

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

L.M., Appellant)

and)

DEPARTMENT OF THE ARMY,)
DIRECTORATE OF PUBLIC WORKS,)
Fort Carson, CO, Employer)

**Docket No. 12-520
Issued: July 20, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2012 appellant filed a timely appeal from an August 2, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration without further merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed from April 6, 2011, the date of the most recent OWCP merit decision, to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 7, 2010 appellant, then a 52-year-old construction representative, filed a traumatic injury claim alleging that he sustained a right knee condition on July 1, 2010. He specified that he was descending a stoop when his right knee gave way. Appellant held on to the railing, slid down the steps and felt a pop in the same knee. He stopped work on July 1, 2010 and return to modified duty on July 26, 2010.²

OWCP informed appellant in an August 9, 2010 letter that additional information was needed to establish his claim. It gave him 30 days to submit additional factual and medical evidence. OWCP did not receive a response.

By decision dated September 24, 2010, OWCP denied appellant's claim, finding the evidence insufficient to demonstrate that an employment incident occurred on July 1, 2010 as alleged.

Appellant requested reconsideration on January 5, 2011 and submitted new evidence. He reiterated in undated statements that he was leaving his building on July 1, 2010 when he "stepped off the stoop and felt my right knee pop causing severe pain." Appellant added that he had a preexisting condition since 1981.

In a July 2, 2010 note, Dr. Sabine M. Shaffer, an internist, related appellant's account that he "stepped off stoop yesterday morning and heard a popping noise." On examination of the right knee, she observed moderate edema without erythema or ecchymosis, anterior and posterior laxity, and point tenderness over the medial collateral ligament. Dr. Shaffer diagnosed localized knee joint pain and old disruption of the medial collateral ligament. Appellant also provided medical reports predating the date of injury from November 16, 1983 to January 13, 1988.

On April 6, 2011 OWCP modified the September 24, 2010 decision to reflect that the July 1, 2010 employment incident occurred as alleged. It denied appellant's claim on the grounds that the medical evidence did not sufficiently establish that the accepted work event caused or aggravated a right knee condition.

Appellant requested reconsideration on April 26, 2011 and submitted new evidence. In an April 14, 2010 report, Dr. Michael E. Feign, an osteopath specializing in orthopedic surgery, noted ongoing bilateral knee problems and multiple surgeries. He indicated that appellant injured his right knee at work in 1981 due to a collapsed ditch. On examination, Dr. Feign observed right knee valgus alignment. X-rays confirmed tricompartmental degenerative arthritis of both knees. Dr. Feign diagnosed end stage bilateral degenerative knee arthritis, pointing out that the right knee was more symptomatic. Appellant also resubmitted Dr. Shaffer's July 2, 2010 note and medical records for the period November 16, 1983 to January 13, 1988.

² The case record indicates that OWCP accepted a prior claim for torn right lateral meniscus by decision dated February 2, 1988. It subsequently granted a schedule award for 58-percent permanent impairment of the right lower extremity. This claim is not presently before the Board.

By decision dated August 2, 2011, OWCP denied appellant's request for reconsideration on the grounds that he did not present new evidence or legal contentions warranting further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP regulations provide that the evidence or argument submitted by a claimant must either: (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.⁴ Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

On April 26, 2011 appellant timely requested reconsideration of OWCP's April 6, 2011 merit decision. He submitted an April 14, 2010 report from Dr. Feign as well as copies of a July 2, 2010 note from Dr. Shaffer and various medical records from November 16, 1983 to January 13, 1988. Thereafter, OWCP denied appellant's application on August 2, 2011, finding that no new evidence was offered warranting further merit review.

The Board finds that Dr. Feign's April 14, 2010 report constitutes relevant and pertinent new evidence not previously considered by OWCP as it addressed the underlying issue of appellant's long-term knee pain. Therefore, OWCP was obligated to conduct a merit review of the claim when appellant submitted this evidence in support of his reconsideration request.⁶ Reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his burden of proof.⁷ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁸ On remand OWCP shall conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

³ 5 U.S.C. § 8128(a).

⁴ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

⁵ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

⁶ *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

⁷ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2011 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision.

Issued: July 20, 2012
Washington, DC

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

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

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