

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

B.P., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Riley, KS, Employer**

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**Docket No. 14-1697
Issued: November 13, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 1, 2014 appellant, through his attorney, filed a timely appeal from a July 10, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed between the last merit decision of OWCP dated, February 4, 2013, to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On October 14, 2012 appellant, then a 35-year-old police officer, filed a traumatic injury claim alleging that he sustained a possible right knee sprain when he stepped in a hole while attempting to complete his security checks at work on that date.

Appellant submitted medical records that addressed his right knee conditions, medical treatment and work restrictions. In a November 12, 2012 report, Dr. Daniel T. Hinkin, an attending Board-certified orthopedic surgeon, provided a history that appellant injured his right knee when he stepped into a foot-deep hole at work on October 14, 2012. He also provided a history of appellant's medical treatment, social and family background. Dr. Hinkin listed findings on physical and x-ray examination. He diagnosed internal derangement, meniscus tear or fat pad impingement of the right knee. In a December 14, 2012 report, Dr. Hinkin noted appellant's worsening right knee symptoms and medical treatment. He provided an examination finding, diagnosed retropatellar tendon bursitis and listed appellant's work restrictions. In a separate report also dated December 14, 2012, Dr. Hinkin indicated that appellant received an injection for his right knee pain on that day.

In a December 3, 2012 right knee magnetic resonance imaging (MRI) scan report, Dr. Gregory J. Welle, a Board-certified radiologist, found small effusion, but no significant internal derangement. He also found fluid-distended deep infrapatellar bursa. Dr. Welle reported linear signal alteration in the infrapatellar fat space that was probably due to a past arthroscopy scar although appellant's surgical history was unknown.

In an October 23, 2012 letter, the employing establishment controverted appellant's claim contending that he was attempting to defraud the government and take additional time off work. It noted his prior claim under OWCP File No. xxxxxx2247 for an October 22, 2011 right knee injury and recent disciplinary actions taken against him for falsifying his time sheets and abusing leave.

By letter dated January 3, 2013, OWCP indicated that, when appellant's claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It advised that it had reopened the claim for consideration because he had not returned to full-time work. OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional factual and medical evidence and respond to its inquiries. It also requested that the employing establishment submit medical evidence if appellant was treated at its medical facility.

Appellant submitted medical records, including additional reports from Dr. Hinkin. In reports dated December 27, 2012 and January 10, 2013, Dr. Hinkin noted appellant's current right knee symptoms, provided examination findings and diagnosed persistent and recurrent right knee pain with fat pad fibrosis and mildly increased Q angle bilaterally which may have contributed to peripatellar pain. He referred appellant to physical therapy to treat the stated diagnosed conditions and mild maltracking in the right knee.

In a February 4, 2013 decision, OWCP denied appellant's claim. It found that the evidence did not establish that the October 14, 2012 incident occurred as alleged. OWCP also found that appellant did not submit any medical evidence containing a medical diagnosis in connection with the alleged injury or event.

By letter dated January 15, 2014, appellant, through his attorney, requested reconsideration. He resubmitted Dr. Hinkin's reports dated November 12 and December 14 and 27, 2012 and January 10, 2013 and Dr. Welle's December 3, 2013 MRI scan report.

In an October 14, 2012 hospital report, Dr. Captain Brian McGrath, an employing establishment osteopath, reported findings on physical examination and diagnosed internal derangement of the right knee. In an October 14, 2012 request for examination and treatment also dated October 14, 2012, he related appellant's account of hyperextending his right knee during the performance of his police duties on October 14, 2012. Dr. Captain McGrath reiterated the diagnosis of internal derangement of the right knee and also diagnosed right knee sprain. He indicated with an affirmative mark that the diagnosed conditions were caused or aggravated by the described employment activity.

In a hospital report dated October 14, 2012, a registered nurse whose signature is illegible related appellant's account of hyperextending his right knee when he stepped in a hole on that day. The nurse provided examination findings and noted the treatment of his right knee.

