

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

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**D.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Inglewood, CA, Employer**

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**Docket No. 16-0949  
Issued: October 17, 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 April 4, 2016 appellant filed a timely appeal from a November 19, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated July 21, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

**ISSUE**

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

**FACTUAL HISTORY**

OWCP accepted that on December 8, 2011 appellant, then a 52-year-old city carrier, sustained left knee, ankle, and leg sprains, and a temporary aggravation of a lumbar strain, when

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

he stepped on plant matter that had fallen from a tree. Appellant accepted a modified letter carrier position on December 14, 2011. He was evaluated through May 2012 by Dr. Anton Volpicelli, an attending osteopathic physician, for continuing left knee and ankle pain.

In a May 23, 2012 report, Dr. Frank Giacobetti, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment. He noted that appellant underwent a right knee arthroscopy in 1989, left knee arthroscopy in 1991, and gastric bypass in 1997. On examination of the left knee Dr. Giacobetti found limited motion, medial joint line tenderness, and a positive medial McMurray's sign. He diagnosed a left knee strain, rule out medial meniscus pathology. Dr. Giacobetti opined that the diagnosed conditions were caused by the December 8, 2011 injury.<sup>2</sup>

Dr. Giacobetti restricted appellant to light-duty work due to left knee and ankle symptoms through October 17, 2012. On November 16, 2012 he performed arthroscopic partial medial and lateral meniscectomies, synovectomy of the medial and lateral compartments, and an arthroscopic chondroplasty of the medial femoral condyle. OWCP approved the procedure. Appellant stopped work as of November 16, 2012, and did not return. He received wage-loss compensation. OWCP placed appellant's case on the periodic rolls effective December 16, 2012.

Dr. Giacobetti provided reports dated from December 16, 2012 through June 11, 2014 holding appellant off work due to chronic, unchanged lumbosacral symptoms, treated with periodic injections.

On March 27, 2013 OWCP obtained a second opinion from Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, who found appellant capable of limited-duty work. Dr. Ha'Eri opined that the December 8, 2011 injuries had ceased without residuals.

OWCP found a conflict of medical opinion between Dr. Giacobetti, for appellant, and Dr. Ha'Eri, for the government, regarding the nature and extent of appellant's condition. On June 26, 2014 it obtained an impartial medical opinion from Dr. Mark Ganjianpour, a Board-certified orthopedic surgeon. Based on a review of the medical record, statement of accepted facts, and a clinical examination, Dr. Ganjianpour opined that the accepted conditions had ceased without residuals. He found appellant able to perform full-time, modified-duty work with restrictions due to left meniscal degeneration and postoperative status.<sup>3</sup>

In reports from August 20 to December 10, 2014, Dr. Giacobetti released appellant to sedentary work.

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<sup>2</sup> Appellant participated in physical therapy from December 18, 2011 to August 20, 2014. A February 12, 2013 lumbar magnetic resonance imaging (MRI) scan showed degenerative disc disease with posterior disc bulges from T10 to L5. A June 9, 2012 MRI scan study of the left knee showed possible Osgood-Schlatter disease, a macerated medial meniscus, and osteochondral changes with loss of the articular cartilage.

<sup>3</sup> Dr. Ganjianpour ordered a July 3, 2014 lower extremity electromyography and nerve conduction velocity study, which demonstrated chronic left S1 radiculopathy.

By notice dated March 4, 2015, OWCP advised appellant of its proposal to terminate his wage-loss compensation and medical benefits, based on Dr. Ganjianpour's opinion as the weight of the medical evidence. It afforded appellant 30 days to submit evidence or argument if he disagreed with the proposal.

In response, appellant submitted his March 25, 2015 letter, contending that OWCP should not terminate his compensation benefits as he had complied with all applicable rules and regulations regarding his claim. He asserted that he provided the employing establishment Dr. Ganjianpour's and Dr. Giacobetti's work restrictions, noting that they pertained to his left knee. Appellant also provided a March 20, 2014 letter from the employing establishment, acknowledging that he provided medical reports on October 3, 2014. He submitted additional medical evidence.

