

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

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M.S., Appellant)

and)

U.S. POSTAL SERVICE, HENRY MCGEE)
POST OFFICE, Chicago, IL, Employer)

) **Docket No. 24-0438**
) **Issued: June 4, 2024**
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)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 20, 2024 appellant filed a timely appeal from a November 1, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 22, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

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).

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¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the November 1, 2023 decision, a appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.*

FACTUAL HISTORY

On September 27, 2022 appellant, then a 63-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed lower back and bilateral knee conditions, including bilateral osteoarthritis of the knees, due to factors of her federal employment, including repetitive lifting, carrying, pushing, pulling, twisting, turning, and bending for 8 to 10 hours per day, 5 to 6 days per week over the course of her 35-year career with the postal service. She noted that she first became aware of her condition on February 1, 2022 and realized its relation to her federal employment on September 20, 2022. Appellant did not stop work.

In an undated statement received on September 27, 2022, appellant described the circumstances surrounding her injury. She reported that her employment duties as a letter carrier required constant standing and walking on concrete for 8 to 10 hours per day, 5 to 6 days per week, which involved lifting, carrying, pushing, pulling, twisting, turning, and bending in a repetitive manner causing severe injury to her back, knees, and entire body. Appellant reported that in 2005, she sustained a work-related meniscus injury accepted under OWCP File No. xxxxxx560, which required surgery. Following her surgery, she returned to limited-duty work for one year due to knee swelling. Appellant noted improvement to her knee following her return to full-duty work until 2022 when she noticed problems involving both of her knees as well as her back. She asserted that her employment duties caused further injury to her knees and back resulting in worsening pain, swelling, severe stiffness, throbbing, and shooting pain in her leg worse on left.

In support of her claim, appellant submitted a September 20, 2022 progress report from Julia Sames, a physician assistant. Ms. Sames described appellant's repetitive employment duties as a letter carrier for the employing establishment and noted her complaints of bilateral knee pain, swelling, stiffness and achiness over the past year, which had progressed with her work duties. She reported that appellant presented for evaluation with severe throbbing in her knees, and descending leg pain stemming from her back radiating into her left leg. Ms. Sames diagnosed low back pain, left knee pain, and bilateral primary osteoarthritis of knee.

In a September 29, 2022 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence required and provided a questionnaire for her completion. In a separate development letter of the same date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding appellant's claim. It afforded both parties 30 days to respond.

In an October 19, 2022 response to OWCP's development letter, appellant noted that her employment duties as a letter carrier contributed to her conditions due to constant and repetitive lifting, carrying, pushing, pulling, twisting, turning, and bending for 8 to 10 hours per day, 5 days per week over the course of 35 years working for the postal service. She further stated that she did not engage in any hobbies or activities outside of work that would have caused her conditions.

In an October 29, 2022 medical report, Dr. Blair Rhode, a Board-certified orthopedic surgeon, reported that appellant presented for evaluation of lumbar and bilateral knee pain, left greater than right. He described her employment duties as a letter carrier and prior history of left knee meniscal tear and subsequent arthroscopic surgery in 2005 under OWCP File No. xxxxxx560. Dr. Rhode diagnosed bilateral primary osteoarthritis of knee. He opined that appellant sustained a work-related aggravation of her knees secondary to significant exposure as a mail carrier.

Dr. Rhode recounted that she had been employed as a mail carrier for 35 years, which involved repetitive standing, walking, bending, twisting, and turning for 8 to 10 hours per day, 5 days per week. He opined that within a reasonable degree of medical certainty that appellant's significant employment exposure over 35 years aggravated her bilateral degenerative knee condition. Dr. Rhode advised that appellant was currently restricted to light-duty work and undergoing physical therapy to reduce symptoms and improve function.

By decision dated November 22, 2022, OWCP denied appellant's occupational disease claim, finding that she had not established the implicated factors of her federal employment. Consequently, it found that she had not met the requirements to establish an injury as defined by FECA.

Appellant submitted additional evidence in support of her claim including an April 19, 2023 lower limb questionnaire. In progress reports dated April 19, May 17, June 21, and July 19, 2023, Mark Bordick, a physician assistant, documented appellant's low back and bilateral knee examination findings and continued course of treatment.

In duty status reports (Form CA-17) dated April 19, May 17, June 21, and July 19, 2023, Dr. Rhode noted diagnoses and provided appellant work restrictions.

In an August 23, 2023 report, Dr. Rhode noted appellant's complaints of low back and bilateral knee pain and provided examination findings. He diagnosed left knee pain, low back pain, and bilateral primary osteoarthritis of the knees.

In an August 23 and September 20, 2023 Form CA-17, Dr. Rhode noted diagnoses and provided appellant work restrictions.

In a September 20, 2023 progress report, Mr. Bordick documented appellant's examination findings and continued course of treatment.

On October 27, 2023 appellant requested reconsideration. In support of her claim, she submitted an October 18, 2023 narrative report from Dr. Rhode.

