



## ISSUE

The issue is whether OWCP properly denied appellant's request to reopen her claim for further merit review under 5 U.S.C. § 8128.

## FACTUAL HISTORY

On August 7, 2007 appellant, then a 36-year-old casual city carrier, filed a traumatic injury claim alleging that on June 30, 2006 she injured her left leg when she stepped into a hole delivering mail. She stopped work on June 30, 2006. OWCP accepted the claim for a left knee strain.<sup>3</sup> On September 15, 2006 appellant underwent a debridement of an anterior horn tear of the left medial meniscus and chondroplasty of the femoral trochlea. On September 8, 2008 she had a lateral release of the left knee and plica excision with debridement of scar tissue.

By decision dated June 25, 2008, OWCP found that appellant had not established that she was disabled from work beginning June 30, 2006 due to her accepted employment injury. On March 17, 2009 OWCP's hearing representative vacated the June 25, 2008 decision and remanded the case for OWCP to refer appellant for a second opinion examination to determine her exact diagnoses and the extent of disability from employment due to her work injury.

In a decision dated July 8, 2009, OWCP denied appellant's claim for disability compensation from June 30, 2006 to April 2, 2008. It found that the opinion of Dr. Harrison A. Latimer, a Board-certified orthopedic surgeon and OWCP referral physician, constituted the weight of the evidence and established that appellant sustained only a strain as a result of her work injury and that any period of disability lasted only around four weeks. On December 28, 2009 OWCP's hearing representative affirmed the July 8, 2009 decision. In decisions dated February 16, 2011 and April 5, 2012, OWCP denied modification of its finding that appellant had not established employment-related disability from June 30, 2006 to April 2, 2008.

On April 4, 2013 appellant, through her representative, requested reconsideration. Counsel argued that appellant had not been released to return to employment before her September 15, 2006 surgery. She described appellant's medical treatment and asserted that the newly submitted September 27, 2012 report from Dr. George A. Flowers, a Board-certified orthopedic surgeon, established that her disability was causally related to her employment injury.

In a report dated September 27, 2012, Dr. Flowers related that he treated appellant for injuries sustained in September 2006 when she stepped in a hole.<sup>4</sup> He noted that her work duties required significant walking and standing and found that she should not perform extensive walking due to her knee condition. Dr. Flowers indicated that the issue of whether appellant could perform her usual employment from June 2006 to April 2008 was "answered in my response to you in the previous numbered response."

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<sup>3</sup> In decisions dated August 14, 2007 and June 23, 2008, OWCP denied appellant's claim for continuation of pay as the injury was not reported on an approved form within 30 days of the injury.

<sup>4</sup> Dr. Flowers indicated that appellant's injury occurred in September 2006 rather than June 2006; however, this appears to be a typographical error.

By decision dated April 8, 2013, OWCP denied appellant's request for reconsideration as the evidence submitted was cumulative and insufficient to warrant reopening her case for further merit review under section 8128. It found that the April 4, 2014 letter from her attorney duplicated a prior reconsideration request dated February 15, 2012. OWCP further determined that Dr. Flowers' September 27, 2012 report was substantially similar to a prior report dated September 8, 2008.

On appeal, counsel describes the factual and medical history of the case and asserts that all of appellant's physicians found that her June 30, 2006 injury impeded her ability to walk or stand as required by the duties of her position. She argues that OWCP placed unwarranted weight on the opinion of the second opinion physician.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</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.<sup>9</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>11</sup>

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<sup>5</sup> *Supra* note 2. Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application."

<sup>6</sup> 20 C.F.R. § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>10</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>11</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

## ANALYSIS

OWCP issued a decision on April 5, 2012 denying modification of its determination that appellant had not submitted medical evidence sufficient to establish that she was disabled from June 30, 2006 to April 2, 2008. On April 4, 2013 appellant sought reconsideration of the April 5, 2012 decision. In an April 8, 2013 decision, OWCP denied her request for reconsideration after finding that the evidence and arguments submitted were cumulative in nature.

As noted above, the Board does not have jurisdiction over the April 5, 2012 decision. The issue presented on appeal 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. In her April 4, 2013 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument not previously considered. In a statement dated April 4, 2013, counsel argued that appellant had not been released to return to work by her physicians at the time of her September 15, 2006 surgery. Additionally, she summarized the medical evidence and asserted that the reports from appellant's attending physicians establish that she was disabled due to her work injury. However, counsel previously raised the identical arguments on February 15, 2012. Her arguments are thus repetitious of evidence already of record and considered by OWCP. Arguments which repeat or duplicate evidence already in the case record do not constitute a basis for reopening a case.<sup>12</sup>

A claimant may also be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. In a report dated September 27, 2012, Dr. Flowers discussed her history of an injury when she stepped in a hole. He referenced a previously submitted report in response to the question of whether appellant could perform her regular work duties from June 2006 to April 2008. Dr. Flowers did not directly address the relevant issue of whether she was disabled from June 2006 to April 2008 but instead referred to his findings in a prior report. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.<sup>13</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel argues the merits of the case. As noted above, the Board only has jurisdiction over the nonmerit decision and therefore is precluded from conducting a merit review.

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<sup>12</sup> See *C.N.*, Docket No. 08-1569 (issued December 9, 2008); *Richard Yadron*, 57 ECAB 207 (2005).

<sup>13</sup> See *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request to reopen her claim for further merit review under 5 U.S.C. § 8128.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2014  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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