



## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

OWCP accepted that on August 23, 2006 appellant, then a 59-year-old rural mail carrier, sustained a left hip contusion, right shoulder sprain, lumbar strain, and right knee strain in an employment-related motor vehicle accident. It later expanded the claim to accept secondary moderate arthritis of the right knee and a torn right medial meniscus. Appellant received compensation for temporary total disability on the periodic rolls.<sup>2</sup>

On November 16, 2006 Dr. William M. Craven, an attending Board-certified orthopedic surgeon, performed arthroscopic medial and lateral meniscectomies of the right knee with anterior cruciate ligament reconstruction and tricompartmental chondroplasty.<sup>3</sup> He submitted periodic progress notes holding appellant off work. Appellant returned to full-time modified duty as a rural carrier associate on May 30, 2007. He continued working in the job with intermittent absences.<sup>4</sup>

Dr. W. Joseph Absi, an attending Board-certified orthopedic surgeon, performed a total right knee arthroplasty on March 29, 2011 authorized by OWCP. On June 24, 2011 he performed closed manipulation of the right knee under anesthesia. In an October 4, 2011 report, Dr. Absi noted that appellant did "not appear to be in pain." On examination, he observed a well-healed anterior scar, nearly full extension, 85 degrees of flexion, and no gross ligamentous instability. X-rays showed good alignment of the right knee prosthesis with no sign of loosening. Dr. Absi released appellant to light duty.

Appellant returned to full-time work as a modified rural carrier on October 7, 2011. His duties required lifting, pulling, and pushing up to 20 pounds, limited standing, no kneeling, squatting, or climbing, and the ability to alternate standing and sitting.

In a November 7, 2011 report, Dr. Absi related appellant's complaints of increased right knee pain while at work. He opined that appellant could continue to perform light duty.

Dr. Absi found that appellant had reached maximum medical improvement as of March 2, 2012. He noted permanent work restrictions limiting standing to one hour a day.

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<sup>2</sup> On November 13, 2007 OWCP issued a schedule award for 24 percent permanent impairment of the right leg. Following a hearing, OWCP's hearing representative affirmed the schedule award by decision dated July 10, 2008. On March 28, 2012 OWCP issued a schedule award for an additional 13 percent permanent impairment of the right leg. On February 3, 2014 an OWCP medical adviser opined that appellant's right knee condition was stable, with no worsening of the accepted injury.

<sup>3</sup> Appellant participated in postoperative physical therapy through April 2007. Dr. Craven released appellant to full duty as of April 18, 2007.

<sup>4</sup> By decision dated June 2, 2008, OWCP issued a formal loss of wage-earning capacity determination finding that appellant's actual earnings as a modified rural carrier associate effective June 22, 2008 properly represented his wage-earning capacity.

Dr. Absi restricted walking, noting that appellant needed to alternate sitting and standing, and was permitted to drive only a van. In periodic reports through April 19, 2013, he noted that appellant complained of right knee pain while at work. Dr. Absi opined that appellant could continue working within his prior restrictions.

Appellant stopped work on August 20, 2013. He claimed wage-loss compensation (Form CA-7) for the period August 20, 2013 and continuing. OWCP treated this as a claim for recurrence of disability.

Dr. Harvey B. Leslie, an attending physician Board-certified in pain management, submitted slips holding appellant off work as of August 20, 2013 and from September 13 to October 21, 2013. On September 30, 2013 he opined that appellant was permanently disabled due to right knee arthroplasty with pain, swelling, and weakness. Dr. Leslie performed closed manipulation of the right knee under anesthesia.

By decision dated October 31, 2013, OWCP denied appellant's claim for recurrence of disability for the period August 20 to September 13, 2013. By decision dated November 12, 2013, it denied his claim for compensation beginning September 14, 2013. OWCP found that Dr. Leslie had failed to provide objective findings establishing that appellant was no longer able to perform his light-duty position as of August 20, 2013.

In a November 12, 2013 letter, received November 19, 2013, appellant requested reconsideration of OWCP's October 31 and November 12, 2013 decisions. He submitted additional evidence.

