

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal appellant generally asserts that she is entitled to wage-loss compensation for the accepted injury.³

FACTUAL HISTORY

On July 13, 2005 appellant, then a 38-year-old window clerk, injured her left leg that day when a package fell on it. She did not stop work. A medical report dated July 13, 2005 noted a diagnosis of contusion to the back of the left knee. On August 25, 2006 appellant filed a recurrence claim. She stated that she had continued left leg pain and when standing at home on July 5, 2006 she had severe pain in her left leg. The employing establishment contested the recurrence claim. A September 30, 2006 magnetic resonance imaging (MRI) scan of the left knee demonstrated a complex Baker's cyst in the popliteal fossa. Appellant stopped work on October 10, 2006.

On October 31, 2006 OWCP accepted that appellant sustained a contusion of the left leg on July 13, 2005. She filed a Form CA-7, claim for compensation, beginning December 5, 2006 and returned to modified duty for four hours a day in April 2007. In a June 4, 2007 decision, OWCP denied appellant's claim for wage-loss compensation beginning December 5, 2006. On July 3, 2007 appellant, through her attorney, requested a hearing and submitted additional medical evidence. By decision dated February 13, 2008, an OWCP hearing representative found that a conflict in medical evidence had been created between the opinion of Dr. Robert A. Smith, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for OWCP and Dr. Peter Trent, an attending Board-certified orthopedic surgeon, regarding whether appellant's current condition was employment related. The case was remanded to OWCP to obtain an impartial evaluation. On July 31, 2008 OWCP authorized surgical removal of a left knee cyst. On September 24, 2008 Dr. Trent removed the cyst.

In a January 5, 2009 decision, OWCP denied appellant's claim for wage-loss compensation. It found the weight of the medical evidence rested with the opinion of Dr. Robert E. Collins, Board-certified in orthopedic surgery, who performed an impartial examination for OWCP and advised that the contusion to appellant's left leg resolved very quickly and that her continued left lower extremity condition was not related to the July 13, 2005 employment injury. In a March 23, 2009 decision, OWCP denied appellant's claim for wage-loss compensation beginning January 1, 2009. In merit decisions dated July 1 and September 15, 2009 and August 4, 2010, it denied modifications of its previous decisions on the grounds

³ The Board notes that on April 9, 2012 appellant filed an application for review by the Board of a March 9, 2012 OWCP decision on the merits of her claim. It was assigned Docket No. 12-1054 and will be adjudicated separately.

that the medical evidence was insufficient to establish that any disability commencing on December 5, 2006 was causally related to the July 13, 2005 employment injury.⁴

On August 2, 2011 appellant requested reconsideration. She submitted duplicates of medical evidence previously of record dated September 19, 2008 to July 15, 2010. Appellant also submitted a number of treatment notes, attending physician's reports and duty status reports dated August 12, 2010 to July 1, 2011, not previously reviewed by OWCP. In these reports, Dr. Daniel Ignacio, a Board-certified physiatrist, noted clinical findings of a swollen, tender left knee that would give way. He initially provided restrictions to appellant's physical activity and beginning October 7, 2010, advised that she could not work due to painful, limited movements, painful patellofemoral crepitation, infrapatellar, diffuse tenderness, and hypoesthesia and weakness along the left leg, due to a crush injury that occurred on July 13, 2005. Dr. Ignacio continued to submit reports advising that appellant could not work, and needed continued medical care and treatment. A May 26, 2011 left knee x-ray was interpreted as normal.

In a nonmerit decision dated August 24, 2011, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁵ Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁶ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁸

⁴ In the September 15, 2009 decision, OWCP noted that appellant underwent authorized surgery on September 24, 2008 and advised her to file a recurrence claim and submit medical evidence to support any period of disability claimed. Appellant submitted a recurrence claim, stating that the recurrence occurred on September 24, 2008, the date of authorized surgery.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.608(a) (2011).

⁷ *Id.* at § 10.606(b)(3) (2011).

⁸ *Id.* at § 10.608(b) (2011).

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated August 24, 2011 denying appellant's request for reconsideration. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's claim.

In her August 2, 2011 reconsideration request, appellant merely asserted that the medical evidence established entitlement to wage-loss compensation. She therefore did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).⁹

With her reconsideration request, appellant submitted evidence previously of record. The Board has long held that the submission of evidence which repeats or duplicates evidence already in the record does not constitute a basis for reopening a case.¹⁰ Nonetheless, the Board finds that OWCP improperly denied her request for merit review pursuant to section 8128(a) of FECA. Appellant, however, also submitted a number of reports dated August 12, 2010 to July 1, 2011 in which Dr. Ignacio noted clinical findings of knee swelling and tenderness and acknowledged appellant's report that her knee would give way. On October 7, 2010 Dr. Ignacio advised that she could not work due to painful, limited movements, painful patellofemoral crepitation, infrapatellar, diffuse tenderness, and hypoesthesia and weakness along the left leg, due to a crush injury that occurred on July 13, 2005. He continued to submit reports advising that appellant could not work, and needed continued medical care and treatment. A May 26, 2011 left knee x-ray was interpreted as normal.

The merit issue in this case is whether appellant is entitled to wage-loss compensation beginning on December 5, 2006 and continuing. The Board finds that, as Dr. Ignacio reported positive examination findings which he advised were due to the July 13, 2005 employment injury and indicated that appellant could not work, these reports constitute new and relevant evidence not previously considered by OWCP. Appellant therefore met the requirements of section 10.606(b)(3).¹¹

As appellant submitted new and relevant evidence not previously considered by OWCP, the case must be remanded to OWCP for a decision on the merits of whether she met her burden of proof to establish that she is entitled to wage-loss compensation.¹² On remand, OWCP should consider the evidence submitted with appellant's August 2, 2011 reconsideration request together with the evidence of record to determine if appellant has established that she is entitled to monetary compensation for any period beginning on December 5, 2006.

⁹ 20 C.F.R. § 10.606(b)(3) (2011).

¹⁰ *D.K.*, 59 ECAB 141 (2007).

¹¹ 20 C.F.R. § 10.606(b)(3) (2011); *see R.M.*, 59 ECAB 690 (2008).

¹² *Annette Louise*, 54 ECAB 783 (2003).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA.

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: August 2, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board