

FACTUAL HISTORY

On September 12, 2007 appellant, then a 59-year-old retired city letter carrier, filed an occupational disease claim alleging that his right knee condition and September 19, 2005 knee replacement surgery were due to his 31 years of working as a letter carrier.³ He indicated that he was first aware of his knee condition in 1978 and that it was caused or aggravated by his employment on August 5, 2002. In a September 23, 2007 statement, appellant explained that after he had retired on January 3, 2003, he learned that he could file his claim. He stated that he had reported several injuries to his right leg, knee and foot during his career and underwent a total knee replacement on September 19, 2005 after he retired. Appellant submitted numerous medical records including a July 15, 2005 report from Dr. Mark G. Franco, a Board-certified orthopedic surgeon, and treatment notes from Dr. William D. Murphy, a Board-certified radiologist.

In a January 18, 2008 letter, OWCP advised appellant that the factual and medical information submitted was insufficient to support his claim. Further information was requested from appellant, including questions pertaining to when he was reasonably aware of a relationship between his knee condition and factors of his employment.

In a March 11, 2008 decision, OWCP denied appellant's claim on the grounds that it was not timely filed under 5 U.S.C. § 8122. It found that his date of injury was August 5, 2002 and that he should have reasonably been aware of a relationship between his knee condition and employment by September 2004.

On March 30, 2008 appellant requested an oral hearing before OWCP's hearing representative, which was held on September 12, 2008.

By decision dated December 1, 2008, OWCP's hearing representative set aside the March 11, 2008 decision and remanded the case for further development of the issue of when appellant became aware of the necessity of knee surgery rather than his degenerative knee condition. Thus, the date of awareness of the need for surgery constituted the date the time limitation would begin to run for purposes of filing the injury claim. The hearing representative requested that OWCP obtain the July 28, 2004 report of Dr. Peter Cimino, a Board-certified orthopedic surgeon, to verify if appellant was aware of the need for a knee replacement at that time or if he was made aware of the surgery in July 2005, when he sought treatment with Dr. Franco.

OWCP subsequently received Dr. Cimino's July 28, 2004 report, which indicated that appellant understood that he would have to have knee replacement in the not so distant future.

By decision dated January 13, 2009, OWCP denied the claim on the basis it was not timely filed. It found appellant was aware or should have reasonably been aware that his knee condition and need for knee replacement surgery was related to his employment on July 28, 2004, when Dr. Cimino recommended knee surgery.

³ Appellant retired from the employing establishment January 3, 2003.

On January 30, 2009 appellant requested a telephonic hearing before OWCP's hearing representative, which was held on May 14, 2009. At the hearing, appellant's attorney asserted that Dr. Cimino's report noted that appellant would need surgery but did not relate appellant's surgery to his employment. Counsel asserted that appellant was not aware that the need for surgery was employment related until he saw Dr. Franco in 2005 and that appellant did not realize the relationship until 2005.

By decision dated August 26, 2009, OWCP's hearing representative affirmed the denial of appellant's claim. The hearing representative advised that it was difficult to separate the need for surgery from the condition that warranted surgery and found appellant was aware or should have reasonably been aware that his right knee condition was related to his employment as of January 3, 2003, the date he retired. The hearing representative further found that even if appellant was not aware of his condition and employment at the time of his 2003 retirement, he was aware of such relationship as well as the need for surgery on July 28, 2004, when Dr. Cimino evaluated him. The hearing representative thus found that appellant did not file within three years of July 28, 2004.

In a letter of May 18, 2010, appellant requested reconsideration of OWCP's decision. He argued that he was not claiming a degenerative knee condition. Appellant stated that this may have affected the hearing representative's decision, as it did not address the July 28, 2004 or July 2005 reports from Dr. Cimino and Dr. Franco, respectively. He noted that for an OWCP claim to be accepted the medical report must show causal relationship. Appellant stated that he was not specifically told by Dr. Cimino on July 28, 2004 that his knee surgery was work related and thus, there was no medical documentation to support causal relationship. Additionally, Dr. Cimino merely indicated that he would need knee surgery in the near future, but did not schedule any follow-up appointments or consultations. Appellant stated that he understood the three-year limitation requirement and argued that the time limitation should begin in July 2005, when Dr. Franco explained to him the need for surgery and the relationship of his condition to his former employment. He requested to be given an impairment rating and issued a schedule award. Appellant also advised that he was submitting additional documentation from Dr. McMinn. However, a copy of Dr. McMinn's report was not submitted.

By decision dated June 4, 2010, OWCP denied appellant's reconsideration request on the grounds that he failed to raise substantive legal questions or include new and relevant evidence.⁴

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, 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

⁴ The record reflects a March 9, 2010 report from Dr. McMinn was received by OWCP on June 21, 2010, after the issuance of the June 4, 2010 decision. The Board's review of the case is limited to the evidence in record before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Consequently, the Board is precluded from reviewing the evidence received after June 4, 2010.

pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of OWCP's 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.⁶ 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.⁷

When reviewing OWCP's decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁸

ANALYSIS

Appellant's May 18, 2010 request for reconsideration neither alleged, nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. Appellant argued that he was not claiming a degenerative knee condition and that this may have influenced the hearing representative's decision. His argument is irrelevant and has no reasonable color of validity.⁹ While appellant's claim is based on a surgical procedure for a degenerative condition, the surgical procedure cannot be authorized unless the condition itself is accepted.¹⁰ He asserted that the medical report must show causal relationship and further state that he wanted a schedule award. However, these assertions have no color of validity because it is premature to consider causal relationship between a condition and the employment until it is established that a claim is timely filed¹¹ and it is premature to consider a schedule award on an unapproved claim.¹² Appellant asserted that he was not told by Dr. Cimino on July 28, 2004 that his knee surgery was work related and that he only realized that his condition and need for surgery was work related in July 2005, when Dr. Franco explained to him the need for surgery and the relationship of his condition to his former employment. These assertions are insufficient to require OWCP to reopen the claim for a merit review as they were previously made by appellant and previously

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

⁹ *L.H.*, 59 ECAB 253 (2007) (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).

¹⁰ *See, e.g., D.K.*, 59 ECAB 141 (2007) (to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition).

¹¹ *See Louis Alterisio*, 32 ECAB 378, fn 6 (1980) (where a claim is not timely filed, it is unnecessary to address the issue of causal relationship).

¹² *See Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury).

considered by OWCP.¹³ Consequently, appellant is not entitled to a review of the merits of his claim based on the above-noted requirements under section 10.606(b)(2).¹⁴

All requests for reconsideration should be accompanied by argument or evidence meeting the applicable standard of review.¹⁵ As appellant's request for reconsideration was not accompanied by argument for error or new and relevant evidence, OWCP properly denied the request without a review on the merits of his claim.

On appeal, appellant asserts that he wants a schedule award and that he was not aware that his condition was work related until July 2005. As explained, these assertions were made before OWCP are insufficient to warrant reopening of the claim for a merit review. The Board further notes that it does not have jurisdiction over the merits of the claim on the present appeal.

CONCLUSION

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

¹³ See *C.N.*, Docket No. 08-1569 (issued December 9, 2008) (evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case).

¹⁴ The record indicates that appellant filed prior claims that may involve his right knee. This decision does not affect any right appellant may have to pursue matters under his other claims.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (January 2010) provides that an application for review which is not supported by additional evidence or argument for error in fact or law is *prima facie* insufficient to warrant review of the case.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 4, 2010 is affirmed.

Issued: September 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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