

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

E.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 16-0729
Issued: November 4, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 1, 2016 appellant filed a timely appeal from an October 9, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated February 9, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 12, 2013, the Board set aside October 3 and June 6, 2012 OWCP merit decisions and remanded the case for

¹ 5 U.S.C. § 8101 *et seq.*

reconstruction of the case record.² The Board ordered OWCP to combine OWCP File Nos. xxxxxx570, xxxxxx577, and xxxxxx710 with the instant case File No. xxxxxx849, due to the overlapping nature of the claims.³ Following reconstruction of the case record, OWCP was instructed to issue a *de novo* merit decision in order to protect appellant's appeal rights. By decision dated August 14, 2013, OWCP issued a *de novo* decision denying appellant's occupational disease claim and denying modification of the prior June 6, 2012 decision. It found that while appellant's treating physician provided a description of the work factors, they failed to establish that these factors caused the bilateral knee condition. The facts and circumstances of the case as discussed in the prior appeal are incorporated herein by reference.

In the current claim, on July 26, 2011 appellant, then a 28-year-old carrier, filed a traumatic injury claim (Form CA-1) assigned File No. xxxxxx849, alleging that he developed severe swelling in the knees after returning to work from his prior injury on July 21 and 22, 2011. He stopped work on July 22, 2011.

By decision dated September 9, 2011, OWCP denied the claim, finding the evidence of record failed to establish that appellant's medical condition was causally related to employment factors.⁴ Appellant requested reconsideration on March 12, 2012.

By decision dated June 6, 2012, OWCP denied modification of its September 9, 2011 decision. The claims examiner reviewed the medical evidence of record and referenced certain medical evidence contained in File No. xxxxxx710, which included a functional capacity examination and second opinion examination pertaining to appellant's work capacity on July 21, 2011. Appellant again requested reconsideration on July 3, 2012.

In an October 3, 2012 decision, OWCP denied modification of its June 6, 2012 decision as the medical evidence submitted in support of his reconsideration claim did not provide a firm medical diagnosis or any explanation as to how the work duties he performed on the two workdays exacerbated unspecified preexisting conditions.

On November 3, 2012 appellant requested an appeal before the Board. The appeal was docketed as No. 13-204.⁵

On January 28, 2013 appellant returned to work in a limited-duty capacity.

² Docket No. 13-204 (issued April 12, 2013).

³ The record reflects that appellant has filed additional, prior workers' compensation claims. Appellant's August 7, 2008 occupational disease claim was accepted for bilateral medial meniscus tears in OWCP file number xxxxxx570. His July 27, 2009 claim under OWCP file number xxxxxx577 was accepted for traumatic arthropathy of both legs and, bilateral medial and lateral meniscal knee tears. Appellant's October 5, 2010 occupational disease claim was accepted under OWCP file number xxxxxx710 for bilateral lower leg localized primary osteoarthritis and bilateral osteochondritis dissecans. Appellant was on the supplemental rolls under this claim until July 18, 2011 when he accepted a limited-duty full-time position.

⁴ As appellant was claiming factors of employment that occurred over a period of more than one workday, OWCP converted the claim into an occupational disease claim.

⁵ *Supra* note 3.

By decision dated January 9, 2014, OWCP denied modification of the August 14, 2013 decision, finding that the evidence of record failed to explain how factors of his federal employment caused or aggravated his preexisting conditions.

On April 11, 2014 appellant requested reconsideration. By decision dated July 7, 2014, OWCP vacated the January 9, 2014 decision and accepted appellant's claim for aggravation of bilateral knee osteoarthritis.

On October 27, 2014 appellant filed a recurrence claim (Form CA-2a) alleging a return/increase of disability on September 24, 2014. In his October 21, 2014 statement, he reported that he was working limited duty when he returned to work. Appellant's limitations included 3.5 hours of street work, limited standing, no bending, and no lifting over 10 pounds. He noted that he had a November 5, 2013 magnetic resonance imaging (MRI) scan of the right and left knee, received injections in April 2014, and started physical therapy in July 2014. Appellant explained that on September 23, 2014 he was on his assigned route and his symptoms from his previous injuries spontaneously appeared. He sought treatment with his physician on September 30, 2014 who determined appellant was unfit to work which was evidenced by his November 2013 MRI scan. Appellant believed that he had chronic severe pain, swelling, inflammation, buckling and stiffness of the knees, exhaustion, and anxiety as a result of the spontaneous worsening of his condition. On the reverse side of the form, the employing establishment noted that appellant never exceeded more than the 3.5 hours of street work, limited standing, and was not required to lift more than 10 pounds as stipulated in his work restrictions.

In a September 30, 2014 medical report, Dr. Louis C. Rose, a Board-certified orthopedic surgeon and appellant's treating physician, reported the physical examination of the left knee revealed moderate swelling and marked tenderness at the medial and lateral joint lines while the right knee revealed mild swelling and marked tenderness at the medial and lateral joint lines. He restricted appellant from working for six weeks after which he would be further evaluated.

By letter dated January 8, 2015, OWCP informed appellant that the evidence of record was insufficient to support his recurrence claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In support of his claim, appellant submitted physical therapy treatment notes and medical reports from Dr. Rose dated November 11 and December 23, 2014, and February 3, 2015.

