

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

On appeal, appellant's representative contends that Dr. D. Burke Haskins, a Board-certified orthopedic surgeon and OWCP referral physician, did not use an inclinometer or goniometer to measure flexion in his second opinion examination. She further contends that Dr. Haskins made a number of false statements in his October 8, 2013 report and, as a result, OWCP relied upon an inaccurate second opinion evaluation to deny the expansion of appellant's claim to include medial and lateral menisci tears. Appellant's representative further argues that the evidence of record is sufficient to establish that appellant was totally disabled for the period claimed.

FACTUAL HISTORY

On April 3, 2013 appellant, a 43-year-old transitional employee (TE) letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury in the performance of duty on that date, as a result of tripping while walking up stairs and hitting his right knee cap on the corner of brick steps. He submitted reports dated April 3, 2013 from Sibley Memorial Hospital, diagnosing right knee contusion and indicating that he was to return to work in three days. OWCP accepted appellant's claim for a right knee contusion. The employing establishment indicated that his federal employment ended on April 19, 2013.

On June 17, 2013 appellant filed a claim for compensation (Form CA-7) for the period May 19 through June 4, 2013.

On July 19, 2013 he submitted an April 3, 2013 x-ray of the right knee which demonstrated "degenerative arthritis involving the patellofemoral joint" and physical therapy notes dated June 10 to July 26, 2013.

In a report dated April 10, 2013, Dr. Stanley Rothschild, an orthopedic surgeon, indicated that appellant was seen for right knee pain after an injury. He stated that appellant was working as a postal employee when he tripped while walking up steps, injuring his right knee. Dr. Rothschild stated that [x]-rays were taken, which were negative, and appellant was diagnosed as having a bruise. He still had some pain in the knee and no prior problems. Dr. Rothschild conducted a physical examination and found that appellant had full range of motion of the right knee. There was a small abrasion at the central point in the patella. There was "no lateral, no medial joint line tenderness," no ligamentous instability, and no excessive Q-angle. There was a minimal effusion, moderate patellofemoral tenderness, and normal tracking of the patella. Dr. Rothschild diagnosed chondromalacia patella of the right knee and ruled out other internal derangements.

In a July 15, 2013 report, Dr. Leah Schulte, an orthopedic surgeon and appellant's attending physician, stated that appellant sustained a right knee injury while at work delivering mail. Appellant reported that it was improving slightly and he had done several sessions of physical therapy. He had seven sessions left, but had right knee swelling after walking for any extended period of time and his knee felt like it was unstable and would give out on him when he moved certain ways. Dr. Schulte conducted a physical examination and found that appellant

walked “with a normal reciprocal gait.” Examination of [appellant’s] right knee showed a negative Lachman’s test. He did not open to varus or valgus stressing at 0 to 30 degrees. Dr. Schulte had 5/5 strength in his quadriceps and no tenderness over the medial collateral ligament (MCL). She found that appellant had “no medial or lateral joint line tenderness” and a positive patellar grind. Appellant had a range of motion from 0 to 135 degrees and no effusion. Dr. Schulte diagnosed right knee arthritic flare with patellofemoral pain symptoms and released her to light-duty work. On August 1, 2013 he reviewed a magnetic resonance imaging (MRI) scan of appellant’s right knee and found that it revealed medial and lateral meniscal tears. She requested that OWCP expand appellant’s accepted conditions to include right knee arthritis, MCL sprain, medial meniscal tear, and lateral meniscal tear.

In an August 20, 2013 letter, an OWCP claims examiner notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries. She stated that she was providing this letter to him so that he could “better understand what evidence [it needed] from the [t]reating [p]hysician prior to any diagnosis being added to the accepted conditions list” and that she had “boldfaced the portions” that would be the most helpful to him.

Appellant submitted a July 22, 2013 MRI scan of the right knee, which revealed a “complex tear posterior horn medial meniscus centrally with involvement of the free edge and inferior surface” and a “tear posterior horn lateral meniscus centrally along the inferior surface.”

In an April 22, 2013 report, Dr. Schulte indicated that appellant continued to suffer residuals of his April 3, 2013 right knee injury. Appellant described his pain as moderate and sharp. His pain was occasional and increased with activities, such as walking and standing for extended periods of time. Dr. Schulte noted that appellant had a left knee MCL and lateral collateral ligament (LCL) injury that required surgery when he was eight years old. Physical examination revealed a right-sided antalgic gait, a two millimeter abrasion over the center of his right kneecap, and a negative Lachman’s test. Appellant had tenderness over the femoral insertion of the MCL, but no medial or lateral joint line tenderness. He had a positive patellar grind and was able to perform a straight-leg raise. Dr. Schulte reviewed x-rays taken at Sibley Memorial Hospital and found that they showed no fracture, dislocation, or other bony abnormality, but did show tricompartmental arthritis with the worst area being the lateral aspect of the patellofemoral joint. She diagnosed right knee arthritic flare and right knee MCL sprain.

