

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).

On appeal counsel contends that the medical reports of Dr. Richard A. Boiardo, an attending Board-certified orthopedic surgeon, are sufficient to establish that appellant's knee condition was aggravated by her falls at work and her employment duties.

FACTUAL HISTORY

On June 24, 2015 appellant, then a 49-year-old flat sorter clerk, filed an occupational disease claim (Form CA-2) alleging an injury caused or aggravated by her federal employment. She became aware of her condition on March 14, 2014 and realized its relationship to her employment on September 21, 2014. Appellant stopped work on September 20, 2014. In an accompanying narrative statement, she provided a detailed description of her flat sorter clerk work duties, the development of her claimed injury, and her medical treatment which included right knee surgery on October 2, 2014 and left knee surgery on January 21, 2015. Appellant noted that Dr. Boiardo diagnosed severe knee osteoarthritis. She stopped work on September 26, 2014 because she could no longer bear the pain. Appellant claimed that stress on her knees was aggravating her condition.

In support of her claim, appellant submitted medical reports from Dr. Boiardo. In disability certificates dated September 21, 2014 to August 19, 2015, Dr. Boiardo placed appellant off work on intermittent dates from September 29, 2014 to December 28, 2015 and set forth her physical restrictions. In a July 30, 2015 letter, he indicated that he had initially evaluated appellant on August 22, 2014. Appellant presented with pain in both knees and most especially in the right knee. Dr. Boiardo noted that appellant's past medical and surgical history was noncontributory. He further noted that she worked at the employing establishment and she had previous falls at work over the past four years that caused her to develop increased knee pain and to barely ambulate comfortably over the past four to five years. Dr. Boiardo discussed findings on physical and x-ray examination and reviewed prior x-ray test results. He diagnosed bilateral osteoarthritis of the knees. Dr. Boiardo summarized that appellant's falls at work certainly did not cause the diagnosed condition, but that a series of falls and injuries over the past four to five years certainly caused decompensation of the previously well-compensated arthritic changes in both knees. He opined that her three replacement arthroplasty operations, one on the right, one on the left, and a revision total left knee replacement arthroplasty were a direct cause and result of this decompensation. Dr. Boiardo advised that appellant was totally disabled as a direct cause and result of these injuries and the constellation of surgeries. He concluded that she was also permanently disabled as a direct cause and result of her falls at work and subsequent surgeries.

In an October 5, 2015 narrative statement, the employing establishment noted that appellant had been out of work since September 19, 2014. It asserted that it had not received a claim or any reports of an on-the-job injury or fall before her last day at work. The employing establishment noted physicians' notes which had placed appellant off work from June 19 through September 7, 2015 and again from August 14 through December 28, 2015 with restrictions.

By letter dated December 4, 2015, OWCP advised appellant of the deficiencies of her claim and requested that she submit additional medical evidence and respond to its questionnaire. Appellant was afforded 30 days to submit this requested evidence.

Appellant submitted a December 23, 2015 narrative statement that essentially reiterated the history of injury and medical treatment she presented in her undated narrative statement. She resubmitted Dr. Boiardo's July 30, 2015 letter.

In a February 3, 2016 decision, OWCP denied appellant's occupational disease claim. It found that the evidence of record was insufficient to establish that the claimed events occurred as alleged and that the record did not contain any medical evidence that provided a medical diagnosis causally related to the claimed work injury or factors.

By letter dated February 19, 2016, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. At the hearing held on May 17, 2016, appellant testified regarding the work duties she performed as a letter carrier for two years when she first started working at the employing establishment as well as the falls she had while performing these duties. She also testified regarding the work duties she performed as a mail processing clerk.

Following the hearing, appellant submitted Dr. Boiardo's undated addendum to his previously submitted July 30, 2016 report. Dr. Boiardo indicated a date of injury as March 14, 2014. He noted appellant's complaint of increasing pain in both knees, especially in the right knee. Dr. Boiardo also noted a history of her medical treatment, including his own treatment of her. He reiterated his diagnosis of severe bilateral knee arthritis. Dr. Boiardo indicated that appellant's condition had been conservatively treated over the years, however, her condition had certainly been exacerbated during her career as a mail carrier secondary to acute frequent falls. He determined that appellant's job did not obviously cause her bilateral knee arthritis, but it did directly cause, in all medical probability, decompensation of the previously noted arthritic changes in both knees with standing and falls during that time period. Dr. Boiardo found that her mail sorter clerk job duties and falls resulted in her three knee surgeries. He reiterated his prior opinion that appellant's current permanent disability was causally related to her work duties and knee surgeries.