An undated hospital record containing an illegible signature addressed a treatment plan for appellant's right knee pain.

In an October 14, 2012 right knee x-ray report, Dr. Julie A. Farrell, a Board-certified radiologist, found mild osteoarthritis.

In notes dated December 10, 2012 to February 4, 2013, Dr. Hinkin indicated that appellant did not attend his scheduled appointments during this period. In a January 2, 2013 report, he provided a history that appellant reinjured his knee at work on December 18, 2012. Dr. Hinkin evaluated him on December 27, 2012 and reiterated the diagnoses of right knee pain with fat pad fibrosis.

In a July 10, 2014 decision, OWCP denied merit review of appellant's claim on the grounds that the November 12, 2012 report was duplicative. It stated that he did not submit any additional factual evidence along with his request for reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of the FECA,³ OWCP's regulation 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

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

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 Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

On January 15, 2014 appellant disagreed with OWCP's February 4, 2013 decision, denying his traumatic injury claim on the grounds that he had failed to establish fact of injury, indicating that he had not submitted evidence to support that the claimed injury occurred on October 14, 2012 as described and he had not submitted any medical evidence to support his claim. He requested reconsideration. The underlying issue on reconsideration is factual in nature.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, he did not advance a relevant legal argument not previously considered.

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. Dr. Captain McGrath's report and request for examination and treatment dated October 14, 2012 found that appellant had internal derangement and sprain of the right knee caused or aggravated by the October 14, 2012 incident. This evidence, while new, is not relevant to the issue of whether fact of injury has been established. Dr. Captain McGrath merely listed a history of appellant hyperextending his right knee while performing his work duties on October 14, 2012, without implicating the work factors believed to have caused or contributed to his right knee conditions. The submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.⁷ The Board finds, therefore, that Dr. Captain McGrath's report is not relevant and pertinent and thus, insufficient to reopen appellant's claim for a merit review.

Dr. Hinkin's notes dated December 10, 2012 to February 4, 2013 and report dated January 2, 2013 and Dr. Farrell's October 14, 2012 x-ray report do not address either the factual or medical component of appellant's claim. Dr. Hinkin related a history that appellant reinjured his knee at work on December 18, 2012. He did not implicate the work factors alleged to have caused appellant's injury on October 14, 2012. Further, neither Dr. Hinkin nor Dr. Farrell provided an opinion as to the causal relationship of appellant's right knee pain with fat pad

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁷ *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

fibrosis and mild osteoarthritis. Thus, the Board finds that the physicians' notes and reports are not relevant and pertinent and thus, insufficient to reopen appellant's claim for a merit review.⁸

Appellant submitted duplicate copies of Dr. Hinkin's November 12 and December 14 and 27, 2012 and January 10, 2013 reports, and Dr. Welle's December 3, 2013 MRI scan report. This evidence was previously of record and considered by OWCP in its February 4, 2013 decision. The Board has held that evidence which repeats or duplicates evidence already in the case record is insufficient to warrant reopening a claim for merit review.⁹ The Board finds, therefore, that the reports of Dr. Hinkin and Dr. Welle are insufficient to reopen appellant's claim for a merit review.

The October 14, 2012 report from a registered nurse whose signature is illegible related appellant's account of hyperextending his right knee when he stepped in a hole on that day, listed examination findings and noted the treatment of his right knee. The Board notes that a nurse is not defined as a physician under FECA.¹⁰ Therefore, the nurse's report does not constitute probative medical evidence or a basis for reopening appellant's claim for merit review.

The undated hospital record containing an illegible signature cannot be identified as having been prepared by a physician and therefore does not constitute competent medical opinion evidence and provides no grounds for reopening appellant's case for merit review.¹¹

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 by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ *Id.*

⁹ *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

¹⁰ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

¹¹ *See R.M.*, *supra* note 7; *Merton J. Sills*, 39 ECAB 572 (1988).

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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