On May 6, 2013 Dr. Schulte reported that appellant had improved since his injection and was capable of working “on a limited-duty basis.” On August 26, 2013 she recommended a right knee arthroscopy with partial medial and lateral meniscectomy. Dr. Schulte stated that “with the underlying arthritis” she could not guarantee 100 percent improvement, but advised appellant of the risks of surgery and indicated that it should be able to reduce his pain and help him with his mechanical popping and locking symptoms.

On August 27, 2013 Dr. Schulte stated that appellant initially presented with pain and tenderness over his MCL and x-rays showed mild arthritic changes. He was diagnosed with an arthritic flare and MCL sprain and tried conservative treatments, including injections and physical therapy, but his knee pain showed no improvement and appellant reported that his condition was worsening. Dr. Schulte stated that due to lack of improvement she ordered an

MRI scan which revealed medial and lateral meniscal tears in his right knee and opined that “these meniscal tears are directly caused by the fall on April 3, 2013.” She advised that appellant was unable to perform the duties of delivering mail due to the extended amount of standing and walking required.

On September 30, 2013 appellant filed a claim for compensation (Form CA-7) for the period May 19 to September 19, 2013.

In an October 2, 2013 letter, OWCP requested additional medical evidence establishing appellant’s disability for work during the period claimed and afforded him 30 days to respond to its inquiries.

OWCP referred appellant to Dr. Haskins for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his October 8, 2013 report, Dr. Haskins reviewed a statement of accepted facts and appellant’s medical records. He conducted a physical examination and found that appellant’s symptoms and objective findings were secondary to a degenerative process with meniscal pathology. Appellant’s lower extremity alignment was normal. The right knee was larger than the left. Appellant had a generous scar about the medial aspect of the left knee, with no obvious quad atrophy in either leg. He had full extension of the right knee and flexion was 110 degrees. Fabere sign was negative. Appellant had fair strength in extension and indicated pain superior and lateral. He had no lateral discomfort about the joint line. Appellant had anteromedial and anterior patellofemoral discomfort. The McMurray’s test was deferred.³ Dr. Haskins diagnosed degenerative joint disease of the right knee and torn medial and lateral menisci and concluded that the April 3, 2013 employment incident aggravated his patellofemoral arthrosis. He found that appellant’s symptoms were primarily patellofemoral and explained that although the degenerative process was aggravated by the April 3, 2013 employment incident, the mechanism of injury did not support a causal relationship with the meniscal tears. Dr. Haskins determined that appellant had not yet reached maximum medical improvement and was capable of working in a sedentary position with restrictions on long-term standing, stooping, and squatting.

OWCP expanded the acceptance of appellant’s claim to include an aggravation of right knee secondary patellofemoral osteoarthritis based on Dr. Haskin’s October 8, 2013 second opinion report.

By decision dated December 6, 2013, OWCP denied the expansion of appellant’s claim to include medial and lateral menisci tears of the right knee, finding that the medical evidence was insufficient to establish a causal relationship between the claimed menisci tears and the April 3, 2013 employment injuries.

By a second decision also dated December 6, 2013, OWCP denied appellant’s claim for compensation for the period May 19 through September 19, 2013, finding that the medical evidence submitted was insufficient to support disability due to the accepted employment injuries, including the right knee condition and aggravation of right knee secondary patellofemoral osteoarthritis.

³ Diagnostic testing previously evinced meniscus tears.

On December 31, 2013 and January 1, 2014 appellant, through his representative, requested reconsideration. In support of his request, he submitted a Form CA-1032 dated December 24, 2013 and two narrative statements dated December 31, 2013 reiterating the factual and medical history of his claim.

By decision dated January 28, 2014, OWCP denied appellant's request for reconsideration, finding that he did not submit pertinent, new, and relevant evidence, nor did he show that OWCP erroneously applied or interpreted a point of law not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury⁵ was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident identified by the employee.⁸

⁴ *Supra* note 1.

⁵ OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁶ *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *Id.* *See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.* *See Gary J. Watling*, 52 ECAB 278 (2001).

