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

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| **T.C., Appellant** | ) | |
| **and** | ) | **Docket No. 17-0353** |
| | ) | **Issued: March 22, 2017** |
| **DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Waltham, MA, Employer** | ) | |

*Appearances*:
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### *JURISDICTION*

On December 5, 2016 appellant filed a timely appeal from an August 18, 2016 merit decision and a November 15, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUES*

The issues are: (1) whether appellant met his burden of proof to establish a left knee injury causally related to a July 2, 2015 employment incident; and (2) whether OWCP properly declined to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On July 7, 2015 appellant, then a 55-year-old compliance investigator, filed a traumatic injury claim (Form CA-1) alleging that he injured his left knee at work on July 2, 2015. He indicated that he was exiting his government vehicle around 11:00 a.m. and his foot slipped. Appellant described having felt his knee go to the left as his body moved forward. He believed that he had pulled a muscle. Although appellant did not stop work at the time, his left knee was reportedly sore and continued to bother him over the holiday (4th of July) weekend. On July 6, 2015 he was pulling weeds and his knee popped. Appellant indicated that he could not put any weight on it. He went to the emergency room on July 6, 2015, and he stopped work on July 7, 2015.

Appellant submitted a July 6, 2015 report, which indicated that he was seen in the emergency room on that date by Dr. John Mulkern, a Board-certified family practitioner. Dr. Mulkern noted that appellant presented with a chief complaint of left knee injury. Appellant reported that he felt some discomfort and a sensation of his knee giving out approximately one week prior. Dr. Mulkern noted, that "[y]esterday he pivoted and felt 'a pop' at the left knee" with increased pain and swelling since that time. Appellant described the sensation as being similar to when he injured his meniscus in the right knee and noted that he was able to bear full weight with pain. Dr. Mulkern noted "Associated injuries none" and "Previous injuries to this area none." He advised that, upon examination, appellant had left knee tenderness at the left medial joint line, small palpable effusion, no proximal fibular tenderness, full range of motion with pain at full flexion, no joint laxity, negative Lachman's sign, negative anterior and posterior drawer tests, no distal paresthesis, and no distal weakness. Dr. Mulkern indicated that x-rays showed no acute findings.[2] He noted that the examination was consistent with a possible meniscal injury and he diagnosed "left knee sprain, possible meniscal injury."

In a July 13, 2015 report, Dr. Kai Mithoefer, a Board-certified orthopedic surgeon, noted that appellant reported that he "had a twisting injury to his knee on [July 2, 2015]" and that he felt something clicking in his knee and locking sensations, which had gradually resolved. Appellant further reported that he continued to have significant pain and felt like something was stuck in the joint. Dr. Mithoefer diagnosed left knee arthralgia and also noted that appellant had symptoms consistent with an acute meniscal tear with a meniscus fragment. He recommended a magnetic resonance imaging (MRI) scan to rule out a meniscal tear.

An August 3, 2015 left knee MRI scan revealed a tear at the root attachment of the posterior horn medial meniscus, small joint effusion, mild trochlea sulcus chondromalacia, myotendinous strain of the gastrocnemius muscles, and mild medial collateral ligament sprain.

On August 10, 2015 Dr. Mithoefer noted that appellant presented for evaluation of his left knee and that appellant reported, "This started with a twisting injury on [July 2, 2015]." He detailed the findings of his August 10, 2015 examination and diagnosed left knee medial meniscal tear with mild osteoarthritis. Dr. Mithoefer recommended that appellant undergo left knee surgery.

[2] A July 6, 2015 left knee x-ray revealed "No acute bony abnormality…."

In a letter dated September 2, 2015, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted an undated statement in which he indicated that the July 2, 2015 injury occurred when he exited the car with his left foot. He noted that his body weight went forward and his knee went sideways. Appellant indicated that he initially thought he pulled a muscle and he thought he could recover at home. After being off work for three days, while at home his left knee popped and buckled when he bent down to pick a weed from his tomato garden. Appellant indicated that he then immediately sought medical attention to avoid further injury.

Appellant also submitted a July 7, 2015 e-mail to an employing establishment official in which he indicated that, as he exited his government vehicle on July 2, 2015, he felt his left knee turn as his foot stepped onto the pavement. He reported that his left knee bothered him over the weekend and that on July 6, 2015 he was pulling weeds "and I heard my knee pop and it buckled to the point I couldn't put any weight on it."

In an October 20, 2015 decision, OWCP denied appellant's claim for a work-related July 2, 2015 left knee injury. It found that he had not submitted a medical report relating a diagnosed condition to the implicated July 2, 2015 work incident of stepping out of his government vehicle.

