

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

N.B., Appellant)	
)	
and)	Docket No. 19-1338
)	Issued: February 14, 2020
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, Tallahassee, FL,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 4, 2019 appellant, through counsel, filed a timely appeal from a January 8, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 12, 2018, to the filing of this appeal,

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.

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

ISSUES

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 April 21, 2017 appellant, then a 48-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on March 30, 2017 she twisted her knee when her foot got caught on nails sticking up from uneven tiles while in the performance of duty. She did not stop work.

In an April 27, 2017 report, Dr. Sylvester Scott, a Board-certified family practitioner, related that appellant had sustained a work-related right knee injury on March 30, 2017, which had a sudden onset and noted a diagnosis of right knee pain. He completed an attending physician's report (Form CA-20), of even date, and indicated that appellant twisted her right knee on March 30, 2017. Dr. Scott also checked a box marked "yes" indicating that the condition was caused or aggravated by an employment activity.

In a May 4, 2017 treatment note, Dr. Dan Peters, a Board-certified family practitioner, indicated that appellant was seen for right knee pain and referred for physical therapy. He also completed a duty status report (Form CA-17) noting appellant's work restrictions.

OWCP received diagnostic reports including a May 12, 2017 magnetic resonance imaging (MRI) scan of appellant's right knee, which listed findings of severe medial compartment chondrosis, intermediate grade multifocal chondrosis within the patellofemoral compartment, intact menisci and ligaments, and small effusion.

Appellant also submitted a June 1, 2017 report from Dr. Robert Thornberry, a Board-certified orthopedic surgeon who related that she twisted her knee at work on March 30, 2017. Dr. Thornberry indicated that appellant had severe medial compartmental chondrosis, intermediate grade multifocal chondrosis within the patellofemoral compartment, intact menisci and ligaments, and a small effusion. He also indicated that she had pain in the joint, lower leg, osteoarthritis, pain in the right knee, and unilateral post-traumatic osteoarthritis in the right knee, preexisting. Dr. Thornberry noted that appellant related her "current problem to a workers' compensation injury 10 years prior, but had no records. [Appellant] was seen in 1999 with a softball injury of this knee...."

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 8, 2019 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP also received several Florida Workers' Compensation Medical Treatment Status forms dated June 1, 2017, which indicated that appellant had osteoarthritis of the right knee.

In a July 20, 2017 report, Dr. Thornberry noted that appellant indicated that she twisted her knee at work on March 30, 2017, and did not receive medical treatment. He diagnosed pain in the joint of the lower leg, osteoarthritis of the lower leg, pain in the right knee, and unilateral primary osteoarthritis in the right knee. On July 20, 2017 Dr. Thornberry completed the attending physician's portion of an authorization for examination and/or treatment (Form CA-16). He diagnosed severe osteoarthritis, noted that appellant had twisted her knee, and checked a box marked "yes" indicating that the condition was due to a preexisting 2008 injury.

Dr. Thornberry continued to treat appellant with steroid injections. In January 18, 2018 report and Form CA-17, he again related that she had twisted her knee at work on March 30, 2017, and he diagnosed right knee primary osteoarthritis and provided light-duty work restrictions. In a development letter dated May 23, 2018, OWCP advised appellant that her claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and, as the employing establishment had not controverted continuation of pay or challenged the case, a limited amount of medical expenses were administratively approved and paid. It had reopened the claim for formal consideration of further medical treatment. OWCP noted that the evidence of record was insufficient to establish that the March 30, 2017 incident occurred as alleged. It advised appellant of the factual and medical evidence necessary to establish her claim and provided a questionnaire for completion. OWCP afforded her 30 days to provide the necessary evidence.

In a May 18, 2018 report, Dr. Andrea Plagge, a Board-certified family practitioner and osteopath, prescribed light-duty work and related that appellant had right knee pain and swelling from a workers' compensation injury that had not resolved.

By decision dated July 12, 2018, OWCP denied appellant's claim, noting that she had not responded to its May 23, 2018 development letter and questionnaire. It explained that the claim was denied on the factual component of fact of injury, because the evidence did not support that the incident and/or events occurred as alleged. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 17, 2018 appellant, through counsel, requested reconsideration.

OWCP thereafter received a June 20, 2018 report from Dr. Plagge, who noted that appellant had sustained a right knee injury at work a year ago. Dr. Plagge related that appellant still experienced right knee pain, and she provided an assessment of appellant's fitness for work.

OWCP also received a September 6, 2018 report from Dr. Lance Chodosh, Board-certified in family practice and occupational medicine. Dr. Chodosh noted that appellant injured her right knee at work on or about March 30, 2017. He related that her knee twisted when her foot became entangled as she was trying to change positions. Dr. Chodosh also noted a prior injury to the knee in 2008, from which appellant had recovered. He diagnosed right knee pain due to osteoarthritis and/or bursitis. Dr. Chodosh related appellant's work restrictions.

OWCP also received a copy of Dr. Thornberry's January 18, 2018 report.

By decision dated January 8, 2019, 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 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 considered by OWCP.⁷ 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 a review on the merits.⁸

When reviewing an OWCP decision denying a 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 application for reconsideration and any evidence submitted in support thereof.⁹

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).¹⁰

In her timely request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not

⁴ This section 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." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *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 OWCP's 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). Chapter 2.1602.4b.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

⁹ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Annette Louise*, 54 ECAB 783 (2003).

¹⁰ *See A.G.*, Docket No. 18-1720 (issued May 7, 2019); *C.F.*, Docket No. 18-0583 (issued October 16, 2018).

previously considered by OWCP.¹¹ Consequently, she is not entitled to a 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

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP under 20 C.F.R. § 10.606(b)(3). The underlying issue in this case was whether she has established an injury in the performance of duty on March 30, 2017, as alleged, as OWCP found that she had not submitted a statement describing in sufficient detail how the alleged injury occurred on March 30, 2017.

On reconsideration appellant submitted several medical reports from Drs. Plagge and Chodosh. However, these medical reports are not relevant as the underlying issue which is factual in nature. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹³

Although evidence submitted on reconsideration need not carry appellant's burden entirely to suffice for reconsideration, the new evidence must at least be relevant and pertinent to the issue upon which the claim was denied.¹⁴ As appellant did not submit any further factual evidence describing the alleged incident, she also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly 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).

¹¹ See *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹² *Id.*

¹³ *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁴ *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *K.B.*, Docket No. 18-1392 (issued January 15, 2019).

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy 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