

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

G.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Highland, IN, Employer**

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**Docket No. 15-1175
Issued: September 28, 2015**

Appearances:

*Joseph E. Allman, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 29, 2015 appellant, through counsel, filed a timely appeal from a November 3, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the filing of this appeal and the last merit decision issued on August 2, 2013, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On February 15, 2013 appellant, then a 55-year-old mail carrier, filed a recurrence claim (Form CA-2a) alleging that he sustained a recurrence of disability on January 30, 2013.³ He stated that he experienced a right knee condition due to walking, twisting, and repetitive stair climbing. Appellant stopped work on January 30, 2013.

In a March 14, 2013 letter, OWCP advised appellant that his claim was being developed as a new occupational disease claim. It further informed him to provide a medical report containing a physician's opinion supported by a medical explanation as to how work factors caused or aggravated a diagnosed condition.

A diagnostic report reflects that x-rays were performed on appellant's right knee and oblique on February 26, 2011. Dr. Shodhan Patel, a Board-certified radiologist, related that appellant presented with pain along the lateral aspect of his right knee. X-rays revealed mild loss of joint space involving the right knee joint and patellofemoral joint. Associated small joint effusion was observed. On January 11, 2013 Dr. Donald Anderson, Board-certified in nuclear medicine and diagnostic radiology, recorded moderate degenerate changes at the medial compartment joint space. He observed no fracture, dislocation, or bone destruction.

In a May 11, 2011 medical report, Dr. Judson Wood Jr., a Board-certified orthopedic surgeon, reported that appellant presented post arthroscopy. He noted that appellant continued to suffer recurrent effusions and advised him of the risk of future effusions. Dr. Wood, in a December 21, 2011 attending physician's report (Form CA-20), noted that appellant suffered degenerative joint disease and checked a box "yes" to indicate that the condition was caused or aggravated by employment.

In a February 20, 2013 report, Dr. Shailesh Bhatt, a Board-certified diagnostic radiologist, advised that x-rays of appellant's knees revealed osteoarthritic changes of both knees with significant narrowing in the medial joint compartment of the right knee.

In an April 5, 2013 attending physician's report (Form CA-20), Dr. Wood related that appellant suffered right knee pain and swelling and referenced the right knee arthroscopy. He diagnosed degenerative joint disease and checked a box "yes" to indicate that the condition was caused or aggravated by his employment.

By decision dated April 18, 2013, OWCP denied appellant's claim finding that the evidence was insufficient to establish that the events occurred as alleged.

Appellant requested reconsideration on May 13, 2013. In June 27, 2012 progress notes, Dr. Wood advised that appellant was status post arthroscopic partial medial meniscectomy on his right knee. Examination revealed moderate size effusion and joint line tenderness. Dr. Wood diagnosed right knee pain, chronic effusion, and early degenerative changes. He cleared appellant for duty.

³ Appellant claimed that the original injury had occurred on February 18, 2011. The Board does not have access to the prior claim.

Progress notes from February 20, 2013 indicated that Dr. Wood had discussed total knee replacement surgery with appellant. Upon examination, he observed mild varus deformity joint line tenderness, especially medial to the patellofemoral crepitus. X-rays revealed significant degenerative joint disease. Dr. Wood indicated his concern that appellant would have difficulty returning to work postsurgery.

Appellant, in an April 21, 2013 statement, described his duties as ascending and descending stairs and various terrains, standing, kneeling, twisting, and carrying mail. He alleged that performing these duties 40 hours per week for 20 years placed “constant wear [and] tear and pressure” on his knees and joints.

In a May 3, 2013 report, Dr. Wood noted treating appellant’s right knee since March 2011. He advised that appellant had arthroscopic surgery with a partial medial meniscectomy on his right knee. Dr. Wood related that appellant returned to work but developed significant pain and discomfort in the knee. He opined that the walking, twisting, and standing associated with appellant’s work contributed to his degenerative joint disease. Dr. Wood diagnosed severe degenerative joint disease and indicated that this would necessitate a total knee replacement in the near future. He attributed appellant’s “line of work” to his diagnosis.