Appellant timely requested a telephonic hearing with an OWCP Branch of Hearings and Review hearing representative in connection with the October 20, 2015 decision. He submitted a September 24, 2015 report in which Dr. Mithoefer indicated that appellant was status post partial medial meniscectomy of the left knee with abrasion chondroplasty of the medial femoral condyle and loose body removal. Appellant also resubmitted copies of previously submitted reports, including the July 6, 2015 report of Dr. Mulkern and the July 13 and August 10, 2015 reports of Dr. Mithoefer.

During the telephonic hearing held on June 10, 2016, appellant testified that he could not say that he slipped when he got out of the car on July 2, 2015, but rather he "stepped wrong" and his knee went to the left. He indicated that his left knee hurt, but he continued with his duties. Appellant noted that he thought he just pulled something and that he then stayed off the leg during the holiday weekend. He did not think that medical care was needed at that time, but he later bent down to pull a weed at home and heard his left knee pop. Appellant asserted that his claim had initially been approved, but OWCP's hearing representative informed him that the initial minimal medical costs had been administratively approved prior to formal adjudication. The hearing representative advised him that to support his claim, the medical evidence must include an accurate history of injury and a rationalized opinion on causal relationship. Appellant was provided an opportunity to submit additional evidence.

After the June 10, 2016 hearing, appellant submitted a June 27, 2016 statement in which he asserted that the hearing transcript did not accurately reflect his previous testimony. He again asserted that he had established his claim for a July 2, 2015 injury. Appellant also submitted a copy of the hearing transcript on which he made various handwritten notations.

On June 30, 2016 appellant submitted a version of Dr. Mithoefer's July 13, 2015 report, which had previously been submitted to OWCP. This version contained the same text as the earlier submission, but also included a page on which brief notes were made regarding appellant's past surgical history, social history, and occupational history.

By decision dated August 18, 2016, the hearing representative affirmed OWCP's October 20, 2015 decision denying appellant's traumatic injury claim. She found that he established the occurrence of a work incident on July 2, 2015 when he stepped out of a vehicle, but that he failed to submit medical evidence relating a diagnosed condition to the specific work incident. The hearing representative indicated that her decision incorporated appellant's comments regarding the accuracy of the transcript of the hearing held on June 10, 2016.

In an August 25, 2016 letter received on September 9, 2016, appellant advised that he was requesting reconsideration of the hearing representative's August 18, 2016 decision. He also resubmitted the three-page report that Dr. Mithoefer produced on June 30, 2016 as an addendum to his previously submitted July 13, 2015 report.

On November 7, 2016 OWCP received a June 28, 2016 letter in which appellant asserted that the transcript of the June 10, 2016 hearing did not accurately reflect his hearing testimony.

By decision dated November 15, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It noted that the evidence and argument he submitted in connection with his reconsideration request was repetitious in nature.

## ***LEGAL PRECEDENT -- ISSUE 1***

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[3]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[4] The second component is whether the employment incident caused a personal injury.[5] An employee may establish that an injury occurred in the performance of duty

[3] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[6]

## ***ANALYSIS -- ISSUE 1***

On July 7, 2015 appellant filed a Form CA-1 claiming that he sustained a left knee injury at work on July 2, 2015. He alleged that the injury occurred when he exited his government vehicle and government his foot slipped. Appellant noted that he felt his knee go left as his body moved forward. OWCP accepted that the July 2, 2015 work incident occurred as alleged. It also accepted that he was in the performance of duty at the time, and that a left knee medical diagnosis had been provided. However, OWCP denied the claim because the medical evidence did not establish a causal relationship between appellant's claimed left knee condition and the accepted July 2, 2015 employment incident. The Board finds that he failed to meet his burden of proof to establish a work-related injury on July 2, 2015.

Appellant submitted a July 6, 2015 report in which Dr. Mulkern, an attending physician, noted that appellant felt some discomfort and a sensation of his knee giving out approximately one week prior. Dr. Mulkern noted, that "[y]esterday he pivoted and felt 'a pop' at the left knee" with increased pain and swelling since that time. He noted "Associated injuries none" and "Previous injuries to this area none." Dr. Mulkern indicated that the examination was consistent with a possible meniscal injury and he diagnosed "left knee sprain, possible meniscal injury."

