

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 23, 2000 appellant, then a 37-year-old carrier, filed an occupational disease claim alleging meniscus tears as employment related. OWCP accepted the claim for bilateral knee medial meniscus tears, left knee popliteal synovial cyst and bilateral knee internal derangement and authorized left knee arthroscopic surgery, which occurred on October 6, 2000 and right knee arthroscopic surgery, which occurred on February 9, 2001.

In a June 27, 2011 progress note, Dr. Kenneth W. Chapman, an attending Board-certified orthopedic surgeon, stated that from appellant's complaints it appeared that she might have a torn cartilage or arthritic knee spur. Appellant had an accepted right knee condition and arthroscopic surgery. Dr. Chapman recommended that a magnetic resonance imaging (MRI) scan be obtained to determine the cause of appellant's difficulties.

On July 5, 2011 appellant filed a claim for a recurrence of disability for medical treatment only due to her accepted conditions beginning June 27, 2011.

By letter dated August 5, 2011, OWCP informed appellant of the definition of a recurrence and the evidence required to support such a claim. It advised her that the evidence of record was insufficient to support her recurrence claim and gave her 30 days to provide additional evidence.

By decision dated October 11, 2011, OWCP denied appellant's recurrence of disability claim.

Following the denial of her recurrence claim, OWCP received a July 5, 2011 office note from Dr. Chapman. Based on a review of an MRI scan, Dr. Chapman found a further tear of the right medial meniscus and early degenerative arthritic knee changes. He opined that this was a recurrence of her accepted right knee internal derangement and further medial meniscus tear and right knee early traumatic degenerative arthritis.

On October 16, 2011 appellant requested reconsideration.

By decision dated February 15, 2012, OWCP denied reconsideration.² It based its denial on the grounds that appellant's request raised no substantive legal question or included new and relevant evidence.

² The Board notes that, following the February 15, 2012 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

OWCP accepted appellant's claim for bilateral knee medial meniscus tears, left knee popliteal synovial cyst and bilateral knee internal derangement. On July 5, 2011 appellant filed a claim for a recurrence of disability for medical treatment, which OWCP denied by decision dated October 11, 2011. She requested reconsideration on October 16, 2011. By decision dated February 15, 2012, OWCP denied appellant's request for merit review. The issue to be resolved is whether OWCP properly refused to reopen the case for further merit review. Appellant did not advance a legal argument not previously considered, nor did she demonstrate that OWCP erroneously applied or interpreted a point of law.

With appellant's request for reconsideration, OWCP received a July 5, 2011 office note from Dr. Chapman which reported a further tear of the right medial meniscus and early degenerative arthritic knee changes based on a review of an MRI scan. Dr. Chapman concluded that these conditions were a recurrence of appellant's accepted conditions as well as early right knee traumatic degenerative arthritis. He offered a new opinion with new conditions which he opined were a recurrence of her accepted employment conditions. The Board finds that Dr. Chapman's July 5, 2011 report constituted relevant and pertinent new evidence not previously considered.⁷ Therefore, OWCP improperly refused to reopen appellant's case for further review of the merits.

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ 20 C.F.R. § 10.606(b)(3). See *R.M.*, Docket No. 09-1231 (issued July 27, 2010) (the Board found a report from appellant's attending physician that had not previously been considered by OWCP was new to the record and relevant to the issue of the extent of permanent impairment caused by appellant's accepted injury); *Claudio Vazquez*, 52 ECAB 496 (2001).

To obtain merit review, appellant is not required to submit evidence sufficient to establish her claim. She need only provide relevant and pertinent new evidence not previously considered by OWCP.⁸ Dr. Chapman's report meets this requirements. The case will be remanded for a decision on the merits of appellant's claim.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 15, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 28, 2012
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁸ *F.D. (S.D.)*, 58 ECAB 413 (2007); *Billy B. Scoles*, 57 ECAB 258 (2005).