

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

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M.S., Appellant )  
and ) Docket No. 09-1225  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: December 16, 2009  
St. Louis, MO, Employer )  
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)

*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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 8, 2009 appellant filed a timely appeal of a March 5, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration without a merit review. Because more than one year has elapsed from the most recent merit decision dated February 21, 2008 to the filing of this appeal, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration without further merit review.

**FACTUAL HISTORY**

On April 17, 2003 appellant, then a 41-year-old administrative clerk, filed a traumatic injury claim alleging that on February 3, 2003 she injured her left knee after sustaining a fall while walking up steps at work. She stopped work on April 3, 2003 and returned on April 7, 2003. The Office accepted appellant's claim for left knee contusion.

On February 25, 2005 appellant filed a claim for a recurrence of medical treatment beginning November 19, 2004. She did not stop work. The employing establishment controverted the claim.

On February 28, 2005 the Office advised appellant of the factual and medical evidence necessary to establish her recurrence claim and allowed her 30 days to submit such evidence. Appellant submitted a March 18, 2005 statement noting that she required additional medical treatment after returning to work from her injury. She indicated that additional medical evidence was forthcoming. A March 7, 2005 attending physician's report from Dr. Charles Nester, Board-certified in family medicine, diagnosed chondromalacia patella and advised that appellant was able to perform her regular work.

In an April 12, 2005 decision, the Office denied appellant's recurrence claim finding the evidence insufficient to establish a need for medical care beginning November 19, 2004 causally related to the accepted February 3, 2003 work injury.

Appellant requested reconsideration on May 18, 2005. In reports dated between April 11, 2003 and April 25, 2005, Dr. Thomas Fox, a Board-certified orthopedic surgeon, noted appellant's complaint of left knee pain and found patellofemoral crepitus. The November 24, 2004 report from Dr. Fox noted a fresh scar over the front of appellant's left knee from a recent fall. On March 31, 2005 Dr. Fox performed a left knee arthroscopy with chondroplasty medial femoral condyle, lateral femoral condyle and patella as well as lateral release. Appellant also submitted several partial reports from Dr. Fox.

In a July 29, 2005 decision, the Office denied modification of its April 12, 2005 decision, finding the medical evidence did not bridge the initial injury to the subsequent claim for recurrence. It noted that there was no evidence establishing that appellant's symptoms in November 2004 were due to the work injury. Instead, the Office indicated that appellant sustained a nonwork-related fall in 2004.

Appellant submitted an undated reconsideration request received on October 13, 2005. In a September 14, 2005 report, Dr. Fox summarized a history of appellant's injury and treatment. He opined that her knee pain and her need for surgery were due to the 2003 fall.

In a January 9, 2006 decision, the Office denied modification of its July 29, 2005 decision finding that the evidence failed to establish a recurrence in 2004 due to the accepted work injury.

Appellant requested reconsideration on February 24, 2006. She asserted that the "fresh scar" noted in Dr. Fox's report referred to a July 24, 2004 incident where she scraped her left knee on brass coated furniture. Appellant submitted a March 31, 2005 surgical report from Dr. Fox who diagnosed patellofemoral degeneration and performed a left knee arthroscopy and lateral release. She also submitted preoperative and postoperative recovery instructions from the hospital. Partial reports from Dr. Fox dated between September 14 and December 8, 2005 noted appellant's left knee complaints. Dr. Fox advised that appellant's left knee condition was the result of the fall she sustained. The record also contains physical therapy notes dated April 12 to June 15, 2005.

In a May 9, 2006 decision, the Office denied modification of its previous decision finding that appellant did not establish a recurrence of the need for medical treatment in 2004 due to her February 3, 2003 injury.

Appellant requested reconsideration on July 24, 2006, reiterating that she scraped her knee on furniture on July 24, 2004 and still had left knee pain. An April 3, 2003 x-ray report from Dr. Nester revealed that the left knee was normal. A February 16, 2005 magnetic resonance imaging (MRI) scan of the left knee from Dr. James Tater, a Board-certified diagnostic radiologist, found chondromalacia mainly over the patella articular surface with Grade 3 and 4 injury mainly medially, no meniscal tear or cruciate ligament injury and a small amount of early osteophytic spurring in all three compartments. Appellant also submitted partial reports from Dr. Fox dated between September 14, 2005 and June 15, 2006, several of which were previously of record.

In a November 1, 2006 decision, the Office denied modification of its previous decisions finding that the evidence submitted was insufficient to establish that the claimed recurrence was causally related to the accepted work injury.

Appellant requested reconsideration on January 22, 2007. In a January 4, 2007 report, Dr. Fox opined that appellant's left knee problem and subsequent need for an arthroscopy was a direct result of the February 2003 fall.

In a June 15, 2007 decision, the Office denied modification of its previous decision finding the evidence insufficient to establish that appellant's November 2004 symptoms were the direct result of the February 3, 2003 work injury.

Appellant requested reconsideration on September 5, 2007. In an August 22, 2007 report, Dr. Fox advised that appellant's left knee problems that ultimately resulted in surgery and other medical treatment were the direct result of appellant's February 2003 fall.

In a February 21, 2008 decision, the Office denied modification of its previous decision finding the medical evidence insufficient to establish a recurrence of the need for medical care effective November 19, 2004.

Appellant's attorney requested reconsideration on February 16, 2009. Counsel asserted that the request was based on the medical report of Dr. Fox.

In a March 5, 2009 decision, the Office denied appellant's reconsideration request finding that she did not provide any new and relevant evidence or advance any new legal arguments.

#### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and

pertinent new evidence not previously considered by the Office.<sup>1</sup> Section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>2</sup>

### **ANALYSIS**

Appellant's February 16, 2009 request for reconsideration consists of a letter from her attorney asking for reconsideration based on Dr. Fox's report. Her request does not demonstrate that the Office erroneously applied or interpreted a specific point of law and it also does not advance a relevant legal argument not previously considered by the Office. Instead, appellant's request for reconsideration was based on Dr. Fox's report. She did not submit any new evidence in support of her request or specify any particular report from Dr. Fox or advance a legal argument based on any of Dr. Fox's reports of record. As the issue of appellant's claimed recurrence is medical in nature, it should be addressed by the submission of pertinent new medical evidence. However, no new medical evidence was submitted with the reconsideration request.

For these reasons, the Office properly denied appellant's reconsideration request as the request did not meet any of the regulatory standards for reopening the claim for a merit review.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration without a further merit review.<sup>3</sup>

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<sup>1</sup> 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB \_\_\_\_ (Docket No. 07-1441, issued October 22, 2007).

<sup>2</sup> *Id.* at § 10.608(b); *K.H.*, 59 ECAB \_\_\_\_ (Docket No. 07-2265, issued April 28, 2008).

<sup>3</sup> The Board notes that appellant submitted new evidence after the Office issued its decision. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated March 5, 2009 is affirmed.

Issued: December 16, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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