Appellant also submitted a January 20, 1996 report which contained an illegible signature and provided a history of injury that, on that day, she hit her right knee while walking up steps at work. The report also provided examination findings and a diagnosis of right knee contusion.

In a July 27, 2016 decision, an OWCP hearing representative affirmed the February 3, 2016 decision. He found that appellant had provided a description of her duties that was not refuted by the employing establishment, but that the time and place of unreported falls in 1996 and 1997 could not be established. The hearing representative found that Dr. Boiardo's addendum report was not sufficiently rationalized to establish that appellant sustained an injury causally related to factors of her employment.

On November 11, 2016 appellant, through counsel, filed an appeal before the Board from the July 27, 2016 decision. By letter dated December 20, 2016, counsel requested that the appeal

before the Board be dismissed in order to pursue a request for reconsideration before OWCP. By order dated January 12, 2017, the Board granted appellant's request for dismissal of her appeal.³

On December 21, 2016 appellant requested reconsideration with OWCP of the July 27, 2016 decision. In support of this request she submitted a December 12, 2016 report in which Dr. Boiardo related appellant's history of injury and medical treatment, diagnosed severe bilateral knee arthritis, and found that this condition was aggravated by appellant's falls at work and her work duties, and that her permanent disability from work was caused by her work duties and resultant knee surgeries.

Appellant also submitted a September 30, 2014 Family and Medical Leave Act (FMLA) designation notice which indicated approval of her request for leave from September 29, 2014 to January 9, 2015.

In a March 15, 2017 decision, OWCP denied reconsideration of the merits of appellant's claim. It found that the evidence submitted was repetitious.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁴ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁵ This section provides that the application for reconsideration must be submitted in writing and 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.⁶ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

OWCP issued a February 3, 2016 merit decision denying appellant's bilateral knee occupational disease claim, finding that the evidence of record was insufficient to establish that the claimed events occurred as alleged and that the record did not contain any medical evidence providing a medical diagnosis causally related to the claimed work injury or factors. In a

³ *Order Dismissing Appeal*, Docket No. 17-0238 (issued January 12, 2017).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

July 27, 2016 merit decision, an OWCP hearing representative affirmed the February 3, 2016 decision, indicating that the factual elements of the claim were not disputed except for the time and place of appellant's unreported falls. On December 21, 2016 counsel requested reconsideration. OWCP declined appellant's request for reconsideration in a March 15, 2017 nonmerit decision.

The Board does not have jurisdiction over the July 27, 2016 merit decision and can consider only whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issue on reconsideration is medical in nature, whether appellant met her burden of proof to establish that the claimed injury occurred as alleged.

The Board finds that in her December 21, 2016 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, 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).

The Board further finds that appellant's evidence did not constitute relevant or pertinent new evidence not previously considered. Appellant submitted a new report dated December 12, 2016 from Dr. Boiardo in which he related appellant's history of injury and medical treatment, diagnosed severe bilateral knee arthritis, and found that this condition was aggravated by appellant's falls at work and her work duties and that her permanent disability from work was caused by her work duties and resultant knee surgeries. This evidence, however, essentially reiterated Dr. Boiardo's diagnoses and opinions set forth in his prior undated addendum report of record. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁸

The September 30, 2014 FMLA designation notice noted approval of appellant's request for leave from September 29, 2014 to January 9, 2015. This evidence, however, is irrelevant to the underlying medical issue regarding the cause of her bilateral knee condition. The submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁹ As such, this document does not constitute a basis for reopening appellant's claim.

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

On appeal counsel argues the merits of appellant's claim and alleges that the medical reports of Dr. Boiardo are sufficient to establish that her knee condition was aggravated by her falls at work and her job duties. As previously noted, the Board lacks jurisdiction over the merits of the claim.

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *See S.D.*, Docket No. 17-0469 (issued June 16, 2017); *Daniel Deparini*, 44 ECAB 657, 659 (1993).

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 March 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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