



On appeal, appellant's representative contends that appellant has submitted medical evidence sufficient to require further review of the case on the merits.

### **FACTUAL HISTORY**

On December 15, 2010 appellant, then a 55-year-old letter carrier, filed an occupational disease claim alleging that she had problems with her low back and right knee due to repetitive work at the employing establishment. She specifically noted that she sustained a cruciate ligament tear, tear of the median meniscus of the right knee, and lumbar disc herniations. On March 18, 2011 OWCP accepted appellant's claim for the following conditions: old disruption of right anterior cruciate ligament; tear of median meniscus of right knee; sprain of medial collateral ligament of the right knee; localized primary osteoarthritis of the lower right leg; displacement of lumbar intervertebral disc without myelopathy; acquired spondylolisthesis; and degeneration of lumbar or lumbosacral intervertebral disc.

On July 26, 2011 appellant filed a claim for compensation commencing July 6, 2011. On October 31, 2011 she underwent a right total knee arthroplasty. On November 4, 2011 appellant underwent a right total knee replacement. OWCP paid wage-loss compensation commencing October 31, 2011.

On June 29, 2010 appellant began treatment from Dr. Edward Mittleman, a family practitioner, and his associates, with regard to her employment injuries. In a September 28, 2011 report, Dr. Mittleman noted that, effective July 5, 2011, his associate, Dr. Serge Obukhoff, a Board-certified neurosurgeon, placed appellant on temporary total disability due to the severity of her injury, which included diminished sensation from Achilles tendons bilaterally. He also noted that reflexes were reduced to zero as well as diminished sensation on the left side in L5-S1 distribution. Dr. Mittleman noted that Dr. Obukhoff placed appellant on temporary total disability specifically due to the danger of her falling. He noted that appellant was further placed on temporary total disability by this office on August 16, 2011 and continued as of September 15, 2011. Dr. Mittleman indicated that he enclosed a copy of Dr. Obukhoff's report.<sup>2</sup>

By decision dated October 13, 2011, OWCP denied appellant's claim for disability compensation for the period July 16 through September 23, 2011. By decision dated February 1, 2012, it denied modification of the October 13, 2011 decision.

On September 5, 2012 appellant requested reconsideration of OWCP's February 1, 2012 decision. At this time, she submitted Dr. Obukhoff's July 8, 2011 report, the report that was previously referenced by Dr. Mittleman. As properly noted by Dr. Mittleman, Dr. Obukhoff stated that appellant was unable to work because of severe back pain syndrome and danger to herself of falling. He listed factors of disability as: diminished sensation from Achilles tendons

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<sup>2</sup> The Board notes that the record does not include a July 5, 2011 report by Dr. Obukhoff and that no report by Dr. Obukhoff was submitted with Dr. Mittleman's September 28, 2011 report. Although OWCP refers to Dr. Obukhoff's July 8, 2011 report in the October 13, 2011 decision, the report does not appear in the record as of the date of that decision. Dr. Obukhoff's July 8, 2011 report, which has findings consistent with Dr. Mittleman's September 28, 2011 report and OWCP's October 13, 2011 decision, was first received into the record on September 11, 2012.

bilaterally with reflexes reduced to zero; diminished sensation on the left side in L5-S1 distribution; and a magnetic resonance imaging of the lumbar spine that is consistent with L4-5 lumbar canal stenosis, spondylolisthesis grade 1, facet arthropathy, and foraminal stenosis. Dr. Obukhoff noted that appellant cannot walk without a cane and cannot extend the lumbosacral region due to severe pain syndrome. He listed diagnoses of: (1) lumbar multiple disc herniations; (2) anterolisthesis L4 on L5 with pseudodisc herniation; and (3) lumbar disc desiccation.

On October 10, 2012 appellant filed another request for reconsideration. In support of this request, she filed an October 10, 2012 report wherein Dr. Hosea Brown, III, a Board-certified internist and an associate of Dr. Mittleman, indicated that appellant was ambulating with a cane at the time Dr. Obukhoff took her off work due to objective findings of decreased diminished sensation from the Achilles tendons bilaterally. Dr. Brown noted that appellant's ability to stand, walk, and drive were all impaired due to diminished sensation and reflexes in the lower extremities. He noted that it was incorrect to state that she had been taken off of work for pain. Dr. Brown opined that diminished sensation in the lower extremities coupled with appellant's severe degenerative arthritis of the right knee rendered her temporarily totally disabled for the period July 16 through September 15, 2011.

By decision dated December 6, 2012, OWCP determined that the evidence was insufficient to modify its prior decision.

