

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

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**G.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
North Babylon, NY, Employer**

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**Docket No. 17-1399  
Issued: November 8, 2017**

*Appearances:*

*Thomas S. Harkins, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 12, 2017 appellant, through counsel, filed a timely appeal from a January 11, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated January 29, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## 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>3</sup> The facts and circumstances surrounding the first appeal are incorporated herein by reference. The relevant facts are as follows.

On February 9, 2012 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 7, 2012 she twisted her left knee when stepping from her postal truck. She stopped work on February 10, 2012.

Dr. Kevin G. Vesey, an attending Board-certified orthopedic surgeon, followed appellant beginning February 15, 2012. In February 15 and 17, 2012 reports, he provided a detailed history of the alleged February 7, 2012 injury. On examination, Dr. Vesey found mild effusion of the left knee with medial joint line tenderness. He diagnosed a Baker's cyst and possible torn medial meniscus. In a February 24, 2012 report, Dr. Vesey opined that a magnetic resonance imaging (MRI) scan of the left knee showed degenerative arthritis and slight degeneration of the "medial meniscus with a possible slight tear" and a possible ruptured popliteal cyst. He held appellant off work.

In a March 7, 2012 letter, OWCP advised appellant of the additional evidence needed to establish her claim. Appellant submitted a March 16, 2012 report from Dr. Vesey noting continued medial joint line tenderness and stiffness in the left knee despite participation in physical therapy. Dr. Vesey recommended left knee arthroscopy as she was not improving. He opined that the factual and medical history "supports causal nature of the injury in development of [appellant's] complaint."

By decision dated April 9, 2012, OWCP denied appellant's claim although she established that the employment incident occurred, finding that causal relationship had not been established.

In an April 24, 2012 letter, appellant requested a review of the written record by an OWCP hearing representative. She submitted an April 18, 2012 report from Dr. Vesey, who noted that she "twisted her left knee on the date of injury as given by [appellant] as February 7, 2012. [Appellant] has persistent medial joint line pain" without radiographic evidence of osteoarthritis.

By decision issued August 23, 2012, an OWCP hearing representative affirmed the April 9, 2012 decision, finding that Dr. Vesey did not explain how stepping from a postal vehicle on February 7, 2012 would have caused or aggravated any of the diagnosed left knee conditions.

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<sup>3</sup> Docket No. 14-0494 (issued June 10, 2014).

On September 18, 2012 appellant requested reconsideration. She indicated that she had been off work from February 7 to July 22, 2012 due to left knee pain and April 30, 2012 surgery. Appellant returned to work on July 23, 2012. She again stopped work on September 7, 2012, pending left knee surgery which was scheduled for September 10, 2012.

Counsel submitted new medical evidence. On April 30, 2012 Dr. Vesey noted performing a left knee arthroscopy and partial medial meniscectomy. He diagnosed medial meniscus tear. In a March 25, 2013 report, Dr. Vesey noted that April 30, 2012 arthroscopy revealed a radial medial meniscus tear with “mild degenerative changes mostly around the patella.” Three weeks after surgery, he aspirated the Baker’s cyst. After a return to limited duty from June to August 2012, appellant again stopped work due to increasing left knee symptoms. Dr. Vesey performed a September 10, 2012 repeat left knee arthroscopy with “further resection of the medial meniscus and debridement of the patellofemoral joint, medial femoral condyle.” He also reaspirated the Baker’s cyst. Dr. Vesey diagnosed mild osteoarthritis of the left knee and a torn meniscus. He explained that “[t]he torn meniscus is felt to be related to the trauma sustained when [appellant] was getting off her truck. The osteoarthritis of the knee cannot be explained fully by the traumatic incident.”

By decision issued August 8, 2013, OWCP denied modification, finding that Dr. Vesey’s March 25, 2013 report was speculative due to his use of the term “felt to be” and therefore insufficient to establish causal relationship. Counsel then appealed to the Board.

By decision issued June 10, 2014,<sup>4</sup> the Board set aside OWCP’s August 8, 2013 decision, finding that Dr. Vesey’s reports were of sufficient probative quality to warrant additional development of the claim. The Board remanded the case to OWCP to refer appellant to an appropriate medical specialist to determine whether she sustained a left knee injury in the performance of duty, as alleged. Following such development, OWCP was to issue a *de novo* decision in the case.

On remand of the case, OWCP referred the medical record and a statement of accepted facts to OWCP’s medical adviser to determine whether the accepted work incident was competent to produce the claimed injury. In an August 25, 2015 report, OWCP’s medical adviser opined that Dr. Vesey’s reports were sufficiently detailed, accurate, and well-rationalized to establish that the accepted February 7, 2012 incident caused a posterior horn tear of the left medial meniscus and a ruptured left popliteal cyst.

On October 22, 2015 OWCP accepted that the February 7, 2012 incident caused a resolved posterior horn tear of the left medial meniscus and a ruptured popliteal cyst of the left knee. Appellant claimed wage-loss compensation from September 8, 2012 through January 16, 2013.

