

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

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**B.L., Appellant**

**and**

**SMITHSONIAN INSTITUTION,  
Washington, DC, Employer**

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**Docket No. 13-1673  
Issued: January 30, 2014**

*Appearances:*  
Richard A. Daniels, for the appellant  
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 July 3, 2013 appellant, through his representative, filed a timely appeal of a May 9, 2013 decision of the Office of Workers' Compensation Programs denying further merit review. Because over 180 days elapsed between the most recent merit decision of October 1, 2012, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's representative argued the merits of appellant's claim alleging that OWCP supplied physicians with leading questions, that the impartial medical examiner did not receive a statement of accepted facts, that there was no conflict at the time the impartial medical

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

examiner was designated and that his report therefore created a new conflict, and that appellant was entitled to a schedule award.

### **FACTUAL HISTORY**

On June 19, 2000 appellant, then a 47-year-old custodian, filed a traumatic injury claim alleging that on April 5, 2000 he sustained a right knee injury when his leg was crushed between a forklift and a medal cart. OWCP accepted his claim for right leg contusion.

Appellant underwent a magnetic resonance imaging (MRI) scan of his right knee on June 16, 2000 which demonstrated extensive bone bruises of the distal medial femoral condyle and proximal tibia, a tear in the anterior cruciate ligament and probable tear of the medial collateral ligament. OWCP accepted the additional condition of anterior cruciate ligament tear on September 20, 2000 as well as tear of the right lateral meniscus. It entered appellant on the periodic rolls on June 24, 2002.

Appellant underwent an MRI scan on May 21, 2002 which demonstrated osteochondritis in the proximal tibia. Dr. Maurice D. Cates, a Board-certified orthopedic surgeon, diagnosed osteoarthropathy of the right knee, but stated that appellant did not have an operative lesion.

On October 20, 2003 Dr. Cates stated that appellant was unable to work as a laborer and could perform sedentary work only. The employing establishment proposed to separate appellant from his position on December 5, 2003.

OWCP referred appellant for a second opinion evaluation with Dr. Robert Smith, a Board-certified orthopedic surgeon, on January 13, 2009. In a report dated January 30, 2009, Dr. Smith noted appellant's history of injury and found that he currently used a cane and hinged brace on his right knee. He found that appellant had full extension and 100 degrees of flexion. Dr. Smith found no instability and normal muscle strength with no atrophy. He opined that appellant's accepted conditions had resolved and that his current condition was osteoarthritis of the knee, which was not related to his employment injury. Dr. Smith stated that appellant could return to his regular work with no restrictions due to accepted work-related conditions. He noted that appellant's activities would be limited due to his knee osteoarthritis.

OWCP referred appellant for vocational rehabilitation services based on Dr. Smith's report. The employing establishment offered appellant a position as greeter effective November 9, 2009. In a letter dated December 8, 2009, OWCP informed him that the offered position was suitable work and allowed him 30 days to accept the position or offer his reasons for refusal. Appellant returned to work and OWCP closed his rehabilitation file on January 29, 2010. In a letter dated February 4, 2010, OWCP reduced his compensation benefits based on his reemployment.

OWCP referred appellant for a "referee examination" on March 4, 2010 with Dr. Sankara Kothakota, a Board-certified orthopedic surgeon. In a letter dated April 14, 2010, it proposed to suspend appellant's compensation due to his failure to report for the scheduled examination. Appellant did not respond and OWCP finalized the proposed suspension on May 17, 2010.

OWCP referred appellant for a second “referee examination” on March 4, 2011 with Dr. David Dorin, a Board-certified orthopedic surgeon. In a report dated March 25, 2011, Dr. Dorin reviewed the statement of accepted facts and the medical records. He noted that appellant’s contemporaneous x-rays did not show any evidence of acute fracture or dislocation. Dr. Dorin found no abnormality in appellant’s gait, no atrophy and no particular tenderness. He found that appellant had satisfactory strength against resistance and was able to extend his knee to zero with 100 degrees of flexion. Dr. Dorin stated that he did not detect any specific clinical abnormality on examination of appellant’s knee. He noted that x-rays currently demonstrated no structural abnormality other than mild narrowing of the joint space on the medial compartment, which was consistent with appellant’s age and independent of his April 5, 2000 employment injury. Dr. Dorin opined that appellant had reached maximum medical improvement and that his right knee in relation to the April 5, 2000 employment injury had healed and did not require further medical treatment. He found that appellant had no employment-related residuals and opined that he had no ratable impairment of his right knee with a normal clinical examination. Dr. Dorin applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>2</sup> (A.M.A., *Guides*) and found that the knee regional grid resulted in a class 0 and impairment rating of zero of the lower extremity as the soft tissue for contusion and strain of the knee was healed with no significant objective abnormalities on examination.

The medical adviser reviewed Dr. Dorin’s report on April 25, 2011 and found that appellant had no ratable impairment of his right knee under the A.M.A., *Guides*.

By decision dated May 4, 2011, OWCP denied appellant’s claim for a schedule award on the grounds that he had no ratable impairment.

