



## **FACTUAL HISTORY**

This case was previously before the Board.<sup>3</sup> Appellant, a 42-year-old former claims examiner, alleged that she dislocated her right patella when she fell down some stairs on July 1, 2008. OWCP initially found that the July 1, 2008 employment incident occurred as alleged, but denied her claim because the medical evidence did not include a specific diagnosis connected to the accepted employment incident. The Branch of Hearings and Review subsequently affirmed the denial, albeit for a different reason. In a November 4, 2009 decision, the hearing representative indicated that, “due to many discrepancies,” the facts of the case could not be determined. Consequently, the hearing representative found that appellant failed to establish an injury as alleged.

When the case was previously on appeal, the Board found that, while appellant established the July 1, 2008 employment incident, she failed to establish that she sustained an injury as a result of this incident.<sup>4</sup> The Board modified the hearing representative’s November 4, 2009 decision accordingly, and affirmed the denial of appellant’s traumatic injury claim. In finding appellant had not established an employment-related right knee condition, the Board reviewed various operative reports and treatment notes from Dr. Jeffrey F. Shall, a Board-certified orthopedic surgeon.<sup>5</sup> The Board’s November 24, 2010 decision is incorporated herein by reference.

On May 25, 2011 appellant’s counsel requested reconsideration. The request was accompanied by two follow-up reports from Dr. Shall dated May 7 and July 2, 2009. Both reports were already part of the record when the Branch of Hearings and Review issued its November 4, 2009 decision.<sup>6</sup>

In a November 2, 2011 decision, OWCP denied appellant’s request for reconsideration.

On November 16, 2011 counsel requested a hearing before the Branch of Hearings and Review and on November 21, 2011 counsel filed the current application for review (AB-1) regarding the same November 2, 2011 decision, which the Board received on December 1, 2011. By decision dated December 19, 2011, the Branch of Hearings and Review denied counsel’s request for a hearing.<sup>7</sup>

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<sup>3</sup> Docket No. 10-431 (issued November 24, 2010).

<sup>4</sup> The Board determined that, on July 1, 2008, appellant “slipped down one step ... in the performance of duty, grabbed a railing and stopped herself from falling down the remaining stairs, twisting her right knee in the process.”

<sup>5</sup> Dr. Shall operated on appellant’s right knee on December 8, 2008 and February 9, 2009.

<sup>6</sup> Appellant initially submitted this evidence to the hearing representative on October 12, 2009.

<sup>7</sup> The Board and the Branch of Hearings and Review cannot simultaneously exercise jurisdiction over the same issue/decision. An OWCP decision issued while the Board has jurisdiction over the matter in dispute is null and void. *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004). Because the Branch of Hearings & Review issued its December 19, 2011 decision after the Board obtained jurisdiction, that decision must be set aside.

## LEGAL PRECEDENT

OWCP has the discretion to reopen a case for review on the merits.<sup>8</sup> An application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> When an application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

## ANALYSIS

Appellant's May 25, 2011 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by OWCP. Counsel merely noted that, based upon so-called "new evidence" from Dr. Shall, the previous decision should be overturned. This is not the type of argument that would warrant further merit review, and as discussed *infra*, counsel did not submit any new evidence relevant to appellant's traumatic injury claim. The Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under section 10.606(b)(2).<sup>11</sup>

Appellant also failed to submit any "relevant and pertinent new evidence" with her May 25, 2011 request for reconsideration. Although counsel represented that Dr. Shall's May 7 and July 2, 2009 follow-up reports were "new evidence," appellant initially submitted this evidence in October 2009 when the case was pending before the Branch of Hearings and Review. Both the hearing representative and the Board referenced Dr. Shall's May 7 and July 2, 2009 reports in their respective decisions. In fact, the Board specifically noted that Dr. Shall's May 7, 2009 reference to appellant's July 1, 2008 fall was insufficient to establish that the accepted employment incident either caused or aggravated appellant's right knee condition. Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.<sup>12</sup> Contrary to counsel's representation, he did not provide any new medical evidence that might arguably impact the prior decision. Consequently, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).<sup>13</sup>

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b)(2).

<sup>10</sup> *Id.* at § 10.608(b).

<sup>11</sup> *Id.* at § 10.606(b)(2)(i) and (ii).

<sup>12</sup> *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2)(iii).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's May 25, 2011 request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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