An October 25, 2013 right knee arthrogram showed the right knee prosthesis was grossly intact, without significant mass or fluid collection.

In reports from November 4, 2013 to January 6, 2014, Dr. Leslie found tenderness and restricted motion of the right knee. He prescribed medication and physical therapy.

By decision dated February 6, 2014, OWCP denied modification of the October 31 and November 12, 2013 decisions, finding that the additional evidence submitted failed to establish a causal relationship between the accepted August 23, 2006 employment injury and the claimed periods of disability. It noted that appellant filed a new occupational disease claim (Form CA-2) for a right knee injury under File No. xxxxxx776, asserting that walking on concrete floors at work following total knee arthroplasty worsened his condition. OWCP denied his claim under File No. xxxxxx776.

In a May 12, 2014 letter, appellant requested reconsideration. He submitted a March 3, 2014 report from Dr. Leslie opining that appellant permanently disabled from work as of August 20, 2013. Dr. Leslie asserted that appellant was unable to sit for more than 10 minutes, drive, or walk due to involuntary muscle spasms and chronic pain. He explained that prescribed narcotic medication impaired his cognitive and motor skills such that he could not drive. Dr. Leslie provided progress notes from March 6 to August 15, 2014 finding continued swelling and pain in the right knee.

By decision dated October 2, 2014, OWCP denied modification, finding that Dr. Leslie's report was not sufficiently rationalized to establish that the August 23, 2006 right knee injury disabled appellant from work as of August 20, 2013.

In an October 20, 2014 letter, received October 27, 2014, appellant again requested reconsideration. He submitted September 16 and October 10, 2014 chart notes and prescription slips from Dr. Leslie, noting continued right knee pain. In an October 13, 2014 letter, Dr. Leslie opined that the right knee arthroplasty rendered appellant "permanently disabled due to [r]ight [k]nee instability, popping on range of motion, swelling, chronic intractable knee pain," and narcotic medication impairing his cognitive and motor skills.

By decision dated December 5, 2014, OWCP denied modification, finding that the additional evidence submitted remained insufficient to establish the claimed recurrence of disability. It found that Dr. Leslie's October 13, 2014 report was not based on a complete, accurate history, and did not contain sufficient rationale supporting a spontaneous worsening of the accepted condition as of August 20, 2013. OWCP noted that appellant implicated new work factors as the cause of the claimed period of disability. Appellant then appealed to the Board.

By decision and order dated June 1, 2015,<sup>5</sup> the Board found that appellant had not established a recurrence of disability, effective August 20, 2013, as Dr. Leslie had not observed a worsening of appellant's right knee as of that date. Also, appellant implicated new work factors, breaking the chain of causation from the accepted right knee injury.

During the pendency of the prior appeal, appellant submitted periodic progress notes from Dr. Leslie dated from December 19, 2014 to May 12, 2015, diagnosing chronic postoperative right knee pain.

In a letter dated October 12, 2015, received October 26, 2015, appellant again requested reconsideration. He asserted that he remained totally disabled for work due to chronic, severe right knee pain, weakness, and restricted motion. Appellant also described severe financial hardships and personal difficulties caused by the accepted injuries. He submitted medical evidence.

Dr. Leslie provided progress notes dated from June 11 to September 11, 2015, diagnosing chronic right knee pain.

In an August 31, 2015 report, Dr. Christopher Haraszti, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment. He obtained x-rays showing a "posterior stabilized total knee replacement in good position," with significant shortening of the patellar tendon causing an extremely low-lying patella, called a "patellar baja." On examination of the right knee, Dr. Haraszti found "significant and crippling quadriceps extension weakness," directly caused by the shortened patellar tendon and patellar baja. He explained that he did not know the etiology of the patellar baja as he did not have access to appellant's complete medical record. Dr. Haraszti emphasized that he could not address causal relationship as he did "not have any records relating the original injury to the knee replacement." He opined that surgery was

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<sup>5</sup> Docket No. 15-0473 (issued June 1, 2015).

very likely to cause additional difficulties and so found that appellant had attained maximum medical improvement.

