

FACTUAL HISTORY

On July 24, 2013 appellant, then a 57-year-old labor custodian, filed an occupational disease claim (Form CA-2) alleging lower back and bilateral knee conditions that he attributed to excessive walking, bending, lifting, pulling, pushing, kneeling, and twisting. She indicated that she first became aware of the disease or illness and realized it was caused or aggravated by her employment on May 29, 2013. Appellant did not stop work. In a July 17, 2013 statement, she noted ongoing back and knee problems for years and advised that in 2010, her problems started getting worse.

In a July 17, 2013 report, appellant's treating physician, Dr. Helen Weinrit, a Board-certified anesthesiologist, diagnosed aggravation of degenerative disc disease of the lumbar spine, lumbar radiculopathy, lumbar annular tears, aggravation of bilateral degenerative joint disease of the knees, bilateral meniscus tears, and bilateral anterior cruciate ligament tears. She recommended that appellant could work without restrictions.²

On October 17, 2013 OWCP accepted appellant's claim for temporary aggravation of bilateral localized primary osteoarthritis, lower leg.³

In a December 3, 2013 report, Dr. Charles Herring, a Board-certified orthopedic surgeon, requested to expand the additional condition and authorization for left knee arthroscopy with partial meniscectomy, chondral debridement, and synovectomy and recommended modified duty per the treating physician.

On December 6, 2013 OWCP referred appellant for a second opinion, along with a statement of accepted facts (SOAF), a set of questions and the medical record to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon.

In a report dated December 12, 2013, Dr. Einbund described appellant's history of injury and treatment, provided results on examination, and determined that the additional medical conditions diagnosed by Dr. Weinrit were not work related. He explained that the diagnostic findings were degenerative in nature and consistent with the aging process and, regarding both knees, he opined that the findings were not medically connected to an industrial injury.

On January 3, 2014 OWCP found that Dr. Einbund's report created a conflict with the opinion of appellant's attending physician, Dr. Weinrit. It advised that a decision would be made regarding the request for authorization for surgery.

On June 27, 2014 OWCP referred appellant along with a SOAF, and the medical record to Dr. Gurvinder S. Uppal, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion.

² In her July 17, 2013 duty status report, Dr. Weinrit recommended no floor buffering.

³ Appellant has a prior claim for a traumatic injury on October 28, 1999, which was accepted for contusion of the face, sprain of neck and back, lumbar region. File No. xxxxxx921.

In a July 30, 2014 report, Dr. Uppal noted appellant's history of injury and treatment and provided results on examination. He diagnosed grade 1 spondylolisthesis, L4-5, degenerative, and bilateral knee degenerative joint disease. Dr. Uppal opined that he did not believe that appellant suffered low back or the right or left knee conditions attributable to her May 29, 2013 injury. He explained that she did not require any further treatment on an industrial basis for the back or knees. Dr. Uppal further explained that appellant had an injury that dated back to 1999 that was industrial. He indicated that she was seen in 2000 by her physician and discharged as cured with no residual injury to her low back. Dr. Uppal noted that appellant continued to work without restrictions. He opined that she had a degenerative condition that would be present absent any industrial injury.

Dr. Basimah Khulusi, Board-certified in physical medicine and rehabilitation, provided several reports dated August 27, October 8, and November 19, 2014. He diagnosed aggravation of degenerative disc disease of lumbar spine, lumbar radiculopathy, lumbar annular tears, bilateral degenerative joint disease of the knees, bilateral meniscus tears, and bilateral anterior cruciate ligament tears. Dr. Khulusi explained that appellant could continue her modified work with the same restrictions. In his October 8, 2014 report, he prescribed restrictions of no pushing or pulling more than 100 pounds on wheels, no floor buffering, and no lifting over 10 pounds intermittently.

On January 20, 2015 OWCP issued a notice of proposed termination of medical benefits. As the weight of the medical evidence, as represented by the report of Dr. Uppal, the impartial medical examiner, established that the work injury had ceased.⁴

Dr. Khulusi continued to submit reports dated January 21, 2015.

In a January 27, 2015 report, Dr. Herring diagnosed bilateral knee degenerative joint disease. He noted that appellant's surgery request had been denied and indicated that he hoped her private insurance would approve the knee replacement, which she desperately needed.

