

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

J.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
STATION, Great Lakes, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-1929
Issued: February 23, 2015**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2014 appellant, through counsel, filed a timely application for review from a March 12, 2014 merit decision and an August 15, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's claim for wage-loss compensation for the period February 10, 2010 through January 15, 2011; and (2) whether it properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 11, 2010 appellant, then a 54-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2010 he slipped on ice while exiting a squad car and twisted his left knee. OWCP accepted his claim for sprain of the medial collateral ligament of the left knee on April 21, 2010. On January 26, 2011 it accepted an additional condition of a tear of the medial meniscus of the left knee.

In a note dated February 24, 2010, Dr. Daniel T. Weber, a Board-certified orthopedic surgeon, stated that appellant could return to work as of the next day with sedentary work restrictions. He reiterated these restrictions in a note dated March 24, 2010, and stated that appellant should be limited to walking or standing for no more than 30 minutes per day and allowed to elevate his left leg.

On August 20, 2010 Dr. Weber stated that, until appellant had arthroscopic surgery, he would maintain his sedentary work restriction. In a narrative report dated September 24, 2010, he again reiterated that appellant's diagnosis was internal derangement of the left knee and that appellant could only perform sedentary work until surgery.

In an attending physician's report dated January 13, 2011, Dr. Weber diagnosed a left medial meniscus tear. He recommended surgery pending authorization from OWCP. Dr. Weber stated that appellant had been able to resume sedentary work on February 24, 2010.

Appellant stopped work on January 19, 2011 and returned on February 9, 2011. He stopped work again on May 28, 2011. A review of appellant's compensation history reveals that he was paid for intermittent disability between January 19, 2011 and April 13, 2012.

On January 20, 2011 Dr. Weber performed a left knee arthroscopy with a partial medial meniscectomy and a patellofemoral abrasion arthroplasty. There were no complications.

On February 14, 2011 appellant filed a claim for intermittent leave without pay from February 10, 2010 through January 15, 2011. He submitted time analysis forms dated February 17, 2011, in which he claimed eight intermittent hours of leave without pay for June 6, 26, 27, 29, and 30, 2010; August 6, 2, 23, 24, 25, and 26, 2010; September 9, 10, 11, and 24, 2010; October 3 and 5, 2010; and January 10, 11, and 19, 2011. Appellant claimed three hours of leave without pay for June 28 and October 4, 2010. He claimed four hours of leave without pay for August 6 and 8, September 12, and October 2, 2010. Appellant claimed six hours of leave without pay for January 7, 2011.

By letter dated February 16, 2011, a representative of the employing establishment asked Dr. Weber to advise as to appellant's disability on dates between June 6, 2010 and January 11, 2011.

By letter dated February 21, 2012, OWCP advised appellant that the evidence of record was insufficient to support his claim for wage-loss compensation due to disability. It noted that he had been released to sedentary work following his injury, and that there was no evidence of record that the employing establishment sent him home due to lack of sedentary work. OWCP afforded appellant 30 days to submit additional information.

Appellant elected to receive retirement benefits in lieu of FECA benefits effective October 22, 2012.

By decision dated October 19, 2012, OWCP denied appellant's claim for intermittent wage-loss compensation for the period from February 10, 2010 through January 15, 2011. It found that the medical evidence was insufficient to support intermittent disability on these dates.

On October 22, 2012 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

A hearing was held on December 18, 2013. At the hearing, appellant testified that, when he had to move around at his job, his knee would swell, and his physician had advised him to put ice on it and keep it immobilized until the swelling abated. He stated that he did not see his physician every time this occurred, and that when it occurred, it would improve within a day or two. Appellant stated that, in addition to his left knee, his right knee also began to hurt, and that he told this to Dr. Weber. He testified that both his left and right knee had been approved under this file. The hearing representative stated that OWCP had not approved a right knee injury under this file. Counsel noted that appellant had been paid wage-loss compensation under this claim for disability after surgery on his right knee in 2012. He also noted that OWCP had paid for appellant's right knee surgery. The hearing representative stated that there was no formal authorization for right knee surgery and that a right knee condition had not been accepted in this case. Appellant noted that he was off work for the dates in question due to both of his knees. He also stated that he did not take partial days off. The hearing representative noted that appellant's time analysis forms stated that he claimed less than eight hours for certain workdays, and that it was unclear whether he worked the rest of the day on these dates. He advised appellant that he needed to submit medical evidence supporting specific dates of disability and held the record open for 30 days for submission of additional evidence.

On March 12, 2014 the hearing representative affirmed the decision of October 19, 2012. He noted that a right knee condition was not approved, and that a review of the case file revealed that a right knee surgery may have been erroneously paid by OWCP. The hearing representative found that no medical evidence had been submitted discussing appellant's claimed intermittent disability between February 10, 2010 and January 15, 2011.

By letter received on June 26, 2014, appellant, through counsel, requested reconsideration of OWCP's March 12, 2014 decision.

With his request for reconsideration, appellant attached a report from Dr. Scott Cordes, a Board-certified orthopedic surgeon, dated April 8, 2014. Dr. Cordes reviewed the history of appellant's injury, noting that appellant underwent total knee replacements in October and December 2012. He stated that appellant's left knee injury caused progressive osteoarthritic deterioration due to prolonged limping and favoring of the left knee. Appellant also resubmitted a functional capacity evaluation dated May 3, 2011 and signed by an occupational therapist.

By decision dated August 15, 2014, OWCP denied appellant's request for reconsideration without reviewing the merits of his case. It found that Dr. Cordes' report was irrelevant, as it did not address the period of disability from February 10, 2010 through January 15, 2011.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.² Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.³ Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁴ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁵

For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁶ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁷

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁸ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a sprain of the left medial collateral ligament of the left knee and a tear of the medial meniscus of the left knee as a result of a traumatic incident on February 10, 2010. Appellant claimed that he was disabled for intermittent dates from February 10, 2010 through January 15, 2011. OWCP denied his claim by decision dated October 19, 2012. A hearing representative affirmed this decision on March 12, 2014.

