

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

_____)	
W.F., Appellant)	
)	
and)	Docket No. 23-0371
)	Issued: August 16, 2024
U.S. POSTAL SERVICE, DUNWOODY POST)	
OFFICE, Atlanta, GA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 20, 2023 appellant, through counsel, filed a timely appeal from a January 11, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant

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 Although OWCP's September 19, 2022 merit decision is within the Board's jurisdiction, counsel did not appeal from that decision. Therefore, the Board will not address the September 19, 2022 merit decision in this appeal. 20 C.F.R. § 501.3; *see D.K.*, Docket No. 22-0111 (issued February 8, 2023); *E.R.*, Docket No. 20-1110 (issued December 23, 2020).

to the 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

This case has previously been before the Board.⁵ The facts and circumstances of the case as set forth in the Board's prior decision is incorporated herein by reference. The relevant facts are as follows.

On August 8, 2016 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 6, 2016 she hit her right leg/knee on a gear shift when exiting her mail truck while in the performance of duty. OWCP accepted the claim for right knee contusion and tear of medial meniscus, right knee. Appellant stopped work on December 30, 2016. On April 19, 2017 she underwent an OWCP-approved right knee arthroscopy with chondroplasty medial femoral condyle. OWCP paid appellant wage-loss compensation on the supplemental rolls as of January 1, 2017, and on the periodic rolls as of April 2, 2017. Appellant returned to full-duty work on July 1, 2017.⁶

On July 24, 2021 appellant filed a notice of recurrence (Form CA-2a) alleging that she stopped work on December 5, 2020 as her accepted knee condition had worsened since she returned to work as a result of work duties which included climbing steps, lifting heavy packages, walking, standing, and getting in and out of a mail truck.

In an August 12, 2021 developmental letter, OWCP advised appellant of the deficiencies in the evidence submitted. It provided the definition of a recurrence of disability, and advised her of the type of factual and medical evidence necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to respond.

OWCP subsequently received additional medical evidence, including an October 20, 2021 operative report in which Dr. Jesse E. Seidman, a Board-certified orthopedic surgeon, indicated

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the January 11, 2023 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.*

⁵ Docket No. 22-0187 (issued June 15, 2022).

⁶ Under OWCP File No. xxxxxx311, OWCP accepted an October 6, 2017 traumatic injury for strain of unspecified muscle and tendon at ankle and foot level, left foot; left knee sprain; and tear of lateral meniscus, left knee. Appellant stopped work on October 6, 2017, and returned to work with restrictions on January 22, 2018. OWCP paid her wage-loss compensation on the periodic rolls from March 31, 2019 until December 5, 2020.

that he performed an OWCP-authorized right knee arthroscopy with partial medial meniscectomy to treat appellant's right knee torn medial meniscus.

By decision dated October 28, 2021, OWCP denied appellant's recurrence claim for disability commencing December 5, 2020. It found that the medical evidence of record was insufficient to establish that she was disabled from work due to a material change or worsening of her accepted August 6, 2016 employment injury.

On November 16, 2021 appellant filed an appeal with the Board. By decision dated June 15, 2022, the Board affirmed OWCP's October 28, 2021 decision, finding that she had not met her burden of proof to establish a recurrence of disability commencing December 5, 2020, causally related to her accepted August 6, 2016 employment injury.⁷

On June 21, 2022 appellant, through counsel, requested reconsideration. Counsel asserted that an OWCP claims examiner, in an accompanying January 27, 2022 memorandum, admitted that appellant's October 20, 2021 surgery was approved. He submitted a copy of a January 26, 2022 memorandum of telephone call (Form CA-110), which noted that appellant had undergone authorized right knee surgery on October 20, 2021. Additional factual and medical evidence was also received.

By decision dated September 19, 2022, OWCP modified its October 28, 2021 decision in part, finding that appellant had established a recurrence of disability commencing October 20, 2021. However, it affirmed the October 28, 2021 decision in part to reflect that appellant had not established a recurrence of disability for the period December 5, 2020 through October 19, 2021, finding that the evidence of record continued to be insufficient to support that she was totally disabled from work due to an objective worsening of her accepted work-related right knee conditions.

On October 13, 2022 appellant, through counsel, requested reconsideration. Counsel indicated that reconsideration was submitted for clarification purposes of the September 19, 2022 decision. He noted that "[a]lthough the decision says that a recurrence of disability was found as of 10/20/2021 the decision is not clear if compensation is ordered paid or not paid and for what time periods."

OWCP subsequently received additional medical evidence by Dr. Sideman, which included an operative anesthesia record dated October 20, 2021 and reports dated December 19, 2022 and January 4, 2023 which provided assessments of unilateral primary osteoarthritis, right knee; and status post arthroscopy of right knee.

OWCP also received diagnostic test reports. In a December 27, 2022 right knee x-ray report, Dr. Justin D. Caughron, a Board-certified diagnostic, interventional, and vascular radiologist, provided an impression of triple compartmental osteoarthritis. In a right knee x-ray report of even date, Dr. Jaymin R. Patel, a Board-certified interventional and diagnostic radiologist, provided an impression of postoperative changes of right knee arthroplasty.

⁷ See *supra* note 5.

By decision dated January 11, 2023, 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 or her own motion or on application.⁸

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.⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ 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.¹²

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).

On reconsideration, appellant did not allege that OWCP erroneously applied or interpreted a specific point, or present a relevant legal argument not previously considered by OWCP.

⁸ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

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

¹⁰ *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.

¹¹ *Id.* at § 10.608(a); *M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

Therefore, appellant is not entitled to a review of the merits of her claim based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of her reconsideration request, appellant submitted new evidence from Dr. Sideman pertaining to her OWCP-authorized October 20, 2021 and December 27, 2022 right total knee arthroplasties. This evidence, however, is not relevant to the issue of whether she met her burden of proof to establish a recurrence of disability causally related to the accepted August 6, 2016 employment injury. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ Appellant also submitted x-ray reports from Dr. Caughron and Dr. Patel which addressed her right knee conditions. The Board has held that diagnostic studies, standing alone, lack probative value as they do not address whether the accepted employment injuries resulted in appellant's claimed disability.¹⁴ These reports are irrelevant and do not constitute a basis for reopening the claim because they do not address the particular issue involved.¹⁵ Consequently, appellant is not entitled to review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁶

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).

¹³ *R.C.*, Docket No. 22-0612 (issued October 24, 2022); *K.V.*, Docket No. 21-0628 (issued August 8, 2022); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁴ *B.W.*, Docket No. 21-0721 (issued February 14, 2023); *P.S.*, Docket No. 22-0983 (issued November 9, 2022); *J.K.*, Docket No. 20-0591 (issued August 12, 2020).

¹⁵ See *R.C.*, *supra* note 13; *C.B.*, Docket No. 18-1108 (issued January 22, 2019); *Edward Matthew Diekemper*, *supra* note 13.

¹⁶ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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