In January 31, 2015 statement, appellant indicated that she was puzzled by Dr. Uppal's report and indicated that she believed that his examination was not a complete examination. She argued that his report was not rationalized and not sufficient to terminate her medical benefits. Appellant also noted that her complete medical history was not addressed by Dr. Uppal as he did failed to note various procedures, such as her rotator cuff surgeries on both shoulders, which had been accepted by OWCP. Furthermore, she indicated that he listed that she denied any weight gain despite her having informed him that she had gastric bypass surgery due to the weight she had gained. Furthermore, appellant argued that Dr. Uppal did not mention that she had medical treatment for her lower back and left knee, as well as severe arthritis in her lower back, since 2001 and in her left knee since the age of 48. She explained that he did not address the repetitive nature of her job and the repetitive motions she performed all day every day for 28 years. Appellant indicated that she believed that her duties had aggravated and worsened her condition. She noted another inaccuracy in Dr. Uppal's report related to his finding that she denied loss of consciousness. Appellant explained that she informed him that during her October 29, 1999 on-the-job injury, she was knocked out when she struck the back of her head. She also explained

⁴ Appellant had not lost any time from work due to her accepted bilateral lower extremity condition.

that she continued to suffer residual pain from that injury and her conditions were related to the original injury. Appellant argued that her job duties aggravated, accelerated, and worsened her condition.

In a February 12, 2015 report and in response to the notice of proposed termination, Dr. Khulusi noted that Dr. Uppal and Dr. Einbund's opinions were erroneous, as they did not understand that degenerative conditions were caused or aggravated by wear and tear, "which means the more wear and tear the worse the degeneration." He argued that OWCP was aware of this concept as there were thousands of accepted cases for knee and back conditions like appellant's. Dr. Khulusi referenced Chapter 2.0805 of FECA procedure manual and referenced an example that repetitive continuous strenuous activities caused acceleration of arthritis of a joint and stated that acceleration of knee arthritis was caused by "activities such as continuous walking, stooping, and squatting in his/her job over a 15[-]year career that involved these activities for a majority of each day." He also referenced a Franingham Osteoarthritis study, which revealed that occupational knee bending and physical labor were risk factors for knee osteoarthritis. Dr. Khulusi referenced additional studies. He further referenced appellant's job duties, which included repetitive lifting up to 50 pounds, standing and walking on hard floors eight hours per day, climbing, kneeling, bending, stooping, twisting, pushing, and pulling, while going up and down inclines repetitively throughout the day, day after day, and year after year, ever since she started working for the employing establishment. Dr. Khulusi opined that these repetitive activities caused a lot more wear and tear of the structures of the body and in her case, her low back and bilateral knees, much more than somebody who was not involved in doing similar activities. He opined that all of the repetitive activities caused permanent, irreversible damage to appellant's back and bilateral knees that had not ceased to exist and continued to be related to her employment. Dr. Khulusi also requested that OWCP accept the additional conditions of acceleration of osteoarthritis of her knees, bilateral medial meniscus tears, and bilateral anterior cruciate tears. He explained that the acceleration of degeneration in appellant's knees resulted in bilateral meniscal tears and bilateral anterior cruciate ligament tears that were neither temporary nor reversible. Dr. Khulusi also noted that Dr. Einbund opined that the only way to correct the damage was for her to undergo total knee replacement surgeries.

OWCP also received additional reports from Dr. Khulusi dated January 21, February 25, and March 25, 2015. Dr. Khulusi continued to repeat his diagnoses and opinions.

In a May 4, 2015 decision, OWCP terminated appellant's medical benefits, effective that date. It found that the weight of medical evidence rested with Dr. Uppal, who supported that she no longer had residuals of the accepted work-related conditions.

On June 3, 2015 appellant requested reconsideration and submitted a May 27, 2015 report from Dr. Khulusi.

