



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 24, 2014 appellant, then a 71-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on March 18, 2014 she sustained a right knee medial meniscus tear when she tried to load a wheeled container into a dumpster at work and it got stuck. She finished her shift, but stopped work on March 19, 2014.

Appellant was initially treated by Dr. Heather C. Killie, a Board-certified orthopedic surgeon. In a March 3, 2014 report, Dr. Killie indicated that appellant complained of persistent right knee pain, which began approximately two weeks prior when appellant felt a snap in the posterolateral aspect of the right knee while she pushed some mail at work. She discussed appellant's history and conducted an examination. Dr. Killie reported superficial varicosities around appellant's leg and tenderness to palpation over the anterolateral and anterior medial aspect of the knee joint. She also noted mild tenderness around the patella and some mild tenderness in the posterolateral joint line. Dr. Killie noted that x-rays showed arthritic changes in all three compartments of appellant's right knee. She diagnosed right knee degenerative joint disease with recent flare.

In reports dated March 24 to May 1, 2014, Dr. Killie related appellant's complaints of continued pain in the medial and anterior aspect of her right knee. She reported examination findings of tenderness to palpation over the medial joint line and medial femoral condyle of appellant's right knee. Dr. Killie explained that appellant's right knee pain was likely arthritic, but she could not rule out a meniscus tear as a result of appellant's work injury. She checked a box marked "yes" on a state workers' compensation medical form indicating that appellant's injury was a result of the injury described. In an April 3, 2014 report, Dr. Killie noted that a right knee magnetic resonance imaging (MRI) scan showed spontaneous osteonecrosis, extensively edematous, and medial meniscus tear. She reported that it "certainly could have been from her fall." Dr. Killie diagnosed right knee pain insufficiency fracture. In a May 1, 2014 report, she diagnosed right knee pain with meniscus tear and spontaneous osteonecrosis. Dr. Killie related that, although she initially reported that appellant fell down at work, appellant's right knee injury actually occurred when she was pushing a large cart which got stuck. She opined that "it was more likely than not that this was the cause of her right knee pain." Dr. Killie explained that, although appellant had underlying degenerative joint disease of the right knee, there was also a medial meniscus tear which was "more likely than not from the acute injury." She authorized that appellant could work light duty.

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<sup>4</sup> Docket No. 15-1443 (issued October 21, 2015).

Appellant underwent a right knee MRI scan on March 28, 2014 by Dr. Michael Luck, a Board-certified diagnostic radiologist. Dr. Luck noted spontaneous osteonecrosis of the knee with subarticular focus of extensive edema, complex tear of the posterior horn and root of the medial meniscus, mild degenerative osteoarthritis, and indeterminate hematopoietic marrow involving the distal femoral shaft and proximal table.

By letter dated April 29, 2014, the employing establishment controverted appellant's claim. E.C., a health and resource management specialist, alleged that appellant was filing a workers' compensation claim in order to cover medical costs incurred for a preexisting condition unrelated to her employment.

By letter dated May 14, 2014, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It requested that she respond to an attached questionnaire in order to substantiate that the March 18, 2014 incident occurred as alleged and provide additional medical evidence to establish a diagnosed condition causally related to the alleged employment incident. Appellant was afforded 30 days to submit additional evidence.

On May 23, 2014 appellant responded to OWCP's development letter. She related that her injury occurred when she pushed a heavy loaded postcon into the dumpster and one of the front wheels got stuck on the metal edge. Appellant stated that when she tried to get the postcon unstuck she felt a severe pain in the front and back of her right knee. She noted that no one witnessed the event, but she informed her supervisor as soon as she saw her. Appellant explained that she scheduled an appointment with her physician when she continued to experience pain the next day. She indicated that she did not immediately file a workers' compensation claim because she was confused and she was waiting for all her medical paperwork. Appellant also described an incident that occurred at the end of February 2014 when she felt a snap at the back of her knee when she reached forward to remove a package that was jammed at the end of a belt. She did not report this incident because she was able to continue working.

OWCP denied appellant's claim in a decision dated June 13, 2014. It found that the evidence of record was insufficient to establish fact of injury because the factual evidence of record failed to establish that the March 18, 2014 incident occurred as alleged.

On July 16, 2014 appellant requested an oral hearing before an OWCP hearing representative. She again described the March 18, 2014 employment incident and alleged that the February 2014 incident was unrelated to the claimed March 18, 2014 incident. Counsel clarified that when appellant sustained another right knee injury on March 18, 2014 she used a prescheduled appointment to address the new injury. He also noted that, while Dr. Killie initially attributed appellant's right knee injury to a fall at work, she later corrected her mistake and described that appellant's injury occurred when pushing a large cart.

By decision dated April 30, 2015, an OWCP hearing representative affirmed the June 13, 2014 denial decision. She determined that the evidence of record failed to establish that the March 18, 2014 employment incident occurred as appellant described.

Appellant filed an appeal to the Board on June 22, 2015.

By decision dated October 21, 2015, the Board affirmed the April 30, 2015 decision with modification.<sup>5</sup> The Board determined that the evidence of record was sufficient to establish that the March 18, 2014 incident occurred as alleged. However, the Board further found that the medical evidence of record failed to establish that appellant's right knee condition was causally related to the March 18, 2014 employment incident.

On April 5, 2016 OWCP received appellant's request for reconsideration.<sup>6</sup> Counsel noted that he was submitting a new December 7, 2015 medical report from Dr. Killie, which established that appellant's right knee meniscus tear was related to the March 18, 2014 employment incident.

