

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

D.H., Appellant)	
)	
and)	Docket No. 22-0875
)	Issued: December 5, 2022
U.S. POSTAL SERVICE, ALBANY)	
PROCESSING & DISTRIBUTION CENTER,)	
Albany, NY, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 20, 2022 appellant, through counsel, filed a timely appeal from an April 5, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that counsel did not appeal OWCP's March 10, 2022 merit decision. Therefore, that decision is not presently before the Board. *See* 20 C.F.R. § 501.3.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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 November 3, 2015 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 20, 2015 she sustained injuries when a gate fell on both her legs and was dragged three feet while in the performance of duty. She did not stop work immediately following the claimed injury. OWCP accepted appellant's claim for left knee contusion. On June 27, 2016 appellant stopped work. OWCP paid her wage-loss compensation for intermittent periods of disability. By decision dated July 11, 2017, OWCP expanded acceptance of appellant's claim to include left knee medial meniscus tear. On November 10, 2020 appellant returned to full-time, limited-duty work.

Appellant continued to receive medical treatment. In a November 9, 2020 follow-up visit report, Dr. Carol S. Fisher, a Board-certified orthopedic surgeon, indicated that appellant complained of constant left knee pain that worsened with activities. She discussed appellant's medical treatment and noted that appellant could continue to work with restrictions.

In a report and work status note dated January 18, 2021, Dr. Fisher recounted appellant's complaints of constant left knee pain. She noted that appellant remained on limited-duty work and worked mostly at a desk. On physical examination of appellant's knee, Dr. Fisher observed minimal effusion and decreased sensation of the skin, which was not tender laterally. She reported that appellant may continue full-time, limited duty.

In a work capacity evaluation form (Form OWCP-5c) dated February 11, 2021, Dr. Fisher indicated that appellant was able to perform full-time sedentary-duty work.

In a report dated March 3, 2021, Dr. Jeffrey Hedden, a Board-certified physiatrist, noted the October 20, 2015 employment injury date and indicated that appellant was treated for complaints of persistent left knee pain. On examination of appellant's knee, he observed diminished sensation to light touch in the anterior knee and lateral calf. Dr. Hedden noted that appellant was currently working.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the April 5, 2022 decision, appellant submitted additional evidence to OWCP. 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.*

On June 10, 2021 appellant filed claims for compensation (Forms CA-7) for intermittent disability from work for the periods November 21 through December 4, 2020; January 16 through 29, 2021; February 13 through March 12, 2021; and March 27 through May 7, 2021. In the attached time analysis forms (Form CA-7a), she claimed wage-loss compensation on specific dates of 3.29 hours of leave without pay (LWOP) on November 25, 2020; 3.12 LWOP hours on December 1, 2020; 2.24 LWOP hours on January 29, 2021; 3.32 LWOP hours on February 25, 2021; 1.41 hours on February 26, 2021; 1.57 LWOP hours on March 3, 2021; .92 hours on March 11, 2021; 8.00 hours on March 12, 2021; 2.17 LWOP hours on March 27, 2021; .99 LWOP hours on April 2, 2021; 8 LWOP hours on April 6, 2021; and 3.11 hours on April 17, 2021.⁵ Appellant reported that her reason for leave use on November 25 and December 1, 2020 and January 29, February 25, March 11 and 12, and April 6, 2021 was knee pain. She did not provide a reason for the time off work on April 17, 2021. Appellant thereafter filed additional CA-7 forms requesting wage-loss compensation for intermittent disability on specific dates.

In a June 14, 2021 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish disability from work on November 25 and December 1, 2020 and January 29, February 25, March 11 and 12, and April 6, 2021. It advised her of the type of additional evidence needed and afforded appellant 30 days to provide the necessary evidence.

In a report and work status note dated July 9, 2021, Dr. Fisher noted diagnoses of other specified mononeuropathies of the left lower limb and presence of left artificial knee joint. She reported that appellant may work “8 hours per day -- continue light-duty work only intermittent time off when has increased pain in left knee.”

