



## **FACTUAL HISTORY**

On August 31, 2009 appellant, then a 41-year-old wildlife biologist, filed a traumatic injury claim (Form CA-1) alleging that on August 27, 2009 he fell and injured his right knee while conducting a parrot survey. He stopped work on August 28, 2009. OWCP accepted appellant's claim for right knee medial meniscal tear and authorized arthroscopic surgery on December 14, 2009 and August 27, 2012.

Appellant was treated by Dr. Javier Delgado-Candelario, a Board-certified orthopedic surgeon, from August 28 to December 14, 2009, for the right knee injury. Dr. Delgado-Candelario noted appellant's history was significant for anterior cruciate ligament (ACL) reconstruction in 1996. Appellant reported a blunt trauma to the right knee while performing his work duties. Dr. Delgado-Candelario noted an October 27, 2009 magnetic resonance imaging (MRI) scan revealed a meniscal tear and possible re-tear of the reconstructed ACL. On December 14, 2009 he performed a partial medial and lateral meniscectomy, debridement, and chondroplasty and diagnosed right knee medial and lateral meniscal tears and chondromalacia. Dr. Delgado-Candelario noted that appellant was disabled for six to eight weeks and could return to work with a knee brace.

Dr. Delgado-Candelario noted that appellant continued to experience pain, inflammation, and dysfunction of the right knee and on August 27, 2012 performed an arthroscopic partial medial meniscectomy, micro fracture, debridement, and chondroplasty of the right knee. He diagnosed right knee medial meniscal tear and patellofemoral chondromalacia.

On July 23, 2015 appellant filed a recurrence of disability claim (Form CA-2a) alleging that he never fully recovered from his right knee injury. He indicated that he had constant pain and inflammation which limited his right knee function.

By letter dated December 17, 2015, OWCP advised appellant of the type of factual and medical evidence needed to establish his recurrence claim. No further evidence was received.

In a decision dated January 27, 2016, OWCP denied appellant's claim for a recurrence of disability as he failed to establish a basis for his recurrence claim.

In a letter to OWCP dated February 3, 2016 and received on February 16, 2016, appellant indicated that he had requested a comprehensive narrative report from Dr. Delgado-Candelario. Appellant indicated that Dr. Delgado-Candelario would submit a report which addressed objective findings, diagnostic studies, diagnosis codes and a rationalized opinion explaining the relationship of his current condition to the original injury.

OWCP received reports from Dr. Delgado-Candelario dated October 27, 2009 to October 8, 2013 which noted appellant's treatment for chronic right knee inflammation and pain. Appellant also submitted June 21, 2012 and September 20, 2013 MRI scans of the right knee which revealed ACL dysfunction, truncated medial meniscus, and grade 3 chondromalacia of the medial joint compartment.

In a letter dated February 29, 2016, OWCP acknowledged having received appellant's February 3, 2016 letter on February 26, 2016. However, it advised appellant that the letter did not state which specific appeal right he was requesting. OWCP instructed him to refer to the

appeal rights that were provided with the decision rendered in his claim and choose a specific appeal in writing.

On March 1, 2016 OWCP received an appeal request form dated February 3, 2016 in which appellant requested a review of the written record. The record included a record of mailing on February 26, 2016. Appellant submitted notes from Dr. Delgado-Candelario dated October 27, 2009 to May 12, 2015. Also submitted were prescription notes from Dr. Delgado-Candelario dated September 11, 2012 to September 17, 2013.

In a decision dated July 25, 2016, OWCP denied appellant's request for a review of the written record. It found that his request was untimely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied as it could equally be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>3</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>4</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>5</sup> Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>6</sup>

### **ANALYSIS**

Appellant requested a review of the written record in an appeal request form dated February 3, 2016 and received on March 1, 2016. Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."<sup>7</sup> The case record contains a packing slip from the carrier reflecting that appellant's request was sent on February 26, 2016, which is 30 days from issuance of the January 27, 2016 decision. The packing slip further reflects receipt on April 29, 2016. The 30-day time period for determining the timeliness of appellant's request commences on the first day following the issuance of

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<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> 20 C.F.R. § 10.615.

<sup>5</sup> *Id.* at § 10.616(a).

<sup>6</sup> *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

<sup>7</sup> *Supra* note 5.

OWCP's decision.<sup>8</sup> As OWCP's decision was issued on January 27, 2016, the 30-day period for requesting a hearing began to run on January 28, 2016 and the last or 30<sup>th</sup> day was February 26, 2016. Since appellant's request for a review of the written record was sent on February 26, 2016, it was timely as it fell on the 30<sup>th</sup> day after the issuance of OWCP's decision. Accordingly, he is entitled to a review of the written record as a matter of right.

On remand OWCP should treat as timely appellant's February 26, 2016 request for a review of the written record. It should conduct a review of the written record as requested.<sup>9</sup> Following this and such other development as necessary, OWCP shall issue an appropriate merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for review of the written record of the January 27, 2016 decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 25, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this decision of the Board.

Issued: March 7, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>8</sup> See *Donna A. Christley*, 41 ECAB 90, 91 (1989). See also *John B. Montoya*, 43 ECAB 1148, 1151-52 (1992).

<sup>9</sup> 20 C.F.R. § 10.618.