

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

D.C., Appellant)

and)

**DEPARTMENT OF DEFENSE, JOINT TASK
FORCE NATIONAL CAPITAL REGION
MEDICAL COMMAND, Arlington, VA,
Employer**)

**Docket No. 13-192
Issued: March 25, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2012 appellant filed a timely appeal of June 1 and September 17, 2012 decisions of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a traumatic injury while in the performance of duty on September 23, 2011; 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 November 4, 2011 appellant, then a 59-year-old dental assistant, filed a traumatic injury claim alleging that she slipped and fell at work on September 23, 2011 due to a wet floor. In a November 10, 2011 job status note, Dr. Kate B. Deisseroth, a Board-certified orthopedic surgeon, indicated that appellant underwent left knee arthroscopy on November 7, 2011.

OWCP informed appellant in an April 25, 2012 letter that additional evidence was needed to establish her claim. It gave her 30 days to submit a report from a qualified physician explaining how the September 23, 2011 fall caused or contributed to a diagnosed condition.

In an April 12, 2012 report, Dr. Deisseroth detailed that appellant experienced left knee pain as early as 2004. A magnetic resonance imaging scan obtained in 2008 exhibited a meniscal tear and degenerative changes. Appellant underwent left knee arthroscopy in or around 2008. She underwent a second surgery on November 7, 2011 following the September 23, 2011 fall. Dr. Deisseroth advised that appellant was scheduled for left knee arthroplasty on April 17, 2012.²

By decision dated June 1, 2012, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that the accepted September 23, 2011 employment incident caused or contributed to a left knee condition.

Appellant filed a request for reconsideration on June 15, 2012 and submitted new evidence. In September 23, 2011 health records, Dr. Linda R. Holifield-Kennedy, an internist, related that appellant injured her left knee when she slipped and fell at work. On examination, she observed prepatellar swelling and tenderness to palpation. An x-ray confirmed degenerative changes, but did not show any evidence of fracture. Dr. Holifield-Kennedy diagnosed left knee contusion and recommended modified assignment.

By decision dated September 17, 2012, OWCP denied appellant's request for reconsideration on the grounds that she did not present new evidence from a qualified physician.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative and substantial evidence,³ including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.⁴ The employee must also

² Appellant subsequently filed multiple claims for compensation for the combined period April 17 to June 1, 2012.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁴ *R.C.*, 59 ECAB 427 (2008).

establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁶

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant did not establish that she sustained a traumatic injury while in the performance of duty on September 23, 2011. Although OWCP accepted that she slipped and fell at work on this day, the medical evidence did not sufficiently demonstrate that this employment incident caused or contributed to a diagnosed injury.

Dr. Deisseroth indicated in November 10, 2011 and April 12, 2012 records that appellant underwent left knee arthroscopy on November 7, 2011 after the September 23, 2011 fall. She added that appellant previously underwent left knee arthroscopy in or around 2008 on account of degenerative changes and a torn meniscus and would undergo left knee arthroplasty on April 17, 2012. Dr. Deisseroth, however, did not pathophysiologically explain how the September 23, 2011 fall caused or contributed to a left knee condition.⁸ The need for rationalized medical opinion evidence is particularly important because she specified a history of preexisting injury. In the absence of such evidence, appellant failed to discharge her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's 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

⁵ *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *T.H.*, 59 ECAB 388 (2008).

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Joan R. Donovan*, 54 ECAB 615, 621 (2003); *Ern Reynolds*, 45 ECAB 690, 696 (1994).

⁹ 5 U.S.C. § 8128(a).

relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration. The underlying issue of the June 1, 2012 merit decision denying her traumatic injury claim was whether the medical evidence sufficiently established that the accepted September 23, 2011 employment incident caused or contributed to a left knee condition. Appellant requested reconsideration and submitted September 23, 2011 health records from Dr. Holifield-Kennedy addressing causal relationship. These records constitute relevant and pertinent new evidence not previously considered by OWCP. However, OWCP erroneously determined that Dr. Holifield-Kennedy was not a qualified physician and denied the request. It was obligated to conduct a merit review of the claim when appellant submitted this evidence in support of her reconsideration request.¹² Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge her burden of proof.¹³ 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.¹⁴

The case shall be remanded for a merit review. After such further development as is deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not establish that she sustained a traumatic injury while in the performance of duty on September 23, 2011. The Board also finds that OWCP improperly denied appellant's request for reconsideration.

¹⁰ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

¹¹ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

¹² *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

¹³ *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁴ *Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2012 decision of the Office of Workers' Compensation Programs be affirmed. **IT IS FURTHER ORDERED THAT** the September 17, 2012 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: March 25, 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