On March 4, 2015 Dr. Giacobetti diagnosed lumbar disc disease and restricted appellant to sedentary duty. In an April 15, 2015 report, he diagnosed lumbar disc disease and status post left knee arthroscopy and partial medial meniscus resection. Dr. Giacobetti agreed with Dr. Ganjianpour's assessment and work restrictions.

By decision dated July 21, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, based on Dr. Ganjianpour's opinion as the weight of the medical evidence. It reviewed appellant's March 25, 2015 letter. OWCP found that Dr. Giacobetti's March 4 and April 15, 2015 reports, were insufficient to establish continuing disability from work, as he agreed with Dr. Ganjianpour that appellant could perform full-time modified duty.<sup>4</sup>

In an August 18, 2015 letter and August 19, 2015 appeal form, received August 25, 2015 appellant requested reconsideration through his union representative. The representative contended that the accepted left knee conditions had not ceased without residuals as Dr. Ganjianpour provided permanent restrictions due to appellant's left medial meniscus.

By decision dated November 19, 2015, OWCP denied reconsideration, finding that appellant's letter and accompanying documents did not constitute relevant or pertinent new evidence. It found that the representative's August 18, 2015 letter was repetitive of appellant's prior arguments.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that 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 pertinent new evidence not previously considered by OWCP.<sup>6</sup> Section 10.608(b)

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<sup>4</sup> On July 27, 2015 appellant claimed a schedule award.

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(3).

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>7</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>8</sup> Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>9</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>10</sup>

### ANALYSIS

OWCP accepted that appellant sustained left knee, ankle, and leg sprains, and a temporary aggravation of a lumbar strain. Appellant underwent arthroscopic medial and lateral meniscectomies on November 16, 2012, approved by OWCP. He did not return to work following surgery. Appellant received wage-loss compensation on the periodic rolls beginning December 16, 2012. Appellant's attending orthopedic surgeon, Dr. Giacobetti, held appellant off work through June 11, 2014. Dr. Ha'Eri, a Board-certified orthopedic surgeon and second opinion physician, opined on March 27, 2013 that appellant could perform full-time modified duty.

OWCP found a conflict of medical opinion between Dr. Giacobetti and Dr. Ha'Eri, and selected Dr. Ganjianpour, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Ganjianpour opined on June 26, 2014 that the accepted conditions had resolved without residuals, and that appellant could perform full-time modified work. Dr. Giacobetti agreed with Dr. Ganjianpour's assessment. By notice dated March 4, 2015, OWCP advised that it proposed to terminate appellant's wage-loss compensation and medical benefits as the accepted conditions ceased without residuals. Appellant responded by March 25, 2015 letter, contending that he followed all instructions from OWCP regarding his claim. He submitted an employing establishment letter confirming that he submitted medical evidence and work restrictions. OWCP terminated appellant's medical benefits and wage-loss compensation, effective July 21, 2015.

Appellant requested reconsideration through his union representative on August 18, 2015. The representative asserted that OWCP could not find that the accepted conditions had ceased as Dr. Ganjianpour provided work restrictions regarding appellant's left knee. OWCP issued a November 19, 2015 decision denying reconsideration, finding that the August 18, 2015 argument was repetitious of appellant's prior assertions.

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<sup>7</sup> *Id.* at § 10.608(b). See also *D.E.*, 59 ECAB 438 (2008).

<sup>8</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>9</sup> See *supra* note 6. See also *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>10</sup> *Annette Louise*, 54 ECAB 783 (2003).

The Board finds that OWCP appropriately denied reconsideration as appellant's argument was duplicative of his March 25, 2015 contentions previously of record. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.<sup>11</sup> Therefore, the August 18, 2015 letter is insufficient to warrant reconsideration of the merits. The August 19, 2015 appeal form does not contain additional evidence or argument.

On appeal, appellant asserts that OWCP did not fully consider the evidence of record prior to terminating his compensation benefits. In particular, he alleges that OWCP did not read documents he mailed on March 25, 2015 in response to the notice of proposed termination. The Board notes, however, that OWCP's July 21, 2015 decision contains a detailed analysis of the evidence appellant submitted in response to the notice of proposed termination.<sup>12</sup> Furthermore, as noted, the Board does not have jurisdiction to address the merits of the claim.

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. 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).

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<sup>11</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>12</sup> Appellant also submitted new evidence on appeal. The Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 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