Dr. Khulusi argued that there were multiple inaccuracies in the decision. He indicated that he documented his findings in all of his reports, which included objective findings on physical examination. Dr. Khulusi noted that he was enclosing copies of all of his reports from May 28, 2014 to January 21, 2015. He also referenced multiple sources and articles with regard to low back disorders and explained that the details of the activities in which appellant was engaged at work, included heavy physical work, with repetitive lifting, and forceful movements

for many years and work-related awkward postures over many years. Dr. Khulusi opined that all of these activities caused her low back musculoskeletal disorder that affected the tendons, ligaments, nerves, joints, cartilage, and bones of her low back. He explained that the result was acceleration of the degeneration of the bone and cartilage ligaments and joints of the back, which caused lumbar annular tears and the lumbar radiculopathy and that led to permanent aggravation of the degeneration of appellant's back. Dr. Khulusi further opined that, regarding her knees, her repetitive activities caused repetitive cumulative trauma to the knees, and that resulted in accelerating the degeneration in her knees. He argued that Dr. Uppal did not provide a rationalized explanation to support his opinion. Dr. Khulusi further argued that Dr. Uppal's opinion was speculative. He repeated his request for OWCP to accept additional conditions to include acceleration of degenerative disc disease of the lumbar spine, lumbar disc displacement, lumbar radiculopathy, acceleration of osteoarthritis of knees, bilateral medial meniscus tears, and bilateral anterior cruciate tears.

Dr. Khulusi continued to treat appellant and submitted reports dated May 28, July 9, August 27, October 8, and November 19, 2014 and January 21, and May 20, 2015.

In an April 28, 2015 report, Dr. Herring diagnosed bilateral knee degenerative joint disease and requested authorization for knee replacement surgery.

By decision dated August 26, 2015, OWCP denied modification of its prior decision.

On September 24, 2015 appellant again requested reconsideration and submitted a September 14, 2015 report from Dr. Khulusi, wherein he reiterated that Dr. Uppal's report was not entitled to receive greater weight as an impartial medical specialist because he had not provided any medical reasoning. Dr. Khulusi argued that his report was speculative and that OWCP had engaged in abuse of discretion through proof of manifest error and a clearly unreasonable exercise of judgment. He repeated his request for OWCP to accept the additional diagnosed conditions of bilateral medial meniscus tears, bilateral anterior cruciate tears, permanent aggravation of osteoarthritis of bilateral knees, lumbar disc displacement, lumbar radiculopathy, permanent aggravation of the degenerative disc disease of the lumbar spine as a result of her bilateral medial meniscus tears and bilateral anterior cruciate ligament tears. Dr. Khulusi repeated his prior opinion that appellant had been working in excess of 26 years doing hard, repetitive, and physical labor. He explained that, if her condition was age related, then all individuals her age would have the same ailments. Dr. Khulusi concluded his arguments and proffered that the report of Dr. Uppal was insufficient to carry the weight of the medical evidence. He continued to treat appellant.

In a September 29, 2015 report, Dr. Herring repeated his request for arthroscopic debridement of the knee to give appellant some relief. He explained that she would need total knee arthroplasty.

By decision dated December 17, 2015, OWCP denied modification of its August 26, 2015 decision.

On January 22, 2016 appellant again requested reconsideration and submitted a January 21, 2016 report from Dr. Khulusi, wherein he noted that he had reviewed Dr. Uppal's

report and Dr. Uppal had not mentioned the SOAF. Dr. Khulusi explained that this was required when referring appellant for a second opinion or impartial medical examination. He also noted that Dr. Uppal was never asked if the accepted conditions of temporary aggravation had ceased or if it was still related to her employment. Dr. Khulusi argued that her knee and back conditions could not have deteriorated because of her age only. He explained that, if her condition was caused by age, then all 58-year olds would be struggling to get up from a chair, and walk, and have constant continuous pain in the back and knees. Dr. Khulusi argued that appellant's hobby was sewing and she did not engage in any sports that could have contributed to her back and knee condition. Furthermore, appellant did not have any injuries that could have caused any damage to her back and knees other than the injury she suffered on the job. Dr. Khulusi again referenced FECA procedure manual and argued that a well-referenced medical opinion contained citations from medical reference resources and other information to support the opinion. He again argued that Dr. Uppal's report was not based on an accurate SOAF, that it was incomplete and inadequate to carry the weight of the evidence. Dr. Khulusi repeated his request for the additional conditions to be accepted. He argued that it was not necessary to prove a significant contribution of factors of employment, to establish causal relation. Dr. Khulusi argued that, if the medical evidence revealed an employment factor contributed to the employee's condition, such a condition would be considered employment related for purposes of compensation under FECA. He opined that "with a reasonable degree of medical certainty" that appellant's activities on the job caused her conditions of her low back and her bilateral knees. Dr. Khulusi argued that accepting appellant's diagnosis would allow her to receive the appropriate treatment and would affect her prognosis.

