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

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| **J.L., Appellant** | ) | |
| **and** | ) | **Docket No. 11-432** |
| | ) | **Issued: September 22, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On December 14, 2010 appellant filed a timely appeal from an August 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and an October 22, 2010 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (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 appellant met his burden of proof to establish that he sustained a left knee injury in the performance of duty on February 22, 2010; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

### *FACTUAL HISTORY*

On June 23, 2010 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 22, 2010 he sustained a left knee injury when he

[1] 5 U.S.C. § 8101 *et seq.*

was walking on his route. His knee became progressively sore such that he could not walk by the end of the day. Appellant notified his supervisor on June 23, 2010. The employing establishment controverted the claim because it was not filed within 30 days of the date of injury.

By letter dated June 29, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In a February 23, 2010 report, Nancy Murphy, a nurse practitioner (NP), noted that appellant complained of left knee pain and recommended that he perform sit down tasks at work.

By decision dated August 9, 2010, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury.

On August 20, 2010 appellant requested reconsideration of OWCP's decision. He stated that he did not file a Form CA-1 earlier because his supervisor at the time was inexperienced and did not inform him of his right to fill one out. Appellant informed his supervisor of his injury on February 23, 2010 and sought treatment that same date. A week later, appellant had shoulder surgery which placed him on leave for two and a half months.

In a February 23, 2010 report, Nurse Murphy noted appellant's complaint of left knee pain on February 22, 2010 while delivering mail, which was aggravated by walking. She diagnosed left knee pain without instability and found no acute injury with the etiology unknown.

In a March 17, 2010 report, Dr. Timothy S. Mologne, Board-certified in orthopedic surgery, stated that appellant complained of left knee pain starting half way through his route on February 22, 2010. Appellant's symptoms improved when he did not walk but returned when he walked his route on March 1, 2010. Dr. Mologne noted that appellant had been on light duty for a recent shoulder surgery and had not experienced any knee pain. He also noted that years ago appellant had suffered an injury which required placement of rods in his tibia and femur. Dr. Mologne had no records for that injury. Following a physical examination and review of x-ray, he reported a history of a traumatic left knee pain one month earlier but that appellant's examination was normal and without any pathologic diagnosis.

By letter dated September 14, 2010, Dean Krueger, a postal service customer service manager, reported that appellant sustained an injury to his left knee on February 22, 2010 which he reported to his supervisor on February 23, 2010, who then issued him an occupational disease form (CA-2). Appellant sought medical attention on February 23, 2010 and continued to work until March 1, 2010. He was absent from work from March 2 to May 13, 2010 for a nonwork-related shoulder surgery. On June 23, 2010 Mr. Krueger informed appellant that he should file a Form CA-1 for his alleged traumatic injury. He further stated that appellant's injury on February 22, 2010 was consistent with his comments and did not warrant further investigation or consideration for controversion.

By decision dated October 22, 2010, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence establishing fact of injury.[2]

## ***LEGAL PRECEDENT -- ISSUE 1***

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[6] The rationalized opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical 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 claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[7]

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[2] The Board notes that appellant submitted additional evidence after OWCP rendered its October 22, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Elaine Pendleton*, *supra* note 3.

[6] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[7] *James Mack*, 43 ECAB 321 (1991).

The term physician is defined under section 8101(2) and nurses are not physicians under FECA; therefore, their opinions do not constitute probative medical evidence.[8]

## ***ANALYSIS -- ISSUE 1***

OWCP accepted that the February 22, 2010 incident occurred as alleged. The issue is whether appellant submitted sufficient medical evidence to establish that the employment incident caused a left knee injury. The Board finds that he did not submit sufficient medical evidence to support that he sustained an injury causally related to the February 22, 2010 employment incident.[9] The medical evidence is deficient on two grounds: first, it fails to provide a firm diagnosis; and second, there is no narrative opinion on causal relationship between a diagnosed condition and the employment incident.

In a February 23, 2010 report, Nurse Murphy noted that appellant complained of left knee pain and recommended he perform sit down tasks when at work. This medical evidence is insufficient to establish a left knee condition causally related to the February 22, 2010 employment incident. Registered nurses, licensed practical nurses and physicians' assistants, they are not physicians as defined under FECA, their opinions are of no probative value.[10] The report is of no probative medical value.

On appeal appellant contends that his delay in filing his claim was a result of being incorrectly told to file a Form CA-2. This point is moot because OWCP accepted that the February 22, 2010 incident occurred as alleged. The Board must decide whether the accepted employment incident caused a clinical left knee condition. Appellant's honest belief that work caused his medical problem is not in question, but that belief, however sincerely held, does not constitute the medical evidence necessary to establish causal relationship. In the instant case, the record is without rationalized medical evidence establishing that his knee condition is causally related to the February 22, 2010 employment incident. Appellant has failed to establish his burden of proof.

Evidence submitted by appellant after the final decision cannot be considered by the Board. As previously noted, the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.[11] Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

[8] 5 U.S.C. § 8101(2). *See Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988).

[9] *See Robert Broome*, 55 ECAB 339 (2004).

[10] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

[11] 20 C.F.R. § 501.2(c)(1).

## ***LEGAL PRECEDENT -- ISSUE 2***

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP 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.[12] Section 10.608(b) of OWCP 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.[13]

## ***ANALYSIS -- ISSUE 2***

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In his August 20, 2010 narrative statement, appellant reported that he informed his supervisor of his injury on February 23, 2010 and sought treatment that same date. By letter dated September 14, 2010, Mr. Krueger, a postal service customer service manager, reported that appellant sought medical attention on February 23, 2010, that appellant's statements were consistent and did not warrant further investigation or consideration for controversion from the employing establishment. In a February 23, 2010 medical report, Nurse Murphy diagnosed appellant with left knee pain. In a March 17, 2010 medical report, Dr. Mologne stated that appellant complained of left knee pain which began on February 22, 2010. He reported that appellant had a history of a traumatic left knee pain in February 2010 and that his examination was normal and without any pathologic diagnosis.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his August 20, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant's argument was that his injury was employment related and he delayed filing his claim because he was told to file the wrong form. The underlying issue in this case is not a question of paperwork. Rather, the question is whether appellant's injury was causally related to the accepted February 22, 2010 employment incident. That is a medical issue which must be addressed by relevant medical evidence.[14]

While the letter from Mr. Krueger and medical report from Nurse Murphy is new evidence and has some connection to appellant's employment, it is not relevant to the issue for which OWCP denied appellant's claim as it does not include a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's alleged injury and the February 22, 2010 incident. While Dr. Mologne's March 17, 2010 medical report is new

[12] *D.K.*, 59 ECAB 141 (2007).

[13] *K.H.*, 59 ECAB 495 (2008).

[14] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

evidence from a qualified physician, the report does not provide a firm medical diagnosis. As this report does not address the issue on which OWCP's decision was based, namely, medical evidence that establishes a diagnosis causally related to the February 22, 2010 employment incident, it is not relevant. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any relevant medical evidence in this case.

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 appellant did not meet his burden of proof to establish that he sustained a left knee injury on February 22, 2010 in the performance of duty. OWCP properly denied his request for reconsideration without a merit review.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated October 22 and August 9, 2010 are affirmed.

Issued: September 22, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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