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for a right knee contusion and aggravation of right knee secondary patellofemoral osteoarthritis as causally related to the April 3, 2013 employment injury. The issue on appeal is whether appellant met his burden of proof to establish that his right knee medial and lateral menisci tears are also causally related to the April 3, 2013 employment injury. The Board finds that appellant has not met his burden of proof.

OWCP referred appellant to Dr. Haskins for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his October 8, 2013 report, Dr. Haskins reviewed a statement of accepted facts and appellant's medical records. He conducted a physical examination and found that appellant's symptoms and objective findings were secondary to a degenerative process with meniscal pathology. Dr. Haskins diagnosed degenerative joint disease of the right knee and torn medial and lateral menisci and concluded that the April 3, 2013 employment injury aggravated only appellant's patellofemoral arthrosis. He found that appellant's symptoms were primarily patellofemoral and explained that although the degenerative process was aggravated by the April 3, 2013 employment injury, the mechanism of injury did not support a causal relationship with the meniscal tears. Dr. Haskins concluded that appellant was capable of working in a sedentary position with restrictions on long-term standing, stooping, and squatting.

The Board finds that Dr. Haskins' second opinion report represents the weight of the medical evidence. The Board finds that he had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Haskins is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Haskins addressed the medical records to make his own examination findings to reach a reasoned conclusion regarding appellant's conditions.⁹ He explained why he found no basis on which to establish a causal relationship between the April 3, 2013 employment injury and appellant's medial and lateral menisci tears. Dr. Haskins' opinion as set forth in his October 8, 2013 report is found to be probative evidence and reliable. The Board finds that his opinion constitutes the weight of the medical evidence and OWCP properly relied on his opinion in its decision to deny appellant's request to expand his claim.

In her reports, Dr. Schulte stated that due to lack of improvement, she ordered an MRI scan which revealed medial and lateral meniscal tears in his right knee and opined that "these meniscal tears are directly caused by the fall on April 3, 2013." She advised that appellant was unable to perform the duties of delivering mail due to the extended amount of standing and walking required. Although Dr. Schulte diagnosed medial and lateral meniscal tears of the right knee and stated that the results of the MRI scan demonstrated medial and lateral meniscal tears, she did not address how this condition and these findings were causally related to the April 3, 2013 employment injury. Dr. Schulte failed to provide a rationalized opinion explaining how tripping while walking up stairs and hitting his right knee cap on the corner of the steps caused or

⁹ See *Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

aggravated appellant's right knee medial and lateral meniscal tears. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁰ Dr. Schulte noted that appellant's condition occurred while he was delivering mail at work, but such generalized statements do not establish causal relationship because they merely repeat appellant's allegations and are unsupported by adequate medical rationale explaining how his physical activity at work actually caused or aggravated the diagnosed conditions.¹¹ Thus, the Board finds that the reports from Dr. Schulte are insufficient to establish that appellant sustained medial and lateral menisci tears of the right knee in the performance of duty on April 3, 2013.

In his April 10, 2013 report, Dr. Rothschild diagnosed chondromalacia patella of the right knee and ruled out other internal derangements. This report contains no opinion as to whether appellant sustained medial and lateral menisci tears of the right knee causally related to the April 3, 2013 employment incident.

Appellant further submitted reports dated April 3, 2013 from Sibley Memorial Hospital, an April 3, 2013 x-ray of the right knee, a July 22, 2013 MRI scan of the right knee, and physical therapy notes dated June 10 to July 26, 2013. These documents do not constitute competent medical evidence as they do not contain rationale by a physician relating appellant's right knee medial and lateral menisci tears to his employment.¹² The Board notes that physical therapists are not considered physicians under FECA¹³ and thus the submitted physical therapy reports are insufficient to establish expansion of the claim.¹⁴

As such, the Board finds that appellant did not meet his burden of proof as Dr. Haskins' well-reasoned second opinion is entitled to the weight of the medical evidence.

On appeal, appellant's representative contends that Dr. Haskins did not use an inclinometer or goniometer to measure flexion in his second opinion examination and made a number of false statements in his October 8, 2013 report. She argues that, as a result, OWCP relied upon an inaccurate second opinion evaluation to deny the expansion of appellant's claim to include medial and lateral menisci tears. As noted above, appellant has not submitted rationalized medical evidence to support his allegation that he sustained medial and lateral menisci tears of the right knee causally related to the April 3, 2013 employment injury, and thus failed to meet his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁰ See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

¹¹ See *K.W.*, Docket No. 10-98 (issued September 10, 2010).

