

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

C.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
SIERRA NEVADA HEALTHCARE SYSTEM,
Reno, NV, Employer**

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**Docket No. 12-392
Issued: July 9, 2012**

Appearances:
Alan J. Shapiro, Esq., for the appellant
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, 2011 appellant filed a timely appeal from a November 9, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration and a July 28, 2011 merit decision denying her claim. 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 appellant met her burden of proof to establish that she sustained a left knee condition in the performance of duty causally related to her accepted February 11, 2011 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 16, 2011 appellant, then a 60-year-old education technician, filed a claim for traumatic injury to her left knee and ankle on February 11, 2011 in the performance of duty. She stated that the incident occurred when her left knee gave out, causing her to fall. On June 20, 2011 OWCP accepted appellant's claim for closed fracture of the left fibula, unspecified, and closed fracture of the left fibula shaft.

In a supplemental statement dated April 8, 2011, appellant explained that her claim was not properly handled as she had also sustained a knee injury on February 11, 2011, but her claim was being processed for an ankle injury. She submitted medical reports regarding her alleged knee injury.

A magnetic resonance imaging (MRI) scan examination of appellant's left knee, dated April 28, 2011, was interpreted by Dr. Joaquin C. Taitano, II, a Board-certified radiologist. Dr. Taitano found that the current study compared to the previous examination of December 21, 2009 showed postoperative changes about the distal patellar tendon. A new geode was seen in the posterior mid proximal tibia which appeared somewhat remote from the postoperative site but may still be postoperative in nature. Dr. Taitano noted that fluid was also again seen about the postoperative site, which indicated strain in this region. He also found a possible strain of the medial gastrocnemius muscle and a complex tear of the posterior horn of the medial meniscus with small meniscal cyst.

Dr. Anthony E. Twite, a Board-certified orthopedic surgeon, noted that appellant's left knee condition was a "chronic issue," with a prior history of surgery in January 2010 for a torn medial meniscus, in addition to her "severe patellofemoral arthritis from prior patellofemoral dislocation problems." He attributed the recent MRI scan finding, which reflected a torn medial meniscus to "postoperative changes from the prior surgery."

In a June 9, 2011 report, Dr. Gregory Lundeen, a Board-certified orthopedic surgeon, stated that appellant complained of left ankle and knee pain. He noted that appellant had a surgical history regarding her knee and recommended evaluation by a knee specialist "given her extensive history."

By letter dated June 22, 2011, OWCP advised appellant that she should submit a medical report that provided a diagnosis of her left knee condition and a physician's opinion, supported by medical rationale, explaining the causal relationship to her work event.

In response, appellant submitted duplicates of reports already of record. She also provided a July 14, 2011 report from Dr. William Gray, an attending physician, who acknowledged that appellant's major question was whether her left knee symptoms were related to the fall in February. Dr. Gray was unable to conclude whether her "degenerative tear of the posterior horn of the medial meniscus predated her fall in February," because he did not have the study prior to her surgery in June 2010 to compare. He concluded that "most of her symptoms are related to her advanced patellofemoral arthritis."

Appellant also submitted numerous physical therapy notes signed by Tim Tulppo, a physical therapist.

By decision dated July 28, 2011, OWCP found that appellant failed to establish that her left knee condition was causally related to her accepted work incident.

On August 23, 2011 appellant submitted a request for reconsideration. She submitted additional physical therapy notes, duplicate diagnostic test results and medical reports from Dr. Gray and Dr. Lundeen.

On November 9, 2011 OWCP denied appellant's request for reconsideration, finding that she had not submitted sufficient evidence to warrant further merit review of her case.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² has the burden to establish the essential elements of her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed, that an injury was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.³

To establish a causal relationship between a claimant's condition and the employment event or incident, she must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the 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.⁴

Section 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. A nurse, physician's assistants or physical and occupational therapists are not physicians as defined by FECA. Their opinions regarding diagnosis and causal relationship are of no probative medical value.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant fell at work on February 11, 2011 and that she sustained an ankle injury as a result. The Board finds that the evidence appellant submitted in support of her claim does not provide a rationalized medical explanation how her left knee condition was caused or contributed to by the employment incident. Appellant did not meet her burden of proof to establish that she sustained a left knee injury on February 11, 2011.

² 5 U.S.C. §§ 8101-8193.

³ *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ *See Roy L. Humphrey*, 57 ECAB 238 (2005).

The Board notes that the medical reports that addressing appellant's left knee condition related a history of a preexisting condition for which surgery was performed. The evidence does not correlate her current complaints to the employment injury of February 11, 2011. Dr. Taitano and Dr. Twite indicated that appellant had undergone surgery for a torn medial meniscus in January 2010 and that the recent MRI scan showed postoperative changes about the distal patellar tendon. While Dr. Taitano also noted findings of possible strain of the medial gastrocnemius muscle, as well as complex tear of the posterior horn of the medial meniscus, with small meniscal cyst, he offered no opinion relating these conditions to the February 11, 2011 fall at work.

Dr. Lundeen did not provide an opinion on the cause of appellant's current condition, but did note that she had an "extensive history" regarding her knees and recommended an evaluation by a knee specialist.

Dr. Gray, while unsure whether the tear of the posterior horn of the medial meniscus predated her employment incident, concluded that her knee symptoms were related to her advanced patellofemoral arthritis, which predated her employment injury. Appellant did not submit sufficient medical evidence explaining how her current left knee condition was caused by her fall on February 11, 2011.

OWCP also received reports from a physical therapist. As noted, the term "physician" under FECA does not include a physician's assistant, nurse or physical therapist. Therefore, the medical documents signed only by Mr. Tulppo, a physical therapist, are not considered probative evidence in evaluation of causal relationship.

As appellant did not submit probative medical evidence explaining how her current left knee condition was causally related to the accepted employment incident, she did not meet her burden of proof to establish that she sustained a left knee injury on February 11, 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

Under section 8128(a) of FECA, OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that: (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.⁶

⁶ 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸ 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.⁹ 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

ANALYSIS -- ISSUE 2

OWCP's most recent merit decision of July 28, 2011 found that appellant had not established that her left knee condition was causally related to her employment incident. On November 9, 2011 it denied her reconsideration request, without a merit review and she appealed this decision to the Board.

The Board finds that appellant did not meet 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 her July 5, 2011 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument not previously considered by OWCP. Consequently, she is 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)(2).

Appellant resubmitted numerous medical documents following the July 28, 2011 decision. As these reports were previously considered by OWCP and repeat evidence already of record, they are duplicative and do not constitute relevant and pertinent new evidence.¹¹ In addition, as noted above, medical notes signed by physical therapists do not constitute competent medical evidence for medical diagnosis or causation; as such appellant's submission of physical therapy notes was irrelevant to the underlying issue of whether the medical evidence established that her condition was in fact causally related to her workplace injury.¹²

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

⁷ 20 C.F.R. § 10.608(b).

⁸ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁹ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹¹ *Supra* note 8.

¹² *Supra* note 5.

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 failed to meet her burden of proof that her left knee condition was causally related to her work incident, and that OWCP properly refused to reopen appellant's case for further review of the merits of her claim with respect to the July 28, 2011 decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 9 and July 28, 2011 are affirmed.

Issued: July 9, 2012
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