In a July 10, 2013 statement, appellant declared that he had stopped working on May 28, 2013. He further indicated frustration that his claim was not developed as a recurrence.

By decision dated August 2, 2013, OWCP reviewed the merits of appellant’s claim. It modified its prior decision to find that the factual component of fact of injury had been established. However, OWCP denied appellant’s claim finding that the medical evidence was insufficient to establish causal relationship.

In a February 19, 2013 duty status report, Dr. Wood diagnosed right knee degenerative joint disease and provided that appellant could return to light-duty work on the same date.⁴

On July 31, 2014 appellant, through counsel, filed a request for reconsideration. Appellant’s counsel contended that Dr. Wood “clearly explained his unequivocal opinion that [appellant’s] accepted conditions and total knee replacement surgery were necessitated by his work as a mail carrier.”

In a November 3, 2014 decision, OWCP denied appellant’s request finding that appellant did not present pertinent new evidence warranting further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP 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

⁴ The Board notes that OWCP also received copies of documents that were originally submitted prior to the August 2, 2013 merit decision. This included a resubmission of Dr. Wood’s April 5 and May 3, 2013 reports.

considered by OWCP.⁵ Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.⁶

ANALYSIS

On August 2, 2013 OWCP denied appellant's claim, finding that he had failed to establish that his claimed right knee condition was causally related to his accepted work duties. Appellant's counsel timely requested reconsideration and submitted evidence and argument. OWCP denied the request on November 3, 2014, finding that appellant did not present pertinent new evidence warranting further merit review.

The Board finds that OWCP correctly denied appellant's reconsideration request. The issue on appeal is whether appellant established that his work duties caused or contributed to his claimed condition and this is a medical question. After the merit decision of August 2, 2013, appellant submitted a February 19, 2013 duty status report by Dr. Wood which diagnosed degenerative joint disease. This document was not previously considered by OWCP but it does not address causal relationship.⁷ Other medical evidence submitted by appellant on reconsideration was previously of record.⁸ Accordingly, the Board finds that this evidence is insufficient to require OWCP to reopen the claim for merit review.

The Board further finds that appellant's request for reconsideration did not advance a relevant legal argument, or demonstrate that OWCP erroneously applied a specific point of law. In a statement accompanying the reconsideration request, appellant's counsel maintained that various medical reports from Dr. Wood established causal relationship. While appellant's counsel's statement does not appear previously in the record and is, by definition, new, it is not a legal argument. Rather, he contends that OWCP had not properly weighed the medical evidence. The Board notes, however, that OWCP had previously considered Dr. Wood's reports and found this evidence to be insufficient to establish causal relationship.⁹

On appeal, appellant's counsel contends that OWCP erred because it did not previously have his legal arguments. He also contends that OWCP in fact erroneously applied or interpreted a point of law because in its final merit decision it disregarded Dr. Woods' opinion. For counsel's arguments to trigger a merit review, they must show that OWCP erroneously applied

⁵ 20 C.F.R. § 10.606(b)(3); *see J.M.*, Docket No. 09-218 (issued July 24, 2009).

⁶ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁷ *See Johnnie B. Causey*, 57 ECAB 359 (2006) (the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim).

⁸ *J.P.*, 58 ECAB 289 (2007) (evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

⁹ *See id.* *See also Y.S.*, Docket No. 08-440 (issued March 16, 2009) (on reconsideration, appellant asserted that the medical evidence was sufficient to require reopening of the claim but the Board found that these assertions were not relevant to the underlying medical issue which could only be resolved through the submission of new relevant medical evidence).

or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. The Board finds that appellant's assertions in his reconsideration request reargues previously considered evidence. Counsel's mere allegation that OWCP did not properly weigh the evidence from Dr. Woods does not establish that appellant is entitled to a merit review.¹⁰

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) without further merit review.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁰ See *id.*