



lateral collateral ligament sprain of the left knee. He stopped work on that day and did not return. OWCP paid appellant compensation for total disability. It placed his case on the periodic rolls effective April 22, 2001.

Appellant was first followed by Dr. David M. Wall, an attending Board-certified orthopedic surgeon. Dr. Wall provided chart notes from March 2000 onward finding appellant totally disabled from work due to pain and restricted motion in the cervical spine, lumbar spine, and left knee. He prescribed physical therapy, medication, and periodic injections.<sup>2</sup>

On August 10, 2000 the employing establishment obtained a fitness-for-duty report from Dr. Milton E. Ashby, a Board-certified orthopedic surgeon, who opined that the accepted injuries had ceased without residuals.

To assess the nature and extent of appellant's ongoing condition, OWCP obtained a second opinion on June 26, 2001 from Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon. Dr. Bleecker reviewed the medical record and a statement of accepted facts (SOAF). On examination, he found limited motion of the left shoulder, cervical spine, and lumbar spine. Dr. Bleecker noted that appellant ambulated with a splayed, cautious gait, and exhibited signs of symptom magnification. He opined that appellant remained temporarily totally disabled from work due to the accepted injuries.

On February 26, 2014 OWCP obtained an updated second opinion report from Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon. Dr. Ha'Eri reviewed the medical record and a SOAF. He described the mechanism of injury as appellant having moved forward to prevent boxes of mail from falling on a coworker. Dr. Ha'Eri noted that appellant had not worked since approximately 2002. On examination, he noted a full range of motion of the cervical spine, limited lumbar flexion, a full range of left shoulder motion, and a stable left knee. Dr. Ha'Eri diagnosed cervical and lumbar strains superimposed on preexisting degenerative disc disease, a left shoulder strain superimposed on an old injury, and a left knee strain with possible degenerative joint disease. He opined that the accepted injuries had ceased without residuals many years before. Dr. Ha'Eri explained that appellant's current condition was due to degenerative disc disease and degenerative joint disease, complicated by morbid obesity and deconditioning. He opined that appellant was able to perform full-time light duty, with lifting, pushing, and pulling limited to 20 pounds.

By notice dated March 19, 2014, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, based on Dr. Ha'Eri's opinion that the accepted injuries had ceased without residuals. It afforded him 30 days to submit additional evidence or argument.

Appellant responded by April 7, 2014 letter in which he asserted that he remained totally disabled from work due to the accepted injuries. He argued that Dr. Ha'Eri's report was not based on an accurate factual or medical history.

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<sup>2</sup> Appellant participated in physical therapy in April 2000 to April 2001.

By decision dated April 29, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, based on Dr. Ha'Eri's opinion as the weight of the medical evidence.

In a May 14, 2014 appeal form received by OWCP on May 20, 2014, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.<sup>3</sup> During the hearing, held on December 9, 2014, he contended that Dr. Ha'Eri misstated the circumstances of his injury as he confused a box of mail with a case of mail. Alternatively, appellant argued that Dr. Ha'Eri's opinion was in conflict with that of Dr. Bleecker. He submitted further medical evidence.

In a November 24, 2014 report, Dr. Wall diagnosed lumbar degenerative disc disease, left rotator cuff impingement and arthritis, a lumbosacral sprain, left L4-5 radiculopathy, and morbid obesity. He found appellant totally disabled from work.

In a November 19, 2014 report, Dr. Basimah Khulusi, an attending Board-certified physiatrist, contended that Dr. Ha'Eri's report was defective as he noted that appellant had no work exposures after 2002, although appellant had not worked since February 16, 2000. She also argued that Dr. Ha'Eri wrongly noted that a box of mail fell toward appellant, whereas the appropriate term was a case of mail. Dr. Khulusi opined that appellant remained totally disabled for work as the lumbar sprain and left knee sprain caused morbid obesity and deconditioning.