² *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

³ *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

⁴ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁵ *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

⁶ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also David H. Goss*, 32 ECAB 24, 27 (1980).

⁷ *See William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

⁸ *See Viola Stanko (Charles Stanko)*, 56 ECAB 436, 443 (2005); *see also Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959).

⁹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (2005).

Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence that he was disabled for work for the claimed period due to his accepted injuries.¹⁰

In a note dated February 24, 2010, Dr. Weber stated that appellant could return to work as of the next day with sedentary work restrictions. He reiterated these restrictions in a note dated March 24, 2010, and stated that appellant should be limited to walking or standing for no more than 30 minutes per day and allowed to elevate his leg. On August 20, 2010 Dr. Weber stated that, until appellant had arthroscopic surgery, he would maintain his sedentary work restriction. In an attending physician's report dated January 13, 2011, he diagnosed appellant with a left medial meniscus tear. Dr. Weber recommended surgery pending approval from OWCP. He stated that appellant had been able to resume sedentary work on February 24, 2010.

Dr. Weber did not address specific dates of disability in any of his reports. He advised that appellant could work with sedentary restrictions as early as February 24, 2010. Dr. Weber did not explain how or why the accepted injuries disabled appellant from work for the dates claimed. Hence, his notes and medical reports lack both rationale and particularity for the dates of disability claimed. Similarly, the remaining medical reports of record do not address any specific dates of disability. As such, these reports are of diminished probative value on the issue of whether appellant was disabled intermittently between February 10, 2010 and January 15, 2011.¹¹

The Board has however long recognized that, under section 8103 of FECA,¹² payment of expenses incidental to the securing of medical services encompasses payment for loss of wages incurred while obtaining medical treatment. An employee is entitled to disability compensation for loss of wages incidental to treatment for an employment injury.¹³ OWCP's Federal (FECA) Procedure Manual,¹⁴ provides that, in general, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments.

Appellant testified at his hearing that his left knee and subsequently his right knee would swell, and that he had been told by a physician to stay off the knee if this occurred. He explained that he would then stay off the knee and ice it, and in a day or two the knee would improve. Appellant stated that he did not go to a physician each time this occurred. A review of the record does indicate that, of the dates of disability he claimed, he did seek medical treatment from Dr. Weber on September 24, 2010. The medical evidence supports that appellant received

¹⁰ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

¹¹ *See Deborah L. Beatty*, 54 ECAB 340 (2003).

¹² 5 U.S.C. § 8103.

¹³ *Daniel Hollars*, 51 ECAB 355 (2000); *Antonio Mestres*, 48 ECAB 139 (1996); *Henry Hunt Searles, III*, 46 ECAB 192 (1994).

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

treatment for his left knee accepted condition on this date and should be granted up to four hours of compensation for his wage-loss incidental to such treatment on this date.¹⁵

OWCP advised appellant by letter dated February 21, 2012 of the evidence needed to establish his claim, including a physician's opinion as to why his accepted injuries would disable him for work intermittently between February 10, 2010 and January 15, 2011. At the telephonic hearing held on December 18, 2013, the hearing representative advised appellant of the evidence needed to establish his claim. Appellant did not submit such evidence. He provided no rationalized reports addressing any other specific dates of disability between February 10, 2010 and January 15, 2011.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by 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.¹⁶ Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.¹⁸ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁰

¹⁵ See *C.F.*, Docket No. 07-1567 (issued January 17, 2008).

¹⁶ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

¹⁷ *Id.* at § 10.608(b); see *K.H.*, 59 ECAB 495, 499 (2008).

¹⁸ See *Daniel Deparini*, 44 ECAB 657, 659 (1993).

¹⁹ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

²⁰ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

ANALYSIS -- ISSUE 2

OWCP issued a March 12, 2014 decision denying appellant's compensation. On June 26, 2014 appellant requested reconsideration of this decision. OWCP denied his request for reconsideration on August 15, 2014 without reviewing the merits of his claim.

The issue presented on appeal of the August 15, 2014 decision is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of his claim. In his June 26, 2014 request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously interpreted or applied. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The relevant issue upon reconsideration was whether appellant had established by submission of rationalized medical evidence of disability on specific dates between February 10, 2010 and January 15, 2011. A claimant may be entitled to review by submitting new and relevant evidence. However, appellant did not submit any new and relevant evidence in this case. With his request, appellant submitted a report from Dr. Cordes dated April 8, 2014. Dr. Cordes reviewed the history of appellant's injury, noting that appellant underwent total knee replacements in October and December 2012. He stated that appellant's left knee injury caused progressive osteoarthritic deterioration due to prolonged limping and favoring of the left knee. Although this report was new, it was not relevant and pertinent to the issue of whether appellant was disabled from work due to his accepted conditions between February 10, 2010 and January 15, 2011. Dr. Cordes did not address specific dates of disability in his report. As such, his report was not relevant and thus insufficient to require a merit review of appellant's claim.

Appellant also resubmitted a functional capacity evaluation dated May 3, 2011 and signed by an occupational therapist. As this evidence was previously of record, it did not constitute a basis for review of the merits of appellant's claim.²¹

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's claim for wage-loss compensation for the period February 10, 2010 through January 15, 2011; except that appellant is entitled to disability compensation for wage loss during medical treatment on September 24, 2010. The Board further finds that OWCP properly denied appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²¹ *Supra* at note 14.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 15 and March 12, 2014 are affirmed as modified.

Issued: February 23, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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