¹² See *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

¹³ See 5 U.S.C. § 8101(2); see also *P.M.*, Docket No. 15-505 (issued June 19, 2015).

¹⁴ See *P.M.*, *id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA¹⁵ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty....” In general the term “disability” under FECA means “incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”¹⁶ This meaning, for brevity, is expressed as disability for work.¹⁷ For each period of disability claimed, the employee has the burden of proving that he was disabled for work as a result of the accepted employment injury.¹⁸ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.¹⁹

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.²⁰

ANALYSIS -- ISSUE 2

While OWCP accepted that appellant sustained a right knee contusion and an aggravation of right knee secondary patellofemoral osteoarthritis, appellant bears the burden to establish through medical evidence that he was disabled during the claimed time period and that his disability was causally related to the accepted injuries.²¹ The Board finds that appellant failed to meet his burden of proof.

Appellant’s treating physician, Dr. Schulte, opined that appellant was capable of working “on a limited-duty basis.” The Board finds that Dr. Schulte failed to provide a rationalized

¹⁵ 5 U.S.C. § 8102(a).

¹⁶ 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

¹⁷ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁸ *See William A. Archer*, 55 ECAB 674 (2004).

¹⁹ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

²⁰ *Id.*

²¹ *See supra* notes 17-18. *See also V.P.*, Docket No. 09-337 (issued August 4, 2009).

medical opinion explaining why appellant was disabled on the dates at issue due to his accepted conditions.

Appellant also submitted an April 10, 2013 report from Dr. Rothschild, April 3, 2013 reports from Sibley Memorial Hospital, and physical therapy notes dated June 10 to July 26, 2013. The Board finds that this medical evidence failed to address with medical rationale from a physician the issue of whether appellant was disabled on the dates claimed due to his accepted conditions and, therefore, lacks probative value to establish appellant's claim.

The diagnostic reports of record, including the April 3, 2013 x-ray and July 22, 2013 MRI scan of the right knee, do not constitute competent medical evidence as they do not contain rationale by a physician relating appellant's disability to his employment.

As appellant has not submitted any rationalized medical evidence establishing that he was disabled for the period May 19 through September 19, 2013 causally related to the accepted employment injuries, he has not met his burden of proof.

Appellant's representative argues on appeal that the evidence of record is sufficient to establish that he was totally disabled for the period claimed. As noted, it is appellant who bears the burden of proof to establish that he was disabled for the period claimed.²² Appellant has not submitted any rationalized medical evidence establishing that he was disabled for the period May 19 through September 19, 2013 causally related to the accepted employment injuries. As appellant has not met his burden of proof to establish that he is entitled to compensation for any disability, the Board finds the representative's arguments are not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.²³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).²⁴

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

²² See *supra* note 17.

²³ *Supra* note 1. 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).

²⁴ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

pertinent new evidence not previously considered by OWCP.²⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.²⁶ 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.²⁷

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record²⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁹

ANALYSIS -- ISSUE 3

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

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. In support of his December 31, 2013 and January 1, 2014 reconsideration requests, he submitted a Form CA-1032 dated December 24, 2013 and two narrative statements dated December 31, 2013 reiterating the factual and medical history of his claim. The Board finds that submission of this evidence did not require reopening appellant's case for merit review as it does not contain a rationalized medical opinion of a physician addressing the issue of causal relationship between appellant's right knee medial and lateral menisci tears and the April 3, 2013 employment incident, and/or relating appellant's disability for the period May 19 through September 19, 2013 to his federal employment, which were the issues before OWCP. Therefore, this evidence does not constitute relevant and pertinent new evidence and is insufficient to require OWCP to reopen the claim for consideration of the merits.

The Board finds that as appellant did not meet any of the necessary requirements, he is not entitled to further merit review.³⁰

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish medial and lateral menisci tears of the right knee causally related to the April 3, 2013 employment injuries. The Board further finds that he has not met his burden of proof to establish disability for the

²⁵ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

²⁶ *Id.* at § 10.607(a).

²⁷ *Id.* at § 10.608(b).

²⁸ See *A.L.*, *supra* note 26. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

²⁹ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

³⁰ See *L.H.*, 59 ECAB 253 (2007).

period May 19 through September 19, 2013 causally related to the April 3, 2013 employment injuries. The Board also finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2014 and December 6, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.³¹

Issued: February 16, 2016
Washington, DC

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

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

³¹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.