By decision dated February 26, 2015, an OWCP hearing representative affirmed the April 29, 2014 decision. She found that Dr. Ha'Eri's opinion continued to represent the weight of the medical evidence in the case as it was well rationalized and based on a complete and accurate factual and medical history. In contrast, Dr. Khulusi's reports failed to explain how and why appellant would remain totally disabled from work due to the accepted lumbar and left knee strains.

On April 27, 2015 appellant requested reconsideration. He provided an April 16, 2015 report from Dr. Khulusi, in which she contended that Dr. Ha'Eri's opinion was defective as he failed to address the effect of deconditioning on appellant's recovery. Dr. Khulusi also asserted that OWCP should expand appellant's claim to accept deconditioning and aggravation of morbid obesity.

By decision dated July 22, 2015, OWCP denied modification of its prior decision, as Dr. Khulusi's April 16, 2015 report was insufficiently rationalized to outweigh Dr. Ha'Eri's opinion. It found that Dr. Khulusi did not provide medical rationale explaining how and why the accepted injuries continued to disable appellant from work or required additional treatment.

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<sup>3</sup> On May 26, 2014 appellant claimed a recurrence of disability (Form CA-2a) commencing April 29, 2014. OWCP responded by June 2, 2014 letter that, if he disagreed with the April 29, 2014 termination decision, he should exercise his appeal rights. It noted that appellant had requested a hearing before a representative of its Branch of Hearings and Review.

In a September 30, 2015 letter, appellant requested reconsideration. He provided a September 24, 2015 report from Dr. Khulusi, who opined that the accepted February 16, 2000 employment incident caused lumbar radiculitis that continued to totally disable him from work.

By decision dated December 21, 2015, OWCP denied modification of its prior decision. It found that Dr. Khulusi's September 24, 2015 report presented no new evidence that would outweigh Dr. Ha'Eri's opinion.

On April 4, 2016 appellant requested reconsideration. He contended that Dr. Ha'Eri's February 26, 2014 second opinion report had become "stale" and should no longer be accorded the weight of the medical evidence. Appellant submitted a March 23, 2016 duty status report (Form CA-17) from Dr. Khulusi which noted work restrictions, with lifting limited to 20 pounds.

By decision dated May 12, 2016, OWCP denied modification of its December 21, 2015 decision. It found that the March 23, 2013 Form CA-17 was insufficient to establish that the accepted injuries were disabling or required additional treatment on and after April 29, 2014. OWCP noted that Dr. Ha'Eri's second opinion report was prepared on February 26, 2014, less than two months prior to the April 29, 2014 termination decision.

On July 1, 2016 appellant requested reconsideration. He contended that OWCP should reinstate his wage-loss compensation and medical benefits as Dr. Ha'Eri's February 26, 2014 report "expired" on February 26, 2016.

By decision dated July 11, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim, as he did not provide new and relevant evidence, or legal argument.

In a letter dated November 17, 2016, appellant again requested reconsideration. He submitted a March 23, 2016 report from Dr. Khulusi, who provided a history of the February 16, 2000 injuries. Dr. Khulusi related appellant's symptoms of lumbar pain with radiation into both lower extremities. She noted findings and appellant's status. Dr. Khulusi diagnosed severe lumbar strain, lumbar stenosis, and lumbar radiculopathy. She noted that appellant would continue to see Dr. Wall for medication and trigger point injections. Dr. Khulusi also provided a November 23, 2016 narrative report and Form CA-17, which related appellant's continuing lumbar pain and radiculopathy. She provided new diagnoses of left knee strain and severe deconditioning. Appellant also submitted a duplicate of Dr. Khulusi's March 23, 2016 Form CA-17.

In a December 1, 2016 report, Dr. Khulusi contended that Dr. Ha'Eri's February 26, 2014 report was erroneous as he opined that appellant's accepted injuries had resolved long before, although Dr. Bleecker had found appellant totally disabled from work on June 26, 2001. She therefore asserted that there was a conflict of medical evidence between Dr. Ha'Eri and Dr. Bleecker which required resolution by an impartial medical examiner.

