

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

M.S., Appellant)	
)	
and)	Docket No. 18-0222
)	Issued: June 21, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
San Francisco, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 9, 2017 appellant, through counsel, filed a timely appeal from an October 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a decision of the Board dated May 18, 2017, which became final after 30 days of issuance, and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees'

¹ 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.

² 20 C.F.R. § 501.6(d); see *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c), 501.3, and 501.6(d), the Board lacks jurisdiction over the merits of this case.

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.⁴ The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 13, 2015 appellant, then a 60-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed left knee pain, swelling, weakness, and stiffness due to lifting, pushing, pulling, standing, and walking required by her federal employment duties. She first became aware of her left knee condition in November 2011 and first attributed it to her employment on October 16, 2012.

Appellant underwent a left knee magnetic resonance imaging (MRI) scan on October 16, 2012 which demonstrated extensive horizontal tearing of the lateral meniscus, advanced cartilage wear in the lateral compartment, joint effusion, and popliteal cyst.

In a development letter dated April 30, 2015, OWCP requested additional factual and medical evidence from appellant in support of her occupational disease claim. It afforded her 30 days to respond. No response was received.

By decision dated July 1, 2015, OWCP denied appellant's occupational disease claim, finding that she had failed to submit the necessary factual and medical evidence to establish her claim. It noted that she had previously accepted conditions of lumbar sprain and thoracic or lumbar neuritis or radiculitis under OWCP File No. xxxxxx296.

On July 17, 2015 appellant requested reconsideration of the July 1, 2015 decision. She noted that she planned to submit additional medical evidence. OWCP did not receive any additional evidence.

By decision dated October 8, 2015, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that she had failed to submit new and relevant evidence or argument in support of her request for reconsideration.

On April 21, 2016 appellant, through counsel, requested reconsideration. In support of this request, OWCP received a report dated April 12, 2016 from Dr. Michael E. Hebrard, a Board-

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 16-1743 (issued May 18, 2017).

certified physiatrist. Dr. Hebrard noted that OWCP had denied appellant's claims for right knee and bilateral hip conditions. He then indicated that regarding her accepted right knee condition⁵ he reviewed x-rays dated September 5, 2014 which demonstrated severe medial joint line narrowing in the right knee, and moderate narrowing in the left knee. Dr. Hebrard noted that these x-rays suggested that there was a preexisting condition of appellant's knees. He also reviewed her March 6, 2014 left knee MRI scan and noted the findings of tear of the lateral meniscus, cartilage wear in the lateral compartment, joint effusion and cyst, preexisting pathology of the left knee. Dr. Hebrard then described appellant's work duties of repetitive squatting, bending at the knees and hips, reaching, pushing, and pulling in order to sort mail. He opined that work-related repetitive squatting and bending at the knees increased the biomechanical stress along the arthritic knee joint, increasing inflammation, and overuse of the surrounding muscles to provide structural support. Dr. Hebrard noted that prolonged sitting increased pressure on the hip and knee joints and contributed to acceleration of the preexisting condition. He concluded, "It is my opinion with a reasonable degree of medical certainty that [appellant] had a preexisting condition involving the knees and hips; that there is causal relationship between her work duties over many years and her current condition; that the mechanical stresses on the hip and knee joints that were involved as part of her job, including standing, sitting, stooping, crouching, and bending through the day, accelerated the preexisting arthritic condition and contributed proximally to her ongoing functional impairment." Dr. Hebrard found that appellant had sustained a permanent aggravation of her right knee and bilateral hip conditions.

By decision dated July 20, 2016, OWCP found that Dr. Hebrard's April 12, 2016 report established a diagnosed condition, arthritis of the left knee. However, it determined that he had not provided rationalized medical opinion evidence describing how appellant's left knee arthritis was caused or aggravated by her work duties.