In a December 10, 2015 letter, OWCP advised appellant to submit a claim for recurrence of disability (Form CA-2a) for the period September 8, 2012 to January 16, 2013. It noted the type of additional medical evidence needed to establish her recurrence claim, including answers

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<sup>4</sup> *Id.*

to items on an attached questionnaire. OWCP afforded appellant 30 days to submit such evidence.

In response, appellant submitted a copy of Dr. Vesey's March 25, 2013 report previously of record. She also provided her January 6, 2016 answer to the questionnaire accompanying OWCP's December 10, 2015 letter. Appellant asserted that the recurrence of disability began when Dr. Vesey reaspirated the Baker's cyst three weeks after the April 30, 2012 arthroscopy. She contended that the Baker cyst caused posterior swelling of the left knee and disabling her from work. Appellant noted performing intermittent light duty when there was work available within her restrictions. She did not return to full duty following the left knee arthroscopy.

By decision dated January 29, 2016, OWCP denied appellant's claim for a recurrence of disability, finding that the medical evidence of record was insufficient to establish a spontaneous worsening of the accepted left knee conditions without intervening cause.

In a May 19, 2016 letter, counsel requested a status update on the payment of compensation. On June 22, 2016 OWCP paid appellant wage-loss compensation for the period March 26 to August 31, 2012.

In an October 12, 2016 letter, appellant, through counsel, requested reconsideration.<sup>5</sup> He contended that Dr. Vesey's March 25, 2013 report was sufficient to establish that the accepted work injury also caused osteoarthritis of the left knee. Counsel submitted a September 30, 2016 report from Dr. Vesey, relating appellant's complaints of chronic left knee pain. On examination of the left knee, Dr. Vesey noted a +1 effusion, patellofemoral crepitus, and crepitus throughout the knee. He obtained x-rays demonstrating "moderate-to-severe osteoarthritis of the left knee," most severe in the "medial joint space with osteophyte formation." Dr. Vesey opined that the accepted injury contributed "probably 50 percent" to the development of left knee osteoarthritis. He noted that left knee x-rays taken at the time of injury were normal, verifying that the osteoarthritis developed only since the injury.

By decision dated January 11, 2017, OWCP denied reconsideration, finding that appellant did not submit new, relevant evidence or legal argument sufficient to warrant reopening the merits of her claim. It found that the copies of evidence previously of record, counsel's letters, and Dr. Vesey's September 30, 2016 were cumulative or irrelevant as they did not specifically address the claimed period of disability or its etiology.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>6</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must:

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<sup>5</sup> On October 19, 2016 counsel filed an application for a counsel fee in the amount of \$2,500.00 for legal services before OWCP rendered to appellant regarding her FECA claim from April 4 to October 12, 2016. He enclosed her October 17, 2016 statement approving the fee. By decision dated November 17, 2016, OWCP approved counsel's fee application in the amount of \$2,500.00.

<sup>6</sup> 5 U.S.C. § 8128(a). Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

(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>7</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>8</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>9</sup>

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>10</sup> He or she need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>11</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)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>12</sup>

### ANALYSIS

OWCP accepted that on February 9, 2012 appellant twisted her left knee while stepping from her postal truck, causing a posterior horn tear of the left medial meniscus resolved by surgery, and a ruptured popliteal cyst. It paid her compensation for the period March 26 through August 31, 2012. Appellant claimed a recurrence of disability for the period September 8, 2012 to January 16, 2013. OWCP denied her recurrence claim by decision dated January 29, 2016, finding that the medical evidence of record was insufficient to establish a spontaneous worsening of the accepted left knee conditions such that she was totally disabled from work for the claimed period.

Appellant, through counsel, requested reconsideration by letter dated October 12, 2016. Counsel contended that an enclosed September 30, 2016 report from Dr. Vesey was sufficient to establish that the accepted February 9, 2012 employment injury also caused osteoarthritis of the left knee. He did not show that OWCP erroneously applied or interpreted point of law. Counsel failed to provide a new, relevant legal argument regarding the claimed recurrence of disability. In his September 30, 2016 report, Dr. Vesey did not address the crucial question of whether appellant was totally disabled from work from September 8, 2012 to January 16, 2013 due to her accepted employment injury. As the medical evidence submitted was not relevant or pertinent

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<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.607(a).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>11</sup> *See supra* note 6. *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>12</sup> *Annette Louise*, 54 ECAB 783 (2003).

new evidence as it did not address the recurrence claim at issue, they are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.<sup>13</sup>

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.

On appeal counsel contends that Dr. Vesey's September 30, 2016 addendum report was new, relevant, and established legal error by OWCP in issuing its January 29, 2016 decision. He argues that the report is sufficient to establish that appellant sustained left knee osteoarthritis due to the accepted injury. As noted above, as Dr. Vesey's September 30, 2016 report was irrelevant to the recurrence claim.

### **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 decision of the Office of Workers' Compensation Programs dated January 11, 2017 is affirmed.

Issued: November 8, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy 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>13</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).