On November 14, 2013 appellant requested reconsideration. In support of her reconsideration request, she submitted a November 4, 2013 report by Dr. Mittleman, entitled "Reconsideration of Denial of Compensation Benefits." Dr. Mittleman stated that there appeared to be a gross misunderstanding of the findings by Dr. Obukhoff in his July 8, 2011 examination concerning the Achilles tendons. He noted that, if the Achilles reflex test response is not normal, it is an indication that there is pathology in the S1 spinal nerve. Dr. Mittleman explained that, on his examination, Dr. Obukhoff noted a deep diminished sensation of appellant's Achilles tendons bilaterally (the Achilles tendons are innervated by the S1 spinal nerve). He noted that the Achilles tendon was intact, but the innervation from the spinal nerve is causing interference with the ability for the Achilles tendon to flex properly. Accordingly, it is the pathology within the lumbar axial spinal nerve system that is pathological not the Achilles tendons. Dr. Mittleman discussed the physical findings noted by Dr. Obukhoff, and opined that considering the severity of appellant's physical findings, Dr. Obukhoff found that she should continue working prior to her surgery, she was in danger of falling thereby producing additional pathology as well as experiencing severe back pain syndrome.

In a decision dated December 4, 2013, OWCP determined that appellant was not entitled to merit review of the February 1, 2012 decision because her request for reconsideration was untimely filed and did not show clear evidence of error. It further determined that she was not entitled to merit review of the December 6, 2012 decision because she had not shown that a merit review was required under the standard for timely applications for review.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> OWCP's regulations provide that the evidence or argument submitted by 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>4</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>5</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>6</sup>

## ANALYSIS

OWCP denied appellant's claim for compensation for the period July 16 through September 23, 2011 and continuing. The last merit decision to review this issue was OWCP's December 6, 2012 decision. On December 4, 2013 OWCP issued a nonmerit decision wherein it denied appellant's request for reconsideration.<sup>7</sup> In this appeal, the Board's jurisdiction is restricted to reviewing OWCP's decision denying reconsideration issued on December 4, 2013. The Board does not have jurisdiction over the merits of the claim.<sup>8</sup>

In support of her request for reconsideration, appellant submitted a November 4, 2013 report by Dr. Mittleman, wherein he provided further discussion of her claim, and in particular, provided further explanation with regard to her Achilles tendon and their impact on her disability prior to her surgery. Dr. Mittleman stated in his November 4, 2013 report that Dr. Obukhoff noted a deep diminished sensation of appellant's Achilles tendons bilaterally and noted that while the Achilles tendon was intact, the innervation from the spinal nerve was causing interference with the ability for the Achilles tendon to flex properly, and that accordingly the pathology within the lumbar axial spinal nerve system was pathological and not the Achilles tendons. He discussed the physical findings noted by Dr. Obukhoff and noted that Dr. Obukhoff found that, should appellant continue working prior to her surgery, she was in danger of falling

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<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he 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).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> In its December 4, 2013 decision, OWCP indicated that appellant was not entitled to a merit review of the February 1, 2012 decision because her request was filed more than one year after the last merit decision and the record did not show that she had not established clear evidence of error. Appellant's request for reconsideration of the February 1, 2012 merit decision was dated September 5, 2012, and was accordingly timely filed. However, OWCP reviewed all the evidence submitted subsequent to the December 6, 2012 decision in its December 4, 2013 decision, so the discussion of clear evidence of error in the December 4, 2013 decision is harmless error.

<sup>8</sup> 20 C.F.R. § 501.3(e).

and thereby producing additional pathology as well as experiencing severe back pain syndrome. Dr. Brown also previously discussed Dr. Obukhoff's July 8, 2011 report in his October 10, 2012 report and noted that Dr. Obukhoff took appellant off work due to objective findings of diminished sensation from the Achilles tendons bilaterally. Dr. Mittelman's report is repetitive of prior reports in the record, including Dr. Obukhoff's July 8, 2011 report, Dr. Mittleman's September 28, 2011 report, and Dr. Brown's October 10, 2012 report. He discusses Dr. Obukhoff's July 8, 2011 report extensively in both his September 28, 2011 report and in his more recent report dated November 4, 2013. Dr. Obukhoff clearly noted diminished sensation from Achilles tendons in his September 28, 2011 report, and although Dr. Mittleman may elaborate on his prior explanation in his November 4, 2013 report when he notes that the innervation from the spinal nerve was causing interference with the ability of the Achilles tendon to properly flex, his explanation does not constitute pertinent new and relevant evidence as it does not provide any pertinent new medical information. The Board has found that evidence which is repetitive, duplicative, or cumulative in nature is insufficient to warrant reopening a claim for merit review.<sup>9</sup>

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, has not advanced a relevant legal argument not previously considered by OWCP, and has not submitted relevant and pertinent new evidence not previously considered by OWCP. Accordingly, the Board finds that she did not meet any of the necessary requirements and is not entitled to further merit review.<sup>10</sup>

### **CONCLUSION**

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

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<sup>9</sup> *J.B.*, Docket No. 14-1164 (issued November 20, 2014); *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>10</sup> *See L.H.*, 59 ECAB 253 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 4, 2013 is affirmed.

Issued: February 18, 2015  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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