On August 31, 2016 counsel appealed OWCP's July 20, 2016 decision to the Board, and by decision dated May 18, 2017,⁶ the Board affirmed the July 20, 2016 decision. It found that Dr. Hebrard's April 12, 2016 report focused on appellant's right knee and bilateral hip condition and that he did not describe how the left knee condition was caused or aggravated by appellant's federal employment. The Board concluded that this report was not relevant to the current issue of causation and was of limited probative value regarding this left knee claim.

On July 17, 2017 appellant, through counsel, requested reconsideration and submitted a report from Dr. Hebrard dated June 27, 2016. Dr. Hebrard summarized his April 12, 2016 report and added that appellant had an underlying condition of osteoarthritis. He opined that the repetitive activities of her job were consistent with her symptoms and did, over time, aggravate the underlying condition. Dr. Hebrard noted that there were no other indications that development of her symptoms was due to anything other than her letter carrier duties. He determined that appellant's duties as a letter carrier contributed to her current condition, and opined, "Repetitive squatting and bending at the hip and knees, standing, walking, reaching, and lifting required by her work as a letter carrier using a vehicle can lead to the aggravation of her underlying

⁵ Dr. Hebrard referenced OWCP File No. xxxxxx433. That claim is not presently before the Board.

⁶ *Supra* note 4.

osteoarthritis/joint disease....” Dr. Hebrard explained that in his opinion an aggravation was a circumstance or event which permanently worsens a preexisting or underlying condition.

By decision dated October 10, 2017, OWCP denied appellant’s request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a). It found that Dr. Hebrard’s report was not relevant and pertinent new evidence as he did not specifically reference appellant’s claimed left knee condition.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP’s regulations provide that the evidence or argument submitted by a claimant must: (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.⁸ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant’s application for review must be received within one year of the date of that decision.⁹ When a claimant failed to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.¹⁰

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹¹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹² When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant’s application for reconsideration and any evidence submitted in support thereof.¹³

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁴ The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ While the reopening of a case may be predicated solely

⁷ 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.

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b).

¹¹ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹² *See supra* note 8. *See also id.*; *Mark H. Dever*, 53 ECAB 710 (2002).

¹³ *J.F.*, *supra* note 11; *Annette Louise*, 54 ECAB 783 (2003).

¹⁴ *T.H.*, Docket Nos. 17-1578 & 17-1651 (issued April 26, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁵ *T.H.*, *id.*; *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁶

ANALYSIS

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).

On July 17, 2017 appellant, through counsel, requested reconsideration of the Board's May 18, 2017 decision, which affirmed OWCP's July 20, 2016 decision denying her occupational disease claim.¹⁷ The underlying issue on reconsideration is medical in nature -- whether appellant established that the implicated factors of her federal employment caused or contributed to her claimed left knee condition.

In her July 17, 2017 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, she 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).¹⁸

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of reconsideration. In its May 18, 2017 decision, the Board denied appellant's occupational disease claim on the merits because Dr. Hebrard did not describe how appellant's left knee condition was caused or aggravated by her federal employment. Dr. Hebrard's June 27, 2016 report also fails to specifically mention appellant's alleged employment injury of her left knee. He did not specifically address the defect identified by the Board in the previous merit decision. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.¹⁹

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel contends that there was an unresolved conflict of medical opinion evidence and that OWCP failed to give due deference to the findings of the attending physician. He also requests that the Board specifically identify any deficiencies in the medical reports of record. The Board finds that counsel's contentions on appeal address the merits of the case which

¹⁶ *M.E.*, 58 ECAB 694 (2007).

¹⁷ The Board notes that OWCP is not authorized to review Board decisions. Board decisions are not subject to review except by the Board and they become final after 30 days. Although the May 18, 2017 Board decision was the last merit decision of record, OWCP's July 20, 2016 initial denial is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

¹⁸ *S.J.*, Docket No. 17-1798 (issued February 23, 2018).

¹⁹ *Id.*

are not currently before the Board,²⁰ and that there was no basis for reopening appellant's claim for consideration of 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 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2018
Washington, DC

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

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

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

²⁰ *Supra* note 2.