

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

G.S., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Philadelphia, PA, Employer**

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**Docket No. 13-1297
Issued: November 8, 2013**

Appearances:
Robert Land, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 3, 2013 appellant, through counsel, filed a timely appeal from a November 6, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed from the last merit decision dated August 5, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the November 6, 2012 nonmerit decision.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

Counsel on appeal argued that OWCP erred in declining further merit review.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 1, 2002 appellant, a 47-year-old customer service representative, injured both feet, middle and lower back, head, shoulders, left knee and neck due to slipping on a puddle of water on a lunchroom floor. OWCP accepted the claim for left knee sprain and left knee medial meniscal tear. It authorized left knee arthroscopic surgery, which occurred on August 29, 2002. Appellant stopped work on the date of the injury. By letter dated December 17, 2003, OWCP placed her on the periodic rolls for temporary total disability.

In a January 18, 2007 report, Dr. Richard J. Mandel, a second opinion Board-certified orthopedic surgeon, reviewed the medical and factual evidence and conducted a physical examination. He opined that the July 1, 2002 employment injury caused a left knee medial meniscal tear, strain and sprain. The clinical examination revealed bilateral knee osteoarthritis. Dr. Mandel concluded that appellant's complaints were due to a natural progression of her degenerative knee condition based on the significant tenderness present over the lateral joint line and not over the medial joint line. He stated that, if there had been a permanent aggravation of her preexisting arthritis, there would have been evidence of increased medial degeneration and medial symptoms rather than in the lateral compartment. With respect to her back condition, Dr. Mandel found evidence of progressive lumbar spondylolysis, but no evidence of any relationship to the accepted employment injury. He also found no evidence of any neck, left shoulder or bilateral foot injury. Dr. Mandel found that appellant no longer had any residuals or disability due to the accepted employment injury. He opined that her ongoing complaints were due to her nonemployment-related multiple degenerative problems.

On March 15, 2007 OWCP issued a notice proposing to terminate appellant's compensation benefits on the grounds that she no longer had any residuals or disability due to her accepted July 1, 2002 employment injury. It found the January 18, 2007 report from Dr. Mandel constituted the weight of the medical evidence. Appellant did not respond.

By decision dated June 11, 2007, OWCP finalized the termination of appellant's compensation benefits effective July 8, 2007.²

On June 18, 2007 appellant requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on November 9, 2007.

By decision dated January 28, 2008, OWCP's hearing representative affirmed the June 11, 2007 decision terminating appellant's benefits.

On January 22, 2009 appellant's counsel requested reconsideration and submitted medical evidence. In an April 2, 2008 report, Dr. John L. Beight, a treating Board-certified orthopedic surgeon, attributed appellant's left knee pain to her employment injury. He opined that any knee replacement surgery would be due to the accepted employment injury. Dr. Beight related that appellant's meniscal tear had not healed and, therefore, knee replacement surgery was required.

² On June 19, 2007 appellant filed an election form opting to receive benefits from the Office of Personnel Management.

In a November 22, 2008 report, Dr. Joseph M. Rybicki, a treating osteopath, opined that appellant's condition since her employment injury was unchanged. Appellant continued to receive treatment for injuries sustained from the injury. Dr. Rybicki opined that appellant sustained neck and spine injuries and severe left knee arthritis as a result of the July 1, 2002 employment injury.

By decision dated April 29, 2009, OWCP denied modification of the January 28, 2008 decision.

On April 29, 2010 appellant's counsel requested reconsideration and submitted the following evidence in support of her request.

In an April 29, 2010 report, Dr. Rybicki noted that he had treated appellant since 2002 and that her condition, due to her employment injury, basically remained unchanged. He continued to treat her for her neck, spine and left knee injuries sustained as a result of the accepted employment injury. Dr. Rybicki also attributed appellant's severe left knee arthritis to the July 1, 2002 employment injury.

By decision dated May 11, 2010, OWCP denied modification of its prior decisions.

On May 13, 2011 appellant's counsel requested reconsideration and reiterated the argument that OWCP erred in relying upon the opinion of Dr. Mandel in terminating her benefits. He contended that the opinions of appellant's treating physicians should have been accorded determinative weight as they were more familiar with her medical condition.

In an April 28, 2011 surgical report, Dr. Beight noted a diagnosis of left knee degenerative joint disease and that a total left knee replacement had been performed.

In a June 10, 2011 report, Dr. Beight attributed appellant's left knee condition to her July 1, 2002 employment injury. He opined that her April 28, 2011 left knee replacement was also related to the accepted employment injury.

By decision dated August 5, 2011, OWCP denied modification of its prior decisions.

Subsequent to the August 5, 2011 decision, OWCP received a May 31, 2011 discharge summary noting a principal diagnosis of right knee degenerative joint disease. It noted that right knee total replacement surgery was performed on May 26, 2011.

In a letter dated August 3, 2012, appellant's counsel requested reconsideration and submitted medical evidence.

In a May 26, 2011 operative report, Dr. Beight noted a diagnosis of right knee degenerative joint disease and that total right knee replacement surgery had been performed.

By decision dated November 6, 2012, OWCP denied reconsideration without further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant must: (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 To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. Appellant's August 3, 2012 request for reconsideration did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by OWCP. The Board finds that appellant is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(3).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. In support of her request for reconsideration, she submitted a May 26, 2011 surgical report of a right knee total replacement and May 31, 2011 discharge summary noting a principal diagnosis of right knee degenerative joint disease. The treatment reports do not address the relevant issue of whether appellant had any continuing residuals or disability due to her accepted left knee sprain and meniscal tear. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁷

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *R.M.*, 59 ECAB 690 (2008); *D'Wayne Avila*, 57 ECAB 642 (2006).

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(3) and properly denied her August 3, 2012 request for reconsideration.⁸

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 6, 2012 is affirmed.

Issued: November 8, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

⁸ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *Candace A. Karkoff*, 56 ECAB 622 (2005) (when an application for reconsideration does not meet at least one of the three requirements enumerated under then section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).