Appellant submitted an October 26, 2014 lumbar magnetic resonance imaging (MRI) scan report, which demonstrated posterior disc bulges at L3-4, L4-5, and L5-S1 with mild-to-moderate central canal stenosis, mild lumbar degenerative disc disease, a suspected hemangioma within the L1 vertebral body, mild hyperlordosis of the distal lumbar spine, and congenital lumbar stenosis.

By decision dated February 16, 2017, OWCP denied appellant's request for reconsideration, as the evidence submitted was insufficient to warrant a merit review. It found that Dr. Khulusi's report was irrelevant as it did not address appellant's condition on and after April 29, 2014.

On February 25, 2017 appellant again requested reconsideration of the merits of his claim. In support of his request, he submitted a copy of an October 26, 2014 MRI scan report previously of record, a February 28, 2017 MRI scan report, and a statement in which he alleged that OWCP had refused to review the October 26, 2014 MRI scan report.

A February 28, 2017 lumbar MRI scan report showed a small annular fissure at L3-4, multilevel broad-based disc bulges at L3-4, L4-5, and L5-S1, and mild bilateral neural foraminal stenosis at L4-5.

By decision dated May 15, 2017, OWCP denied reconsideration, finding that appellant did not submit new and relevant evidence, or legal argument sufficient to warrant reopening the merits of his claim. It found that the October 26, 2014 and February 28, 2017 MRI scan reports were irrelevant as they did not address the critical issue of continuing disability from work on and after April 29, 2014.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> 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.<sup>5</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>6</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>7</sup>

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.<sup>8</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>9</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP

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<sup>4</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."

<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>9</sup> *See supra* note 5. *See also Mark H. Dever*, 53 ECAB 710 (2002).

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.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim.

OWCP accepted that on February 16, 2000 appellant sustained a lumbar sprain and a lateral collateral ligament sprain of the left knee when he jumped forward to prevent a mail case from falling on a coworker. It paid him compensation for total disability beginning in March 2000. On April 29, 2014 OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 29, 2014, based on the February 26, 2014 report of Dr. Ha'Eri, a second opinion physician. It affirmed the termination by decision dated February 26, 2015. Thereafter, OWCP denied modification of the termination decision on July 22 and December 21, 2015, and May 12, 2016.

On November 22, 2016 appellant again requested reconsideration. He provided March 23, November 23, and December 1, 2016 reports from Dr. Khulusi who opined that he was totally disabled from work due to lumbar radiculopathy which she attributed to the accepted February 16, 2000 lumbar sprain. Dr. Khulusi contended that the opinion of Dr. Ha'Eri, a Board-certified orthopedic surgeon and second opinion physician, was factually inaccurate and in conflict with that of Dr. Bleecker, a Board-certified orthopedic surgeon and prior second opinion physician in the case. Appellant also submitted an October 26, 2014 lumbar MRI scan report. OWCP denied reconsideration by decision dated February 16, 2017, as Dr. Khulusi's reports were irrelevant as they were comprised of the same arguments previously noted in prior requests for reconsideration without adding any additional substantive evidence supported with objective medical examination findings and did not specifically address the termination issue.

Appellant again requested reconsideration on February 25, 2017. He alleged that OWCP failed to review the October 26, 2014 MRI scan report and provided a second copy. Appellant also submitted a February 28, 2017 lumbar MRI scan report. OWCP denied reconsideration by decision dated May 15, 2017 as the MRI scan reports alone are were insufficient as they are only diagnostic tools and as such irrelevant. As well, appellant failed to address the termination issue.

Neither MRI scan report submitted on reconsideration specifically addressed the critical issue of whether appellant remained totally disabled for work and in need of additional medical treatment on and after April 29, 2014 due to the accepted lumbar sprain and a lateral collateral ligament sprain of the left knee. Similarly, appellant's argument that OWCP had refused to review the October 26, 2014 lumbar MRI scan report was not relevant to the termination issue. As such, these documents are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.<sup>11</sup>

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<sup>10</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>11</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

A claimant may be entitled to a merit review by submitting relevant and pertinent new 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.

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2018  
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