On September 14, 2015 Dr. Haraszti opined that appellant had a poor result from total knee replacement and could no longer work as a letter carrier.

Appellant also submitted duplicates of an employing establishment accident report, Dr. Craven's November 21, 2006 report, June 12, 2007 imaging studies, Dr. Absi's March 8, 2011 report, March 29, 2011 operative note, and Dr. Leslie's March 3, 2014 letter.

By decision dated November 2, 2015, OWCP denied reconsideration, finding that appellant's letter and accompanying documents did not constitute new, relevant evidence. It further found that Dr. Haraszti's reports, although new, were irrelevant to the recurrence claim as he did not address the cause of appellant's August 20, 2013 work stoppage. OWCP further found that the copies of evidence previously of record were repetitious and therefore insufficient to warrant a review of the claim on the merits. It also found that appellant's October 12, 2012 letter was irrelevant as it did not present new, relevant legal argument, or establish legal error by OWCP.

### **LEGAL PRECEDENT**

To require the office to reopen a case for merit review under section 8128(a) of FECA,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>9</sup> Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>10</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

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

<sup>9</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>10</sup> *See supra* note 7. *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>11</sup> *Annette Louise*, 54 ECAB 783 (2003).

## ANALYSIS

OWCP accepted that appellant sustained a left hip contusion, right shoulder sprain, lumbar strain, right knee strain, secondary moderate arthritis of the right knee, and a torn right medial meniscus. It authorized a total right knee arthroplasty, performed on March 29, 2011 by Dr. Absi, an attending Board-certified orthopedic surgeon. Appellant returned to full-time modified duty on October 7, 2011 and stopped work on August 20, 2013. He claimed compensation for total disability beginning August 20, 2013.

OWCP issued an October 31, 2013 decision denying appellant's claim for compensation, finding that the medical evidence did not establish an objective worsening of the accepted condition that would disable him from his modified-duty job. By decision dated November 12, 2013, it denied his claim for compensation beginning September 14, 2013, as the medical evidence of record was insufficient to establish the claimed period of disability. OWCP affirmed its October 31 and November 12, 2013 decisions on February 6, October 2, and December 5, 2014, finding that additional medical evidence did not establish the claimed recurrence of disability or a period of disability on and after August 20, 2013. The Board affirmed the denial of recurrence of disability in its June 1, 2015 decision and order.

Appellant requested reconsideration in an October 12, 2015 letter, received October 26, 2015, asserting that his chronic right knee pain and weakness rendered him totally disabled for work. He submitted August 31 and September 14, 2015 reports from Dr. Haraszti, an attending Board-certified orthopedic surgeon, who diagnosed a patellar baja of unknown etiology, Appellant also provided copies of evidence previously of record. OWCP denied reconsideration by decision dated November 2, 2015, finding that his letter and accompanying documents were either repetitious or irrelevant.

The Board finds that OWCP appropriately denied reconsideration as appellant's argument was not relevant to the claim. The critical issue was whether residuals of the accepted right knee conditions disabled him for work on and after August 20, 2013. Appellant's letter is not medical evidence and is thus irrelevant to that issue. Therefore, it does not comprise a basis for reopening the case.<sup>12</sup> The copies of medical evidence previously of record are duplicative. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.<sup>13</sup> The duplicate copies of medical evidence are therefore insufficient to warrant consideration on the merits.

Dr. Haraszti's reports are new medical evidence not previously considered by OWCP. However, they are not relevant to the claim as they do not address whether appellant's right knee

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<sup>12</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>13</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

worsened beginning August 30, 2013. Therefore, these reports do not warrant a review of the merits of the claim.<sup>14</sup>

On appeal, appellant asserts that his physicians supported that his patellar pain remained related to his original injury. This argument pertains to the merits of the claim, which are not before the Board on the present appeal.

Appellant has not met any of the criteria for a merit review. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>14</sup> The submission of evidence or argument which does not address the particular issue involved does constitute a basis for reopening a case. *See S.O.*, Docket No. 16-0973 (issued August 4, 2016); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).