

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

N.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Cleveland, OH, Employer)

Docket No. 19-1378
Issued: February 13, 2020

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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 10, 2019 appellant, through counsel, filed a timely appeal from an April 10, 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 March 14, 2018, 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.³

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.*

³ The Board notes that following the April 10, 2019 decision, OWCP received additional evidence. However, 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.*

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 December 8, 2005 appellant, then a 52-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she slipped over a postal scale and twisted her left knee while in the performance of duty. She stopped work on December 12, 2005.

In a December 9, 2005 statement, S.R., appellant's supervisor, confirmed that appellant had reported the incident to her shortly after its occurrence. Appellant received medical treatment on December 12, 2005 and her claim was then dormant for over a decade.

On July 10, 2016 appellant filed a claim for recurrence of disability (Form CA-2a) alleging that her left knee remained symptomatic over a period of years, but "popped" and gave out on July 9, 2016 as she walked to her car. Following intermittent absences, she stopped work on August 16, 2016 and has not returned. OWCP administratively converted the recurrence claim to an occupational disease claim.

In a July 14, 2016 report, Dr. Timothy J. Nice, a Board-certified orthopedic surgeon, opined that the December 8, 2005 left knee injury caused mild degenerative arthritis leading to a July 9, 2016 meniscal tear.

In a development letter dated August 8, 2016, OWCP notified appellant of the factual and medical deficiencies of her claim. It advised her of the type of evidence required and provided a questionnaire for her completion. Appellant was afforded 30 days to submit the necessary evidence.

In response, appellant provided a completed questionnaire signed August 16, 2016. She attributed her left knee condition to repetitive lifting, bending, kneeling, and prolonged walking at work.

In an August 18, 2016 report, Dr. Stephen L. Cheng, a Board-certified orthopedic surgeon, diagnosed a left knee strain with very early osteoarthritis. He opined that appellant's job duties exacerbated her symptoms.

In an August 30, 2016 report, Dr. Nice opined that the 2005 employment incident caused a torn left medial meniscus which had worsened over time. He held appellant off work.

By decision dated September 12, 2016, OWCP denied the claim, finding that fact of injury was not established.

Appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated March 14, 2017, an OWCP hearing representative set aside the September 12, 2016 decision and remanded the case for appointment of a second opinion physician to evaluate the nature and extent of the claimed employment-related condition.

On April 18, 2017 OWCP obtained a second opinion report from Dr. Gerard M. Papp, a Board-certified orthopedic surgeon, who attributed appellant's left knee osteoarthritis to obesity, unrelated to a factor of her federal employment.

By decision dated May 5, 2017, OWCP accepted the factors of her federal employment, but denied her claim as causal relationship had not been established.

On May 15, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on September 27, 2017. Following the hearing, counsel submitted an October 1, 2016 magnetic resonance imaging (MRI) scan study of the left knee, a July 24, 2017 operative note and work slip from Dr. Nice, and a coworker's statement asserting that the employing establishment was aware of appellant's left knee condition at the beginning of August 2016.

By decision dated October 30, 2017, the hearing representative affirmed OWCP's May 5, 2017 decision, finding that causal relationship had not been established.

On December 20, 2017 appellant, through counsel, requested reconsideration. In support of the reconsideration request, appellant submitted an October 16, 2017 report from Dr. Nice in which he opined that the December 8, 2005 employment incident had caused a torn medial meniscus. Dr. Nice explained that pivoting on the left knee following surgery, while lifting and bending at work, had aggravated appellant's symptoms.

By decision dated March 14, 2018, OWCP denied modification of the prior decision finding that the additional evidence submitted was insufficient to establish causal relationship.

On January 17, 2019 appellant, through counsel, requested reconsideration. In support of the request, she provided a December 3, 2018 impairment rating report from Dr. Nice which assigned one percent permanent impairment of the left lower extremity according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁴

By decision dated April 10, 2019, OWCP denied reconsideration of the merits of appellant's claim.

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.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶

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

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law or advanced a new and relevant legal argument not previously considered. Thus, 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).

On reconsideration appellant provided a December 3, 2018 impairment rating report from Dr. Nice. However, OWCP had denied her occupational disease claim because the medical evidence of record was insufficient to establish causal relationship between her work duties and the diagnosed left knee conditions. A rating of permanent impairment is irrelevant to the issue of causal relationship in this case as it does not address the etiology of the described left lower extremity impairment. 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.¹⁰ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on 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).

⁶ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *L.C.*, Docket No. 18-0787 (issued September 26, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *L.C.*, *id.*; *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board