By decision dated August 31, 2021, OWCP denied appellant’s claim for compensation for intermittent disability from work for the period November 25, 2020 through April 17, 2021. It noted that the medical evidence of record was insufficient to establish that appellant was disabled from work during the claimed period due to the accepted October 20, 2015 employment injury.

On September 13, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on January 5, 2022.

Appellant submitted an October 4, 2021 work status note by Dr. Fisher who indicated that appellant may work light-duty with “intermittent time off when [she] has increased pain left knee.”

A left knee x-ray scan dated October 14, 2021 revealed small-to-moderate joint effusion and no acute fractures.

By decision dated March 10, 2022, OWCP’s hearing representative affirmed the August 31, 2021 decision.

⁵ OWCP paid wage-loss compensation for the dates February 26, March 3, March 27, April 2, April 28, May 5, and May 6, 2021 for partial disability because the employing establishment was not able to accommodate appellant’s work restrictions.

On April 4, 2022 appellant, through counsel, requested reconsideration and submitted medical evidence.

OWCP received an office visit report dated October 26, 2020 by Dr. Fisher who indicated that appellant was treated for constant and worsening left knee pain. She discussed the medical treatment that appellant received and provided examination findings. Dr. Fisher indicated that appellant continue limited duty. This report also contained December 1, 2020 and January 20, 2021 addendums from Dr. Fisher who noted that appellant was totally disabled for the period October 26 through 31, 2020 due to a possible left knee infection.

Appellant also resubmitted Dr. Fisher's reports dated October 30 and November 9, 2020 and January 18, 2021.

In a report dated July 9, 2021, Dr. Fisher explained that appellant experienced periods of "severe pain," particularly when the weather changed, and had to take a few days off. She provided examination findings and noted symptoms from infrapatellar saphenous neuropathy.

In an October 4, 2021 report, Dr. Fisher indicated that appellant was treated for increasing left knee pain and noted that appellant worked limited duty. She discussed appellant's medical treatment and provided examination findings.

In a report and note dated February 18, 2022, Dr. Fisher provided examination findings and indicated that appellant had continued symptoms of saphenous neuropathy post knee replacement. She indicated that appellant was partially disabled for work until April 2, 2022. Dr. Fisher noted that appellant could continue limited duty only with "intermittent time off when has increased pain left knee."

By decision dated April 5, 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 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.⁶

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 OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

⁶ 5 U.S.C. § 8128(a); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see S.K.*, Docket No. 22-0248 (issued June 27, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

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 alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered by OWCP. 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).¹¹

In support of her request for reconsideration, appellant submitted additional medical evidence, including reports dated October 26, 2020 through February 18, 2022 by Dr. Fisher. Dr. Fisher discussed the medical treatment that appellant received for left knee pain and provided examination findings. In the October 26, 2020 report, she provided addendums dated December 1, 2020 and January 20, 2021 and noted that appellant was totally disabled for the period October 26 through 31, 2020. In the February 18, 2022 report, Dr. Fisher indicated that appellant could continue limited-duty with "intermittent time off." While this medical evidence is new, it is not relevant because it does not address the underlying issue of the present case, *i.e.*, whether appellant has established that she was disabled from work on an intermittent basis during the period November 25, 2020 through April 17, 2021 due to the accepted October 20, 2015 employment injury. 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.¹² Moreover, the reports dated October 30, November 9, 2020, and January 18, 2021 were previously submitted to the record and reviewed. The Board has held that the submission of evidence which duplicates or is substantially

⁸ *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 (September 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.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *Id.* at § 10.606(b)(3); *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *D.T.*, Docket No. 20-0456 (issued September 1, 2020).

¹² *B.P.*, Docket No. 22-0553 (issued October 21, 2022); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *E.G.*, Docket No. 18-0270 (issued August 24 2018); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

similar to evidence already in the case record does not constitute a basis for reopening a case.¹³ Therefore, for the above reasons, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

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).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹³ *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁴ *See D.J.*, Docket No. 21-0371 (issued November 24, 2021).