By decision dated March 17, 2016, OWCP denied appellant's request for reconsideration without conducting a review of the merits as her request neither raised substantive legal questions nor included relevant and pertinent evidence. It determined that the evidence was cumulative and substantially similar to evidence previously obtained, and thus, it was insufficient to warrant review of its prior decision. OWCP further noted that the objectivity of Dr. Khulusi's reports was compromised when he simultaneously became a medical provider and claimant advocate.

On April 14, 2016 appellant again requested reconsideration and submitted an April 4, 2016 report from Dr. Khulusi wherein he argued that his January 21, 2016 report was not cumulative and it was sufficient to warrant a merit review. Dr. Khulusi reiterated that he had demonstrated in his past reports dated May 27 and September 14, 2015, that Dr. Uppal's opinion was not rationalized and not based on medical science. He also explained that, in his January 21, 2016 report, he demonstrated that Dr. Uppal's opinion was not based on a complete physical examination as Dr. Uppal described in detail in his letter, which made his decision making deficient and not rationalized. Dr. Khulusi argued that Dr. Uppal did not disclose the contents of the SOAF and they were not given this information. He explained that he advocated for all of his patients and disputed OWCP's findings that his reports were minimized by the fact that he advocated for his patients. Dr. Khulusi argued that OWCP also engaged in error and abuse of discretion in its actions and misquoting the law. He disputed OWCP's notation that, having a postal union office on site, had no relevance to his unbiased opinion. Dr. Khulusi also argued that it was not necessary that the evidence be so conclusive as to establish causal relationship beyond a reasonable doubt. He explained that if the circumstances supported a causal

relationship and the medical evidence supported causal relationship, appellant had met her burden of proof.

Dr. Khulusi continued to treat appellant and, in an April 13, 2016 report, he indicated that she presented for follow-up for her low back and bilateral knee conditions from a May 29, 2013 date of injury. He noted that she reported today, that she had a fall at home about 2½ weeks ago because she could not pick up her left leg and tripped on the hose. Appellant ended up injuring her right elbow, right shoulder, and right knee, and since then she has been having more low back pain. Dr. Khulusi indicated that she saw her private physician and would go back for more follow-up. He noted that appellant reported pins and needles in both knees and the low back, reported pain in the knees as being sharp and reported having more pain in the right knee for the last month. Furthermore, appellant felt it more when she was trying to shift from gas to brakes. Dr. Khulusi advised that she related that her low back pain felt like aching, burning, and pulsating and she has not been receiving further treatment. He provided examination findings and diagnosed aggravation of degenerative disc disease of the lumbar spine, lumbar radiculopathy, lumbar annular tears, bilateral degenerative joint disease of the knees (accepted), bilateral meniscus tears, and bilateral anterior cruciate ligament tear. Dr. Khulusi recommended modified work with the same restrictions that he had previously provided.

By decision dated July 8, 2016, OWCP denied appellant's request for reconsideration without conducting a review of the merits as her request neither raised substantive legal questions nor included relevant and pertinent new evidence. It determined that the evidence submitted did not support that OWCP erroneously applied or interpreted a point of law and the evidence did not include a relevant legal argument not previously considered. OWCP also found that the evidence submitted was cumulative and substantially similar to evidence or documentation already contained in the case file and previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ A Timely application for reconsideration, including all supporting documents, must set forth arguments and contain 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

⁵ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the OWCP decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

considered by OWCP.⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS

Appellant disagreed with the termination of her medical benefits effective May 4, 2015. OWCP twice denied modification of the decision terminating her medical benefits. The most recent merit decision was dated February 17, 2015. Appellant again requested reconsideration on January 22 and April 14, 2016.

Appellant submitted reports from her physician, Dr. Khulusi, who generally repeated his disagreement with the findings of the impartial medical examiner. Although these medical reports were not previously considered by OWCP, the Board finds that they are substantially similar and duplicative of evidence previously considered and reviewed by OWCP, and they do not constitute a basis for reopening the case.¹⁰

In the January 21, 2016 report, Dr. Khulusi noted that he had reviewed Dr. Uppal's report and argued that he did not mention the SOAF, which was required when referring appellant for a second opinion or impartial medical examination. He also noted that Dr. Uppal was never asked if the accepted conditions of temporary aggravation had ceased or if it was still related to her employment. However, the Board notes that it does not have jurisdiction over the merits of the claim. The Board also notes that the record reflects that Dr. Uppal was provided with the SOAF and this argument would not be relevant and pertinent new evidence sufficient to require merit review as this does not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.