In a December 7, 2015 report, Dr. Killie indicated that appellant was doing better from the work-related injury. She clarified that appellant's right knee was injured on March 18, 2014. Dr. Killie noted that appellant did not have any previous issues with her right knee prior to the March 18, 2014 injury. She opined that appellant's right knee was related to the injury sustained at work. Dr. Killie reported that although appellant had some underlying arthritic change in her knee, she absolutely had no real issues prior to this and it was "indeed related to her work injury on March 18, 2014."

OWCP denied modification of its April 30, 2015 decision by decision dated June 3, 2016. It found that the medical evidence of record was insufficient to establish that appellant's right knee injury was causally related to the accepted March 18, 2014 employment incident.

On October 11, 2016 appellant requested reconsideration. Counsel reported that he was submitting an August 16, 2016 medical report from Dr. Killie which established that appellant's right knee injury was causally related to the March 18, 2014 employment incident.

In an August 16, 2016 report, Dr. Killie related that appellant was initially seen on March 3, 2014 for complaints of posterior lateral pain of her right knee. She noted that at the time she diagnosed arthritis, localized to the lateral aspect of appellant's right knee, she had authorized appellant to work in a limited-duty status. Dr. Killie explained that she scheduled a follow-up appointment with appellant on March 24, 2014. She indicated that during the March 24, 2014 appointment, appellant's posterior lateral knee pain had resolved and she was now complaining of significant medial-sided knee pain. Dr. Killie reported that appellant attributed her new right knee pain to a March 18, 2014 incident at work when she twisted her knee while pushing some carts at work. She noted that because appellant had no pain in the posterior lateral aspect of the knee, she concluded that appellant likely had a medial meniscus tear and recommended a right knee MRI scan. Dr. Killie explained that appellant did not have any medical-based symptoms prior to the March 24, 2014 examination. She concluded that "the

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<sup>5</sup> *Id.*

<sup>6</sup> Although appellant claimed to be filing a request for reconsideration from the Board's October 21, 2015 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the October 21, 2015 Board decision was the last merit decision, the hearing representative's April 30, 2015 decision is the appropriate subject of possible modification by OWCP.

injury sustained on March 18, 2014 was indeed the cause for her medial meniscus tear as she had no pain in the medial aspect of her knee prior to this examination.”

By decision dated October 25, 2016, OWCP denied further merit review of appellant’s case under 5 U.S.C. § 8128(a). It found that Dr. Killie’s August 16, 2016 report was cumulative and substantially similar to her previously submitted reports and was thus duplicative.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>7</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.<sup>8</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.<sup>9</sup> The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.<sup>10</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>11</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.<sup>12</sup>

### **ANALYSIS**

In OWCP’s most recent June 3, 2016 merit decision, it again denied appellant’s traumatic injury claim finding that the medical evidence of record failed to establish that her right knee injury was causally related to the accepted March 18, 2014 employment incident. On October 11, 2016 it received her latest request for reconsideration.

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (January 2004).

<sup>11</sup> *Supra* note 8 at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>12</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant has failed to establish that OWCP erroneously applied or interpreted a specific point of law, nor has she advanced a relevant legal argument not previously considered by OWCP. She has also not submitted relevant and pertinent new evidence not previously considered by OWCP.

In support of appellant's reconsideration request, her representative noted that he submitted a new August 16, 2016 report from Dr. Killie, which addressed OWCP's concerns in its latest denial decisions and established that appellant's current right knee medial meniscus tear was a result of the March 18, 2014 employment incident, not a preexisting injury. The Board finds that this assertion does not show a legal error by OWCP or constitute new and relevant legal argument. Accordingly, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

Appellant submitted new evidence in support of her request for reconsideration. In an August 16, 2016 report, Dr. Killie explained that she initially examined appellant on March 3, 2014 for complaints of posterior lateral right knee pain she diagnosed arthritis. She related that, at a March 24, 2014 follow-up appointment, appellant's new complaint was of significant medial-sided right knee pain, which appellant related to a March 18, 2014 incident at work when she twisted her knee while pushing some carts. Dr. Killie opined that "the injury sustained on March 18, 2014 was indeed the cause of her medial meniscus tear as she had no pain in the medial aspect of her knee prior to this examination."

Although Dr. Killie's August 16, 2016 report was not previously considered by OWCP, the Board notes that this new medical report is substantially similar to her previous reports. She merely reiterated findings and repeated her previous opinion that appellant sustained a new right knee injury on March 18, 2014. The Board has held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.<sup>13</sup>

Accordingly, the Board finds that appellant did not provide OWCP with any evidence which has met the requirements of 20 C.F.R. § 10.606(b)(3) sufficient to require further merit review of her claim.

On appeal, counsel alleges that Dr. Killie did not merely restate her opinion, but established that appellant sustained a right knee injury on March 18, 2014. As previously explained, however, Dr. Killie's August 16, 2016 medical report does not constitute pertinent new and relevant evidence sufficient to require merit review of her claim under 20 C.F.R. § 10.606(b)(3).

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<sup>13</sup> *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

As appellant has not met any of the regulatory requirements, OWCP properly declined her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).<sup>14</sup> Thus, OWCP did not abuse its discretion in refusing to reopen her claim for a review on the merits.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 17, 2017  
Washington, DC

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

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

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

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<sup>14</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).