

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

K.P., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Memphis, TN, Employer**

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**Docket No. 16-0185
Issued: April 6, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 10, 2015 appellant timely appealed an August 20, 2015 merit decision and an October 19, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established right knee arthritis causally related to factors of his federal employment; and (2) whether OWCP properly denied reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 58-year-old retired motor vehicle operator, filed an occupational disease claim (Form CA-2) for right knee arthritis, which he alleges arose on or about April 29, 2015.

¹ 5 U.S.C. § 8101 *et seq.*

He previously injured his left lower extremity in the performance of duty on July 3, 1992. Appellant worked as a welder at the time of his first injury. OWCP accepted his 1992 injury for left knee sprain (OWCP File No. xxxxxx701).² Appellant also has an accepted claim for left knee bursitis, which arose on or about September 26, 2001 (OWCP File No. xxxxxx599).³ He retired from the employing establishment effective April 1, 2014. Appellant attributed his current right knee complaints to operating semi-trailer trucks with manual and automatic transmissions and using his legs to climb in and out of vehicles. OWCP combined his three lower extremity injuries and designated the July 3, 1992 traumatic injury claim (OWCP File No. xxxxxx701) as the master file.

In an April 29, 2015 report, Dr. John W. Ellis, a Board-certified family practitioner, diagnosed left knee lateral collateral ligament sprain and bilateral knee traumatic arthritis. He noted that appellant initially injured his left knee in a July 3, 1992 work-related fall. Dr. Ellis described it as an acute injury that strained the ligaments of appellant's left knee. He noted that appellant continued to have left knee instability since his 1992 injury. Dr. Ellis further noted that the laxity of the ligaments caused abnormal biomechanical stresses on the left knee, which injured the cartilage, caused chondromalacia, and ultimately resulted in traumatic arthritis of the bone in the left knee. Additionally, he indicated that increased instability of the left knee caused abnormal stresses on appellant's right knee, which resulted in consequential traumatic arthritis in the right knee. Dr. Ellis also noted that appellant continued working until April 1, 2014 as a truck driver, which required him to get in and out of large semi-trucks. He explained that this would have caused greater strains on the right knee and made it more prone to developing the right knee arthritis and chondromalacia found on the current examination.

Dr. Ellis indicated that it would be medically reasonable for appellant's right knee to be a consequential injury to his left knee. However, he noted that the right knee was also injured as a result of appellant's heavy workload, especially getting out of trucks, which caused traumatic arthritis. Dr. Ellis explained that appellant was more prone to developing this condition in the left knee, but getting in and out of trucks and sometimes unloading trucks also contributed to the traumatic arthritis in his right knee.

In a July 29, 2015 statement, the employing establishment indicated that beginning in September 2011, appellant had a modified assignment due to a previous hand/wrist injury. His duties involved picking up parts and supplies. According to the employing establishment, appellant would drive a pickup or a stake body truck twice a week to get supplies. He reportedly did not have to climb onto the back of the truck. The employing establishment further indicated that appellant's supervisors were aware of issues he had with his back and did not require him to do any unnecessary climbing. Appellant's supervisors reportedly encouraged him to take extra breaks and rest stops when driving long distances. Appellant did not climb ladders while in this modified position. Lastly, the employing establishment indicated that getting in and out of

² Appellant ultimately resumed his regular duties as a welder and was discharged from treatment on June 10, 1993. Follow-up treatment notes from May 15, 1995 indicated that his then-current left knee physical examination was "completely normal." Appellant's x-rays were similarly "normal."

³ Dr. Riley Jones, a Board-certified orthopedic surgeon, released appellant to resume his regular duties, effective June 14, 2002.

vehicles would have been appellant's only physical requirement.⁴ When he was not driving, appellant answered the telephone and filed/organized papers.

The employing establishment challenged appellant's claim based on causal relationship. It argued that his right knee arthritis could be age related. The employing establishment also surmised that appellant could have injured his right knee since his April 2014 retirement.

In an August 20, 2015 decision, OWCP denied appellant's claim based on his failure to establish causal relationship. It found that Dr. Ellis' opinion was insufficient to establish either a consequential injury or a separate occupational disease.