Dr. Khulusi also made several arguments with regard to appellant's knee and back conditions. For example, he argued that they could not have deteriorated because of her age only. However, Dr. Khulusi was arguing that OWCP accept additional conditions despite the fact that the only accepted condition was a temporary aggravation of localized primary osteoarthritis in the bilateral lower legs. The Board notes that these other mentioned conditions were not accepted by OWCP and these arguments are not relevant to the termination of appellant's medical benefits for the accepted conditions. Dr. Khulusi repeated his arguments that the impartial medical examiner's report was inadequate to carry the special weight of the evidence. He argued that references to FECA procedure manual were necessary for a well-referenced medical opinion. Dr. Khulusi again argued that Dr. Uppal's report was not based on an accurate SOAF, that it was incomplete and inadequate to carry the weight of the evidence and repeated his request for the additional conditions to be accepted. However, the acceptance of additional diagnosed conditions has not been addressed by OWCP and these arguments are not

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (b).

¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

new. Thus, these are not relevant new arguments not previously considered and they would not be relevant to establish the criterion for reopening the claim for a merit review.

Likewise, in his April 4, 2016 report, Dr. Khulusi argued that his January 21, 2016 report was not cumulative and it was sufficient to warrant a merit review. However, he again repeated his disagreement with the opinion of the impartial medical examiner, referenced his past reports dated May 27 and September 14, 2015 and again argued that Dr. Uppal's opinion was not rationalized and not based upon medical science. Dr. Khulusi again argued that the report did not contain a complete physical examination and that he did not disclose the content of SOAF and they were not given this information. He also argued that he advocated for all of his patients and disputed OWCP's findings that his reports were minimized by the fact that he advocated for his patients. Dr. Khulusi again argued that OWCP engaged in error and abuse of discretion in its actions and misquoting the law. He denied that his opinion was biased. Dr. Khulusi also argued as that he had satisfied the burden to support causal relationship. He argued that the report of the impartial medical examiner was inadequate and that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. However, the Board finds that these arguments are not supported by the record. Dr. Khulusi appears to be arguing that the additional diagnosed conditions should be accepted, but they have not been accepted by OWCP. The Board finds that these arguments are insufficient to warrant a merit review.

OWCP also received a medical report dated April 14, 2016, in which Dr. Khulusi noted that appellant had a fall at home about 2½ weeks prior because she could not pick up her left leg and tripped on the hose. Appellant ended up injuring her right elbow, right shoulder, and right knee, and since then she has been having more low back pain. Dr. Khulusi indicated that she saw her private physician and would go back for more follow-up. He noted that appellant reported pins and needles in both knees and the low back, reported pain in the knees as being sharp and reported having more pain in the right knee for the last month. Furthermore, appellant felt it more when she was trying to shift from gas to brakes. Dr. Khulusi advised that she related that her low back pain felt like aching, burning, and pulsating and she has not been receiving further treatment. He provided examination findings and diagnosed aggravation of degenerative disc disease of the lumbar spine, lumbar radiculopathy, lumbar annular tears, bilateral degenerative joint disease of the knees (accepted), bilateral meniscus tears, bilateral anterior cruciate ligament tear. Dr. Khulusi recommended modified work with the same restrictions that he had previously provided. The Board notes that the only condition accepted by OWCP was temporary aggravation of localized primary osteoarthritis, lower leg, and bilateral. Dr. Khulusi again repeated his arguments that the additional conditions should be accepted. However, he has not explained how these newly diagnosed conditions would be relevant to appellant's claim for continuing work-related residuals of her accepted medical conditions. Thus, Dr. Khulusi's April 13, 2016 report is not relevant and pertinent new evidence related to the issue of whether she continued to have work-related disability due to the accepted conditions, and thus, they are insufficient to require a merit review.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that OWCP erroneously applied or interpreted a specific point of law, or advanced

a relevant new argument not previously submitted. Therefore, OWCP properly denied her request for reconsideration.

On appeal appellant argues that the report of the impartial medical examiner was deficient. However, these arguments are not new and the sufficiency of his report was previously addressed by OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's January 22 and April 14, 2016 requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 8 and March 17, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.¹¹

Issued: December 14, 2017
Washington, DC

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

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

¹¹ Collen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.