The submission of this report would not establish appellant's claim for a work-related July 2, 2015 injury because Dr. Mulkern did not provide any description of the July 2, 2015 work incident of stepping out of a government vehicle. Although he noted appellant's recitation of recent symptomatology, he did not provide a clear opinion on the cause of the diagnosed left knee condition. Dr. Mulkern did not indicate that appellant sustained an injury due to the accepted July 2, 2015 work incident. The Board has held that medical evidence which does not offer a clear opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[7]

In a July 13, 2015 report, Dr. Mithoefer, an attending physician, noted that appellant reported that he "had a twisting injury to his knee on [July 2, 2015]" and that he felt something clicking in his knee and locking sensations, which had gradually resolved. He diagnosed left knee arthralgia and also noted that appellant had symptoms consistent with an acute meniscal tear with a meniscus fragment. Although Dr. Mithoefer mentioned appellant's reference to a July 2, 2015 work-related twisting injury, he did not provide any description of the specific incident of stepping out of a vehicle. At the time, Dr. Mithoefer did not provide a clear opinion that appellant's left knee arthralgia and possible acute meniscal tear were related to the July 2, 2015 employment incident. Moreover, he did not mention the July 6, 2015 incident that prompted appellant to seek medical care, *i.e.*, his left knee popped and buckled when he bent down to pick a weed from his tomato garden.

[6] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[7] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988).

In an August 10, 2015 report, Dr. Mithoefer noted that appellant presented for evaluation of his left knee and that he reported, "This started with a twisting injury on [July 2, 2015]." He diagnosed left medial meniscal tear with mild osteoarthritis and recommended that appellant undergo surgery. Although Dr. Mithoefer again mentioned appellant's reference to a July 2, 2015 twisting injury, he did not provide any description of the July 2, 2015 work incident of stepping out of a vehicle or otherwise relate the observed left knee condition or need for surgery to the specific July 2, 2015 work incident implicated by appellant.

In a September 24, 2015 report, Dr. Mithoefer indicated that appellant was status post partial medial meniscectomy of the left knee with abrasion chondroplasty of the medial femoral condyle and loose body removal. He did not provide any opinion that this surgery was necessitated by a work-related injury sustained on July 2, 2015.

On appeal, appellant argues that the hearing representative did not consider all the relevant medical evidence. He also claimed that the transcript for the June 10, 2016 hearing was inaccurate. The Board notes that OWCP's hearing representative did in fact consider all the relevant medical evidence and that she considered appellant's comments regarding his hearing testimony, submitted shortly after the June 10, 2016 hearing, prior to issuing her August 18, 2016 decision.

The current record does not contain any medical evidence establishing that appellant sustained a left knee injury as a result of stepping out of his government vehicle on July 2, 2015. Therefore, he did not meet his burden of proof to establish a work-related injury on July 2, 2015.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[8] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[9] 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.[10] Atimely 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 considered by OWCP.[11] When a timely application for reconsideration does not meet at least

[8] 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).

[9] 20 C.F.R. § 10.607.

[10] *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 OWCP's 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.

[11] 20 C.F.R. § 10.606(b)(3).

one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[12]

Submitting evidence or argument that repeats or duplicates evidence or argument already in the case record does not warrant reopening the record for merit review.[13] Similarly, the submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.[14] Reopening of a case may be predicated solely on a legal premise not previously considered; however, such reopening is not required where the legal contention does not have a reasonable color of validity.[15]

## ***ANALYSIS -- ISSUE 2***

In a letter received by OWCP on September 9, 2016, appellant timely requested reconsideration of the hearing representative's August 18, 2016 decision denying his claim for a work-related July 2, 2015 injury. The Board finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(3), thereby, precluding further merit review. In connection with his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Nor did he advance a new and relevant legal argument not previously considered by OWCP.

On reconsideration, appellant resubmitted what he described as a three-page addendum to Dr. Mithoefer's July 13, 2015 report, which OWCP previously considered and found insufficient to establish causal relationship. This is the same information appellant submitted on June 30, 2016 when the case was pending before the Branch of Hearings & Review. As noted above, the submission of evidence that repeats or duplicates evidence already in the record does not constitute a basis for reopening the claim for further merit review.[16]

Appellant submitted a June 28, 2016 letter in which he indicated that the hearing transcript did not accurately reflect his hearing testimony. However, he had already submitted a similar statement, dated June 27, 2016, which the hearing representative considered in her August 18, 2016 decision. Moreover, appellant has not explained how the alleged deficiencies in the transcript undermine the hearing representative's finding with respect to causal relationship, which is a medical issue. The hearing representative specifically found that "Nowhere in the medical evidence … is there any mention of the July 2, 2015 work incident," *i.e.*, stepping out of a car. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[17]

[12] *Id*. at § 10.608(a), (b).

[13] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[14] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[15] *John F. Critz*, 44 ECAB 788, 794 (1993).

[16] *See supra* note 13.

[17] *See supra* note 14.

The underlying issue in this case was whether appellant submitted medical evidence showing that he sustained a work-related injury on July 2, 2015. That is a medical issue which must be addressed by relevant medical evidence.[18] A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in this case.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he sustained a left knee injury causally related to a July 2, 2015 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 15 and August 18, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 22, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[18] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).