 5, 2017 and submitted additional medical reports from Dr. Teater.

By decision dated February 5, 2018, OWCP found that the evidence of record was insufficient to warrant merit review of the decision dated October 19, 2016 as the evidence submitted with the request for reconsideration was irrelevant or immaterial and had no bearing on the issue of recurrence of disability. This decision was issued 276 days after appellant's request for reconsideration. In order to preserve her right to timely request reconsideration, OWCP has a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.⁹ Its procedures provide that when a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.¹⁰ As OWCP's February 5, 2018 decision was issued more than 90 days after it received appellant's request for reconsideration, the question becomes whether

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.*

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a); *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *D.N.*, Docket No. 18-1630 (issued March 7, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

¹⁰ *Id.* at Chapter 2.1602.7

the delay has jeopardized her right to a review of the merits of the case by the Board. OWCP has determined that there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board would have expired within the 90-day period following its receipt of the claimant's reconsideration request.¹¹ The Board has considered whether the 180-day time limit for requesting review by the Board expired within the 90-day period following OWCP's receipt of appellant's reconsideration request.¹² The Board finds that, because appellant filed her request for reconsideration on May 5, 2017, 198 days had passed from the last merit decision and therefore an appeal to the Board would have been untimely filed.

Under the facts of the present case, the Board finds that OWCP's delay of 276 days in issuing the February 5, 2018 nonmerit decision has impacted appellant's ability to file a timely request for reconsideration of the merits of her case under 5 U.S.C. § 8128(a).¹³ Had OWCP issued the decision within its 90-day timeliness goal, she would have had an additional 77 days to seek review under the criteria set forth for a timely request for reconsideration with OWCP. Here, the delay has precluded such further review and any further request for reconsideration would, *per se*, be untimely as it would be filed more than one year following the October 19, 2016 merit decision. The standard of review for an untimely request for reconsideration requires appellant to demonstrate clear evidence of error. To demonstrate clear evidence of error she must submit evidence relevant to the issue decided by OWCP which is positive, precise, and explicit and it must manifest on its face that OWCP committed an error.¹⁴ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁵ The Board has repeatedly held that clear evidence of error is intended to represent a difficult standard.¹⁶

The Board therefore finds that, under the facts of this case, and as the Board explained in *E.I.*,¹⁷ the significant delay in issuance of a reconsideration decision by OWCP has impacted appellant's ability to submit additional evidence or argument and bring a timely request for reconsideration before OWCP. To preserve appellant's right to file a timely request for reconsideration, and to afford her the ability to present further evidence or argument to establish her claim, this case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision.

¹¹ *Id.*; *see also C.L.*, Docket No. 10-1483 (issued May 12, 2011).

¹² *See G.B.*, Docket No. 16-1485 (issued January 6, 2017).

¹³ *E.I.*, Docket No. 18-0634 (issued January 23, 2019).

¹⁴ 20 C.F.R. § 10.607(b); *P.L.*, Docket No. 18-0813 (issued November 20, 2018); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁵ *V.L.*, Docket No. 17-1493 (issued September 12, 2018); *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁶ *P.L.*, *supra* note 14; *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁷ *Supra* note 13.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further action consistent with this decision.

Issued: April 19, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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