In a letter dated May 11, 2011, OWCP proposed to terminate appellant’s medical benefits.

Appellant’s representative requested an oral hearing before an OWCP hearing representative on May 20, 2011.

By decision dated June 13, 2011, OWCP terminated appellant’s medical benefits effective that date finding that Dr. Dorin was entitled to the weight of the medical evidence as the impartial medical examiner. Appellant requested an oral hearing regarding this decision on June 15, 2011.

In support of his claim, appellant submitted reports dated August 4 and September 15, 2011 from Dr. William J. Launder, a Board-certified orthopedic surgeon, who found that appellant had full range of motion of his knee with moderate effusion and medial tenderness. Dr. Launder noted slight medial instability when appellant’s knee was flexed, crepitation with motion and one centimeter of calf atrophy on the right. He noted that appellant limped and diagnosed internal derangement, right knee. Dr. Launder recommended a right knee MRI scan.

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<sup>2</sup> 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

In a letter dated October 13, 2011, appellant requested that the oral hearing be changed to a review of the written record. By decision dated December 14, 2011, the hearing representative found that the weight of the medical evidence as represented by Dr. Dorin's impartial medical examination established that the injury-related condition had resolved and that appellant had no permanent impairment due to his accepted employment injuries.

Appellant requested reconsideration on January 31, 2012. Dr. Arthur Becan, an orthopedic surgeon, examined appellant on October 11, 2011 and stated that his right knee buckled in 2002 causing an Achilles rupture. He found mild effusion in the right knee, with medial joint line tenderness. Dr. Becan reported flexion and extension from 0 to 140 degrees. He diagnosed crush injury to the right knee, post-traumatic chondromalacia patella of the right knee, anterior cruciate ligament rupture, torn medial meniscus and consequential partial rupture of the right Achilles tendon as well as osteochondral dissecans of the right tibial plateau. Dr. Becan found right joint arthritis impairment of 9 percent and right Achilles rupture of 13 percent for right lower extremity impairment of 21 percent.

By decision dated October 1, 2012, OWCP denied modification of the December 14, 2011 decision finding that the weight of the medical opinion evidence rested with Dr. Dorin, as the impartial medical examiner.

Appellant requested reconsideration on November 29, 2012. He argued that Dr. Dorin was improperly designated as an impartial medical examiner as there was no conflict of medical opinion evidence regarding the extent of appellant's permanent impairment for schedule award purposes. Appellant argued that Dr. Dorin's report was not entitled to the special weight accorded by OWCP and the hearing representative.

By decision dated May 9, 2013, OWCP denied appellant's November 29, 2012 request for reconsideration. It noted that appellant's representative argued that there was an unresolved conflict of medical evidence regarding the extent of appellant's right knee injury and that Dr. Dorin's report was not entitled to the weight of the medical evidence. OWCP found that these arguments were not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

### **LEGAL PRECEDENT**

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>3</sup> Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but

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<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606.

does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.<sup>5</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.

OWCP's procedure manual provides that if a reconsideration decision is delayed beyond 90 days, the claimant's right to review of the original decision by the Board is abrogated. When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification rather than denying the application for review should be prepared.<sup>6</sup>

### ANALYSIS

The Board finds that OWCP's May 9, 2013 nonmerit decision is defective on two grounds. First, in support of his November 29, 2012 reconsideration request, appellant argued that Dr. Dorin was not an impartial medical examiner as defined by FECA and that therefore his report was not entitled to the special weight accorded by OWCP and the hearing representative in the June 13 and December 14, 2011 and October 1, 2012 decisions. OWCP did not address this relevant legal argument not previously considered by OWCP in the May 9, 2013 decision denying merit review. The Board finds that this legal argument was sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

The Board further finds that OWCP delayed over five months in issuing a decision on appellant's November 29, 2012 reconsideration request. This effectively precluded him from appealing OWCP's most recent merit decision of October 1, 2012 on his claim to the Board. Had OWCP acted within 90 days, appellant would have been able to seek review of OWCP's October 1, 2012 merit decision before the Board.<sup>7</sup>

### CONCLUSION

The Board finds that the case will be remanded to OWCP to issue an appropriate decision on the merits of the claim in order to preserve appellant's appeal rights and to address the relevant argument that there was no conflict of medical opinion evidence at the time Dr. Dorin was designated as impartial medical examiner.

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<sup>5</sup> *Id.* at § 10.608.

<sup>6</sup> *See* Federal (FECA) Procedure Manual, *supra* note 2, Chapter 2.1602.7(a) (December 2003).

<sup>7</sup> *S.L.*, Docket No. 12-734 (issued September 13, 2012); *C.L.*, Docket No. 10-1483 (issued May 12, 2011); *Geoma R. Munn*, 50 ECAB 242 (1999); *Debra E. Stoler*, 43 ECAB 561 (1992); *Carlos Tola*, 42 ECAB 337 (1991) (remanding cases for merit review where OWCP delayed issuance of reconsideration decisions).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 30, 2014  
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