



his federal employment. On the claim form he reported that he performed work while on his knees and this had contributed to his knee condition. Appellant submitted a February 12, 2014 statement that described his work activity as requiring a kneeling position for 75 percent of his work hours. He reported that the kneeling position was required for job duties that included deck plate work, tank work, or grinding deck surfaces. Appellant also noted that he accessed work areas through ladders and gangways, which had contributed to a knee condition.

OWCP, by letters dated March 19, 2014, requested that additional evidence from appellant and the employing establishment be submitted within 30 days. The record contains a March 5, 2014 letter from a supervisor indicating that the supervisor did not concur with appellant's allegations. The supervisor reported that appellant had been on work restrictions since June 11, 2013 that had restricted him from grinding or dust producing activities. In a letter dated March 28, 2014, an employee of the employing establishment's occupational safety office indicated that his office did not concur with the accuracy of appellant's claim. The safety officer reported that a review of appellant's work history showed that the alleged conditions did not occur at the employing establishment. The safety officer reported that there was an ergonomics program that, provided guidance regarding work equipment, there were ergonomic training programs and employees are notified of safety regulations.

As to medical evidence, the record includes a report dated April 10, 2014 from Dr. Arthur Waddell, a Board-certified orthopedic surgeon. Dr. Waddell diagnosed left knee medial and lateral meniscus tears, and left knee popliteal cyst. He opined that the diagnoses were the result of repetitive work activities. In a form report (Form CA-20) dated July 24, 2014, Dr. Waddell diagnosed left knee internal derangement and reported that appellant was totally disabled from January 7 to August 7, 2014. On August 8, 2014 appellant, through counsel, submitted copies of training certificates and photographs of employees working in a kneeling position.

By decision dated October 1, 2014, OWCP denied the claim for compensation. It found that the factual element of the claim was not established. According to OWCP, appellant's description of job tasks in a kneeling position was inconsistent with evidence from the employing establishment regarding the frequency of such activity. OWCP found that the factual evidence did not establish that the employment incidents occurred as alleged. In addition, it found that the medical evidence was of diminished probative value.

On January 28, 2015 appellant, through counsel, requested reconsideration. Counsel indicated that a December 30, 2014 report from Dr. Waddell had been submitted. In this report, Dr. Waddell reported that appellant had a 1994 left knee arthroscopic surgery, but was asymptomatic until January 7, 2014, when he had pain and swelling as a result of repetitive work activity. He indicated that appellant had undergone additional left knee arthroscopic surgery, and the findings were the result of his injury on January 7, 2014. Appellant submitted additional reports from Dr. Waddell, including an attending physician's report (Form CA-20) dated January 13, 2015 indicating that appellant continued to be totally disabled.

Appellant also submitted an April 13, 2015 report from Dr. Naveen Akkina, a Board-certified pulmonologist. Dr. Akkina indicated that appellant was being treated for asthma, chronic obstructive pulmonary disease, and allergic rhinitis. In an April 20, 2015 report, he

opined that employment exposure to lead dust and rust had contributed to his pulmonary condition.

By decision dated August 20, 2015, OWCP found that the reconsideration request was insufficient to warrant merit review of the claim. It found that the evidence did not address the factual issue on which the claim was denied.

On September 15, 2015 appellant, through counsel, again requested reconsideration. He resubmitted the April 13 and 20, 2015 reports from Dr. Akkina. Appellant also submitted an undated statement from a supervisor indicating that, when cleaning out the bottom of a tank, appellant was exposed to dust.

By decision dated November 9, 2015, OWCP found that the reconsideration request was insufficient to warrant merit review of the claim.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>2</sup> OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP."<sup>3</sup> 20 C.F.R. § 10.608(b) states 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.<sup>4</sup>

### **ANALYSIS**

Appellant filed an occupational disease claim alleging that he sustained a left knee injury as a result of his federal employment as a ship fitter. The claim was denied by decision dated October 1, 2014. As noted above, the Board does not have jurisdiction over this particular decision. The issue before the Board is whether appellant met one of the requirements of 20 C.F.R. § 10.606(b)(3) that would establish a basis for a merit review of the claim for compensation. In this case, there were two reconsideration requests submitted by appellant's counsel: January 28 and September 15, 2015. The Board has reviewed the reconsideration requests and the evidence submitted on reconsideration, and finds that appellant has not met any of the three requirements under 20 C.F.R. § 10.606(b)(3).

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<sup>2</sup> 5 U.S.C. § 8128(a) (providing that "[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").

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

<sup>4</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

In the October 1, 2014 decision, OWCP denied the claim because there were factual issues that remained unresolved. Appellant had referred to extensive work in a kneeling position, but the employing establishment had contested that allegation.

The first basis for a merit review is if appellant shows that OWCP erroneously applied or interpreted a specific point of law. Appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law. The second basis is the advancement of a relevant legal argument not previously considered by OWCP. Again, appellant did not raise a new and relevant legal argument in this case.

The final basis for establishing a merit review is the submission of relevant and pertinent new evidence not previously considered by OWCP. The claim in this case was denied based on a finding there were factual inconsistencies in the case. Relevant evidence would therefore be evidence as to the factual element of the claim, such as specific work factors identified, and the nature and duration of the performance of these work factors.<sup>5</sup> In this case, the factual issues relate to the frequency of kneeling, the use of ladders, and other relevant information. Appellant did not submit any new and relevant evidence in this regard. The medical evidence submitted from Dr. Waddell and Dr. Akkina is irrelevant as the claim was denied because the factual component of the claim was not established.<sup>6</sup>

For the above reasons, the Board 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 evidence not previously considered by OWCP. The Board finds that OWCP properly denied merit review in this case.

### **CONCLUSION**

The Board finds that OWCP properly denied the reconsideration requests without merit review of the claim pursuant to 5 U.S.C. § 8128(a).

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<sup>5</sup> See *P.D.*, Docket No. 14-1273 (issued January 23, 2015).

<sup>6</sup> See *D.P.*, Docket No. 13-1849 (issued December 19, 2013). The Board also notes that Dr. Akkina refers to exposure to lead dust and other particles, which is not the claim on appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 9 and August 20, 2015 are affirmed.

Issued: April 13, 2016  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board