Appellant timely requested reconsideration by letter dated September 21, 2015 and received September 25, 2015. He took issue with the employing establishment's characterization of his former duties as a motor vehicle operator. Appellant also submitted a statement from a retired supervisor who described the types of vehicles appellant operated between 2005 and 2007.

By decision dated October 19, 2015, OWCP denied appellant's request for reconsideration without a merit review.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA has the burden to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁵

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁶

⁴ When operating a pickup, appellant had to step approximately 10 to 12 inches from the ground to enter the vehicle. Accessing the stake body truck's cabin was a two-step process. The initial step from the ground was approximately 15 inches, followed by a second step of approximately 8 inches to get inside the truck.

⁵ 20 C.F.R. § 10.115(e), (f) (2014); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

⁶ *Victor J. Woodhams, id.*

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional misconduct.⁷ Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁸

ANALYSIS -- ISSUE 1

Dr. Ellis opined that appellant's right knee arthritis was a consequence of his 1992 employment-related left knee injury, as well as a result of his subsequent duties as a truck driver. With respect to the consequential injury, he noted that appellant had left knee instability since his 1992 injury, which caused abnormal stress on the right knee resulting in arthritis. Prior to his own April 29, 2015 examination, the most recent left knee medical evidence Dr. Ellis reviewed was a May 15, 1995 treatment record, which indicated that appellant's x-rays were "normal" and his left knee physical examination was "completely normal." This particular evidence calls into question Dr. Ellis' opinion, as the physician did not identify any other medical evidence to support his assertion that appellant had ongoing left knee instability since his July 3, 1992 injury.

Dr. Ellis' finding that appellant's right knee arthritis was related to his duties as a truck driver is similarly deficient. He indicated that getting in and out of large semi-trucks would have placed greater strain on appellant's right knee making it more prone to developing arthritis and chondromalacia. Dr. Ellis further indicated that unloading trucks also contributed to appellant's right knee arthritis. Although he exhibited some familiarity with appellant's duties as a truck driver, Dr. Ellis appears to have been unaware of appellant's modified assignment beginning in September 2011. The employing establishment indicated that appellant drove twice a week, and operated a pickup or a stake body truck.

A physician's opinion on causal relationship must be based on a complete factual and medical background.⁹ In this instance, Dr. Ellis did not identify any evidence of ongoing left knee ligament laxity and/or instability, and he was not aware of appellant's modified assignment employment duties. Accordingly, the Board finds that the medical evidence of record fails to establish that appellant's claimed right knee arthritis is employment related.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁰ OWCP has discretionary authority in this regard and has imposed certain

⁷ *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* 10-1 (2006).

⁸ *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

⁹ *Victor J. Woodhams*, *supra* note 5.

¹⁰ This section provides in pertinent part: "[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).

limitations in exercising its authority.¹¹ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹² A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹³ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

OWCP received appellant's September 21, 2015 request for reconsideration on September 25, 2015. Appellant submitted the appeal request form that accompanied the August 20, merit decision, as well as a brief statement challenging the employing establishment's description of his duties as a motor vehicle operator. He believed that the employing establishment omitted important details regarding his duties prior to September 2011. The Board finds that appellant's September 21, 2015 request for reconsideration neither alleged, nor demonstrated, that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. Accordingly, he is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).¹⁵

Appellant also failed to submit any "relevant and pertinent new evidence" with his September 21, 2015 request for reconsideration. OWCP denied his claim for failing to establish causal relationship, which is a medical issue that generally requires rationalized medical opinion evidence.¹⁶ Appellant did not submit any new medical evidence on reconsideration. Although the supervisor's statement regarding appellant's duties is new to the record, it is not relevant and pertinent to the issue on reconsideration. Because appellant did not provide any "relevant and pertinent new evidence," he is not entitled to a review of the merits based on the third

¹¹ 20 C.F.R. § 10.607.

¹² *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of the OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹³ *Id.* at § 10.606(b)(3).

¹⁴ *Id.* at §§ 10.607(b), 10.608(b).

¹⁵ *Id.* at § 10.606(b)(3)(i) and (ii).

¹⁶ *Robert G. Morris, supra* note 5.

requirement under section 10.606(b)(3).¹⁷ Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

Appellant failed to establish right knee arthritis causally related to factors of his federal employment. The Board further finds that OWCP properly denied his September 21, 2015 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 19 and August 20, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 6, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁷ 20 C.F.R. § 10.606(b)(3)(iii).