

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

M.M., Appellant	)	
	)	
and	)	Docket No. 17-0574
	)	Issued: June 26, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
City of Industry, CA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 17, 2017 appellant filed a timely appeal from a November 8, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 12, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

**ISSUE**

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

**FACTUAL HISTORY**

On February 4, 2014 appellant, then a 54-year-old mail carrier technician, filed an occupational disease claim (Form CA-2) alleging that he developed a left knee condition as a result

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

of his federal employment duties, including prolonged walking, standing, bending, and stooping.<sup>2</sup> He had previously filed two traumatic injury claims for a slip and fall onto a stairway on June 17, 2011 (File No. xxxxxx383) and a slip and fall on uneven pavement on May 11, 2012 (File No. xxxxxx415). Appellant stopped work on May 23, 2013 and has not returned.

OWCP referred appellant to Dr. Michael Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In a May 8, 2014 report, Dr. Einbund found that appellant had underlying degenerative joint disease in the left knee, which was quite advanced. He further found a medial meniscus tear which was also degenerative in nature. Dr. Einbund diagnosed left knee degenerative joint disease, left knee degenerative medial meniscus tear, and history of left knee contusion, June 2011, resolved. He opined that appellant's left knee condition was not causally related to factors of his federal employment, but the result of a nonwork-related, underlying degenerative joint disease.

By decision dated May 20, 2014, OWCP denied appellant's claim, finding that the medical evidence of record failed to establish that appellant's diagnosed conditions were causally related to factors of his federal employment.

On October 6, 2014 appellant requested reconsideration and submitted two duty status reports (Form CA-17) dated September 29, 2014 and January 22, 2015 from Dr. Basimah Khulusi, a Board-certified physiatrist, who diagnosed left knee meniscus tear and provided work restrictions.

By decision dated March 5, 2015, OWCP denied modification of its prior decision, finding that Dr. Einbund's May 8, 2014 opinion represented the weight of the medical evidence.

On May 15, 2015 appellant again requested reconsideration and submitted an April 23, 2015 duty status report (Form CA-17) from Dr. Khulusi providing work restrictions. He further submitted a May 11, 2015 report from Dr. Khulusi who diagnosed acceleration of left knee degenerative joint disease, left knee chondromalacia, and left knee medial meniscus tear and extrusion. Dr. Khulusi opined that appellant's multiple falls on the job resulted in a tear to the left medial meniscus of the left knee joint, which caused permanent aggravation of the degeneration of the left knee joint.

By decision dated August 12, 2015, OWCP denied modification of its prior decision, finding that the weight of the medical evidence still resided with Dr. Einbund. It found that the medical opinion of Dr. Einbund was well rationalized as it explained how his left knee condition resulted from his preexisting degenerative knee condition and not due to his repetitive work duties of prolonged walking, standing, bending, and stooping as a mail carrier technician. It further found that the opinion of Dr. Khulusi lacked medical rationale explaining how appellant's work as a Mail Carrier Technician caused or aggravated his claimed conditions.

On August 15, 2016 appellant again requested reconsideration and submitted a February 26, 2014 report from Dr. Frederic Nicola, a Board-certified orthopedic surgeon serving as an OWCP second opinion examiner in File No. xxxxxx383. He also submitted a January 27,

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<sup>2</sup> The claim was assigned OWCP File No. xxxxxx417.

2016 duty status report (Form CA-17) from Dr. Khulusi who diagnosed left knee degenerative joint disease and provided work restrictions. In a July 25, 2016 report, Dr. Khulusi referred to Dr. Nicola's February 26, 2014 second opinion report and noted that he had diagnosed tricompartmental osteoarthritis of the left knee with medial meniscus tear sustained on June 17, 2011. She then reiterated her diagnoses and opined that appellant's left knee conditions were causally related to the left medial meniscus tear he sustained at work on June 17, 2011.

By decision dated November 8, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim because he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> 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.<sup>5</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

### **ANALYSIS**

Appellant's August 15, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

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<sup>3</sup> 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 own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *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.

<sup>6</sup> 20 C.F.R. § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.608(a), (b).

The Board also finds that appellant failed to submit relevant and pertinent new evidence not previously considered by OWCP. Along with his reconsideration request, he submitted a February 26, 2014 report from Dr. Nicola, his OWCP second opinion examiner in File No. xxxxxx383. Dr. Nicola's second opinion evaluation was obtained by OWCP to develop appellant's traumatic injury claim for a slip and fall onto a stairway on June 17, 2011. The Board finds that submission of this evidence did not require reopening appellant's case for merit review because it failed to address the issue of causal relationship between appellant's left knee condition and factors of his federal employment, which was the issue before OWCP in this occupational disease claim. Thus, the Board finds that this report does not constitute relevant and pertinent new evidence and is, therefore, insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant further submitted a July 25, 2016 report from Dr. Khulusi who referred to Dr. Nicola's February 26, 2014 second opinion evaluation and opined that appellant's left knee conditions were causally related to the left medial meniscus tear he sustained at work on June 17, 2011. The Board finds that submission of this evidence did not require reopening appellant's case for merit review because it failed to address the underlying issue of causal relationship between appellant's left knee conditions and factors of his federal employment, which was the issue before OWCP. Thus, the Board finds that this report does not constitute relevant and pertinent new evidence and is, therefore, insufficient to require OWCP to reopen the claim for consideration of the merits.

Also in support of his reconsideration request, appellant submitted a January 27, 2016 duty status report (Form CA-17) from Dr. Khulusi who diagnosed left knee degenerative joint disease and provided work restrictions. The Board finds that submission of this report is insufficient to require reopening the case for merit review because it does not contain medical rationale relating the left knee condition to factors of appellant's federal employment, which was the underlying issue before OWCP.<sup>8</sup> Therefore, this report does not constitute relevant and pertinent new evidence and is, therefore, insufficient to require OWCP to reopen appellant's claim for consideration of the merits in accordance with the third above-noted requirement under section 10.606(b)(3).<sup>9</sup>

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3) and, therefore, properly denied his request for reconsideration.

### **CONCLUSION**

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

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<sup>8</sup> See 5 U.S.C. § 8101(2). See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004).

<sup>9</sup> See *V.H.*, Docket No. 15-1262 (issued March 18, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2018  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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