

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's attorney asserts that the May 23, 2012 report of the employee's attending physician, Dr. Craig H. Rosen, a Board-certified orthopedic surgeon, was sufficient to establish that the employee suffered residuals of her employment injury and that OWCP should have conducted a merit review of the case.

FACTUAL HISTORY

This case has previously been before the Board. In a July 8, 2011 decision, the Board found that appellant did not meet her burden of proof to establish that the employee sustained a recurrence on April 8, 1992 but that the employee would be entitled to wage-loss compensation for the brief period from the date of surgery on January 25, 2002 until she died on February 3, 2002. The Board also found that OWCP properly denied appellant's request for a hearing.³ The law and the facts of the previous Board decision are incorporated herein by reference.⁴

On February 6, 2012 OWCP paid appellant compensation for the period January 25 through February 2, 2002.

On June 14, 2012 appellant, through her attorney, requested reconsideration. The attorney asserted that an attached May 23, 2012 report from Dr. Rosen indicated that the employee had residuals of her left knee employment injury and would be entitled to disability benefits from April 8, 1992 until her death.

In the May 23, 2012 report, Dr. Rosen described the employee's medical history. He indicated that on July 25, 2000 and August 23, 2001, it was his opinion that appellant had continued problems with her left knee due to degenerative arthritis which was related to the

³ Docket No. 10-1941 (issued July 8, 2011).

⁴ On December 27, 1965 the employee, then an 18-year-old clerk typist, injured her left knee when she fell at work. The claim was accepted for dislocation of the left knee and she underwent a left medial meniscectomy on March 17, 1966. The employee returned to her regular duties without restrictions, and in 1984, while playing recreational softball at a local township, stepped in a hole and reinjured her left knee. She resigned from federal employment on March 23, 1990. The employee underwent a second left knee arthroscopic procedure on April 8, 1992. On November 4, 2000 she filed a recurrence claim. On January 16, 2001 OWCP accepted that the employee sustained a left knee meniscus tear on December 27, 1965. By letter dated July 23, 2001, it informed the employee that the April 8, 1992 recurrence was accepted, and she was advised to file a claim for compensation. On January 25, 2002 Dr. Rosen performed left total knee replacement. The employee died on February 3, 2002, while hospitalized after the surgery. The death certificate listed the immediate cause of death as pseudomembranous colitis. Her widower was appointed administrator of her estate, and on February 20, 2002 filed a survivor's claim. The widower died on June 24, 2005. His niece, the appellant in this case, was appointed executrix of his estate. In an April 8, 2010 decision, OWCP denied the employee's recurrence claim for monetary compensation for the period April 8, 1992 to January 25, 2002 on the grounds that the medical evidence did not support total disability from work. On April 19, 2010 appellant, through her attorney, requested a hearing. By decision dated May 11, 2010, OWCP denied the hearing request.

December 26, 1965 employment injury, and that she required treatment for her left knee due to continued problems with pain from 1992 until the time of her total knee replacement which was performed on January 25, 2002. Dr. Rosen noted that the employee died in the postoperative period and opined that she would have been disabled from work for a period of six months after the January 25, 2002 surgery.

In a nonmerit decision dated September 10, 2012, OWCP denied appellant's reconsideration request. It found that the evidence submitted was not relevant to the merit issue, whether appellant established that the employee was entitled to wage-loss compensation for total disability from April 8, 1992 until her death.

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 Title 20 of the Code of Federal Regulations (C.F.R.) provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).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

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated September 10, 2012 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's claim.⁹

With the reconsideration request, appellant's attorney asserted that the medical evidence was sufficient to establish that the employee was entitled to disability compensation from April 8, 1992 until her death. Appellant therefore did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.608(a).

⁷ *Id.* at § 10.608(b)(1) and (2).

⁸ *Id.* at § 10.608(b).

⁹ *Supra* note 1.

not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁰

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted a May 23, 2012 report from Dr. Rosen. In its July 8, 2011 decision, the Board noted that, while Dr. Rosen discussed appellant's medical condition in a number of reports, he did not advise that appellant was totally disabled or discuss her ability to work. As such his opinion was insufficient to establish that the employee was totally disabled.¹¹ In his May 23, 2012 report, Dr. Rosen merely indicated that the employee would have been totally disabled for work for a period of six months after her January 25, 2002 surgery. OWCP paid appellant compensation for the period January 25, 2002 until the employee's death on February 3, 2002. As Dr. Rosen's May 23, 2012 report did not discuss whether appellant was disabled from her previous sedentary position as a secretary for the period beginning April 8, 1992 and continuing until her January 25, 2002 surgery, the May 23, 2012 report is irrelevant to the merit issue in this case.¹² Appellant therefore did not submit relevant and pertinent new evidence not previously considered by OWCP.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied her reconsideration request.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ *Supra* note 3.

¹² *Supra* note 7. Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA. *D.M.*, 59 ECAB 164 (2007). Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence. *Tammy L. Medley*, 55 ECAB 182 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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