In his October 18, 2023 report, Dr. Rhode reported that appellant initially presented on September 20, 2022 for evaluation of lumbar and bilateral knee pain, left more affected than the right. He discussed her employment with the postal service as a letter carrier for the past 35 years, which required her to engage in physical activities on a daily basis. This included starting appellant's day by prepping her route, which involved standing on concrete and categorizing mail in preparation for delivery. She then transferred the mail to the truck for delivery, which required standing and walking while managing high volumes of mail, as well as pushing and pulling heavy rolling containers and gurneys. Dr. Rhode reported that she completed these activities on concrete while twisting, turning, bending, squatting, and putting pressure on her lower back and knees in a constant manner throughout her workday. He reported that during delivery, appellant also walked long distances on concrete to deliver mail to residences and businesses in Chicago, which entailed managing uneven ground, extreme weather conditions, and encountering many stairs throughout the day. Dr. Rhode noted that her employment duties involved repetitive and physically demanding tasks that imposed pressure through her knees and back constantly for 8 to 10 hours per day, 5 days per week, throughout the course of her career with the postal service. He discussed her medical history explaining that appellant had a prior left knee meniscal tear in February 2005 for which she underwent subsequent arthroscopic surgery under OWCP File No. xxxxxx560.

Dr. Rhode reported that following the surgery, appellant underwent physical therapy and eventually returned to full-duty work. Appellant reported that her current symptoms began in February 2022 as a result of her employment duties, which had progressed since that time resulting in bilateral knee swelling, stiffness, achiness, and episodes of her left knee giving way. Additionally, she complained of shooting pain from her lower back and descending leg pain down to both calves.

Dr. Rhode diagnosed bilateral primary osteoarthritis of the knee. He opined, to a reasonable degree of medical certainty, that appellant sustained overuse injuries to her knees secondary to the occupational factors of her job at the employing establishment. Dr. Rhode explained that her extensive history working for the employing establishment involved constant standing and walking while lifting, carrying, pushing, pulling, twisting, turning, bending, and squatting for 8 to 10 hours per day, five days per week, which exceeded her physiological tolerance, precipitated injury to her knees, and accelerated the progression of osteoarthritis. He asserted that the high frequency and duration of performing such work factors resulted in extreme pressures through her knees, with alternating applied force depending on the specific job factor being performed and the angle of her knee. Dr. Rhode explained that biomechanically, this led to disproportionate sheer forces through the meniscal fibrocartilage and articular hyaline cartilage, which taking into account the prior right knee meniscal tear and subsequent arthroscopy accepted under OWCP File No. xxxxxx560, further supported the overuse mechanism of injury. He opined that appellant experienced extreme pressures and sheering forces through her knees, which precipitated injury and initiated a sequela of progressive injury with an acceleration rate of cartilage wearing beyond what would be expected for an otherwise healthy individual of a similar age. Dr. Rhode concluded that her tricompartmental structural damage occurred at a rate that exceeded the expectations for a person of appellant's age and health status.

Appellant also submitted an October 18, 2023 Form CA-17 from Dr. Rhode, noting her diagnoses and work restrictions and an October 18, 2023 progress report from Mr. Bordick documenting treatment for her condition.

By decision dated November 1, 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.³

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

³ 5 U.S.C. § 8128(a); *see R.C.*, Docket No. 22-0612 (issued October 24, 2022); *M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

In support of her request, appellant submitted an October 18, 2023 report from Dr. Rhode who documented her lumbar condition and bilateral knee osteoarthritis from repetitive activities involving standing on concrete and categorizing mail in preparation for delivery, transferring mail to a truck, standing and walking while managing high volumes of mail, and pushing and pulling heavy rolling containers and gurneys. He described appellant's employment factors in further detail reporting that these activities involved twisting, turning, bending, squatting, and putting pressure on her lower back and knees in a constant manner, walking long distances on concrete to deliver mail, managing uneven ground, extreme weather conditions, and encountering many stairs throughout her workday. The Board, therefore, finds that Dr. Rhodes' October 18, 2023 report constitutes relevant and pertinent new evidence with regard to the underlying issue of fact of injury.⁸

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.⁹ Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁰

⁴ 20 C.F.R. § 10.606(b)(3); *see R.C., id.; L.D., id.*

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *D.H.*, Docket No. 23-0134 (issued February 14, 2024).

⁹ *F.F.*, Docket No. 20-1542 (issued April 9, 2021); *see C.H.*, Docket No. 17-1065 (issued December 14, 2017); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁰ *B.S.*, Docket No. 20-0555 (issued April 22, 2021); *P.M.*, Docket No. 19-1253 (issued January 23, 2020); *R.T.*, Docket No. 18-1263 (issued February 7, 2019).

The Board thus finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).¹¹ The case shall be remanded for an appropriate merit decision.¹²

CONCLUSION

The Board finds that OWCP improperly 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 November 1, 2023 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 4, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹¹ *L.J.*, Docket No. 22-0348 (issued April 28, 2023).

¹² On remand OWCP should consider administratively combining the present claim with OWCP File No. xxxxxx560 for full and fair adjudication. See Federal (FECA) Procedure Manual, Part 2 -- Claim, *Doubling Case Files*, Chapter 2.400.8(c)(1) (February 2000).