Dr. Rose's medical reports provided findings on physical examination and noted review of a November 5, 2013 MRI scan of the left knee which revealed degenerative changes including Grade I degenerative changes of posterior horn medial meniscus. He diagnosed exacerbated bilateral osteoarthritis and lateral joint, noting that the condition was worsening. Dr. Rose provided modification of activities to avoid injury and cautioned appellant against any impact or significant forceful extending and bending of the joint which would cause further injury. Appellant was further restricted from kneeling or squatting activities. In his November 11, 2014 medical report, Dr. Rose restricted appellant from work. In his December 23, 2014 report, he advised that appellant could work full-time, light duty. In his February 3, 2015 report, Dr. Rose advised that appellant could resume light-duty work on February 10, 2015 with 3 hours of delivering mail, 1.5 hours of casing mail inside, and 8 hours of partial post.

By decision dated February 9, 2015, OWCP denied appellant's recurrence claim as the medical evidence of record failed to establish that his alleged disability beginning September 24, 2014 was due to a material change/worsening of his accepted work-related conditions.

On July 7, 2015 appellant requested reconsideration. In support of his claim, he submitted physical therapy notes, requests for medical treatment, and medical reports.

In a March 23, 2015 report, Dr. Daniel Lerer, a Board-certified diagnostic radiologist, reviewed a right knee MRI scan and found mild soft tissue swelling, small right knee joint effusion, and status post arthroscopy with no gross meniscal tear. He noted mild diffuse mucoid degeneration of the "anterior cruciate ligament," no ligamentous tear, and mild periarthral spurring.

In another March 23, 2015 diagnostic report, Dr. Lerer reported that an MRI scan of the left knee revealed mild soft tissue swelling, small left knee joint effusion, and small Baker's cyst. He found no meniscal or ligamentous tear. Dr. Lerer further noted an arthroscopy scar within Hoffa's fat and mild degenerative fibrocystic change within the posterior medial tibial plateau, slightly away from the articular surface and without significant change.

Appellant also submitted medical reports from Dr. Rose dated February 3, March 17, April 28, June 8, and July 20, 2015 documenting physical examination findings and work restrictions. Dr. Rose reported that appellant was currently working full-time, light duty.

In a June 19, 2015 narrative report, Dr. Rose reported that appellant had sustained an injury to his bilateral knees on July 22, 2011 while working for the employing establishment as a letter carrier which required him to ambulate for extended periods of time and climb stairs. Appellant was wearing knee braces and developed swelling about the bilateral knees. He complained of aching pain, stiffness, and swelling. Dr. Rose provided findings on physical examination and reviewed the diagnostic testing.

The March 23, 2015 MRI scan of the right knee revealed mild soft tissue swelling, small right knee effusion, no gross meniscal tear, mild diffuse mucoid degeneration of the ACL, no ligamentous tear, and mild periarticular spurring. Dr. Rose diagnosed osteoarthritis of the bilateral knees with exacerbation of a preexisting condition and probable bilateral medial and lateral meniscal tears.

Dr. Rose described the July 22, 2011 employment incident and reported that appellant had a permanent partial disability which was causally related to the history as stated and the direct result of sustaining injuries while at work as a letter carrier for the employing establishment. He opined that appellant had developed these symptoms and injuries due to the type of work he performed on a daily basis which required long periods of ambulation and stair climbing. Dr. Rose noted that his condition continued to worsen over the past four years. He further noted that appellant developed significant pain, as well as limited range of motion, and would continue to have worsening symptoms making it difficult for him to lift, carry, push, or pull even light objects, stand, or walk for extended periods of time. Dr. Rose further restricted him from crouching, kneeling, and the use of stairs. He concluded that appellant was moderately

disabled on a permanent basis and would require continued physical therapy, use of anti-inflammatory and analgesic medications, injections, and bilateral total knee arthroplasties.

By decision dated October 9, 2015, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 (a) of FECA,⁶ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show 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.⁷ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his July 7, 2015 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law nor did he advance a relevant legal argument not previously considered by OWCP. The issue in this case was whether appellant was totally disabled on or after September 24, 2014 due to a worsening of his accepted work-related bilateral knee condition. That is a medical issue which must be addressed by relevant medical evidence.⁹ Appellant, however, failed to submit relevant and pertinent new medical evidence in support of his claim.¹⁰

While appellant submitted new medical reports dated March 17, April 28, June 8 and 19, and July 20, 2015 from his treating physician Dr. Rose, these reports are irrelevant to his claim. Dr. Rose's treatment notes dated March 17, April 28, June 8, and July 20, 2015 were essentially identical to the previously submitted notes dated September 20, 2014 through February 3, 2015. While the reports provided findings on physical examination and discussed appellant's treatment,

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁹ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹⁰ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

they do not address the relevant issue of causal relationship. As these reports are duplicative of the deficient evidence already of record, they do not constitute a basis to reopen the case.¹¹

Dr. Rose's June 19, 2015 report did not address the relevant issue in this claim and made no mention of a specific period of disability. The medical reports dated March 17 through July 20, 2015 do not provide any support for a recurrence of disability as they acknowledge that appellant was working full-time limited duty.¹²

Dr. Lerer's March 23, 2015 report only provided diagnostic findings of the right and left knee with no opinion on disability. Appellant has not submitted any medical evidence showing that he sustained a recurrence of disability due to his accepted employment injury beginning September 24, 2014.¹³ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ While appellant submitted new evidence, it was not relevant and pertinent as the reports failed to provide a rationalized opinion addressing whether he sustained a recurrence of disability on or after September 24, 2014 as a result of his accepted employment-related injuries.¹⁵

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

¹¹ See *J.P.*, 58 ECAB 289 (2007); *T.K.*, Docket No. 16-813 (issued July 20, 2016).

¹² See *David J. McDonald*, 50 ECAB 185 (1998).

¹³ *L.J.*, Docket No. 14-523 (issued August 7, 2014).

¹⁴ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁵ *Q.W.*, Docket No. 14-147 (issued May 19, 2014).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated October 9, 2015 is affirmed.

Issued: November 4, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board