

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

L.W., Appellant	)	
	)	
and	)	<b>Docket No. 17-1171</b>
	)	<b>Issued: May 18, 2018</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>PHILADELPHIA VETERANS</b>	)	
<b>ADMINISTRATION MEDICAL CENTER,</b>	)	
<b>Philadelphia, PA, Employer</b>	)	
	)	

*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 May 9, 2017 appellant filed a timely application for review from a March 8, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days elapsed from the last merit decision, dated May 4, 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 to review the merits of appellant's claim.

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<sup>1</sup> Appellant filed a timely request for oral argument. After exercising its discretion, by order dated October 12, 2017, the Board denied her request, finding that her arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1171 (issued October 12, 2017).

<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

On May 1, 2014 appellant, then a 50-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that, on March 7, 2014, she sustained a left knee injury as a result of striking her left knee against a keyboard bracket. On the reverse side of the claim form, appellant's supervisor indicated that the claimed injury occurred in the performance of duty and noted that appellant did not stop work.

In a report dated August 27, 2014, Dr. Craig Rubenstein, Board-certified in emergency and sports medicine, noted that appellant visited him in order to follow up on her right knee osteoarthritis. He treated her with a steroid-lidocaine injection of the right knee.

On September 22, 2014 Dr. Charles L. Nelson, a Board-certified orthopedic surgeon, noted that appellant had a six-month history of left knee pain after striking her knee on a broken keyboard holder at work. He diagnosed her with knee pain, pain in the joint of the lower leg, and primary localized osteoarthritis.

In a diagnostic report of September 22, 2014, Dr. Seth Glick, a Board-certified radiologist, examined x-rays of appellant's knees, and provided an impression of tricompartmental osteoarthritis of the left knee along with chondrocalcinosis of the lateral meniscus.

In a diagnostic report dated February 9, 2015, Dr. Irene Darocha, a Board-certified radiologist, examined the results of a magnetic resonance imaging (MRI) scan of appellant's left knee. She noted impressions of moderate-to-severe degenerative osteoarthritis; chronic-appearing tear or injury of the medial meniscus with extensive degenerative signal of the lateral meniscus; and mild degenerative joint disease laterally with moderate degeneration joint disease at the patellofemoral articulation.<sup>3</sup>

By development letter dated March 25, 2015, OWCP advised appellant that when her traumatic injury claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Because the employing establishment had not controverted continuation of pay or the merits of the claim, payment of a limited amount of medical expenses was administratively approved. However, because appellant had later filed a recurrence claim, OWCP reopened the claim and considered the merits. It found that the evidence submitted was insufficient to establish tricompartmental osteoarthritis causally related to the accepted March 7, 2014 employment injury. It advised appellant of the type of evidence necessary to establish her

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<sup>3</sup> On February 24, 2015 appellant filed a claim for recurrence of disability (Form CA-2a), alleging that her left knee weakened and then buckled while walking to her car on January 18, 2015. She fell onto the sidewalk, causing injuries to her left knee, left arm, and left hand. A record of conversation dated March 16, 2015 notes that OWCP's claims examiner informed appellant that the January 18, 2015 fall would be considered an intervening event, maybe consequently related or unrelated to the incident of March 7, 2014. By letter dated March 20, 2015, an employing establishment manager controverted appellant's recurrence claim, contending that she fell at home on January 18, 2018, not on the employing establishment's premises.

traumatic injury claim and attached a factual development questionnaire for her completion. Appellant was afforded 30 days to submit the requested information.

Appellant subsequently submitted a diagnostic report dated February 23, 2015, wherein Dr. Thomas R. Slattery, a Board-certified radiologist, examined an x-ray of appellant's knees. He provided an impression of tricompartmental osteoarthritis bilaterally, severe in the medial compartments, more advanced on the right.

Also submitted was an operative report, indicating that appellant underwent total left knee arthroplasty on March 18, 2015. The surgery was performed by Dr. Nelson, who noted findings of severe primary osteoarthritis.<sup>4</sup>

In a narrative statement dated April 17, 2015, appellant described the events that led to her left knee condition. She asserted that, on March 7, 2014, she struck her knee on a keyboard holder mounted under her desk, which resulted in a "jolt" and temporary inability to bear weight. Appellant banged her knee again, on the same piece of equipment, several days later.

By decision dated May 26, 2015, OWCP denied appellant's traumatic injury claim. It accepted that the March 7, 2014 incident occurred as alleged, but found that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted employment incident.

On August 25, 2015 appellant requested reconsideration of OWCP's May 26, 2015 decision.

In a report dated August 6, 2015, Dr. Nelson related that appellant's knee joint replacement was medically necessary. He noted that she had presented to him in September 2014 after she had hit her knee on a broken keyboard holder at work. Dr. Nelson diagnosed tricompartmental osteoarthritis of the left knee with chondrocalcinosis of the medial meniscus. He explained that the exact onset could not be determined as she presented to his office six months after the trauma and her prior films were not available.

By decision dated November 18, 2015, OWCP determined that appellant was not entitled to continuation of pay for any absence from work during the period March 8, 2014 and continuing because the March 7, 2014 injury was not reported on a form approved by OWCP within 30 days following the injury. By separate decision of the same date, OWCP reviewed the merits of appellant's claim, but denied modification of its May 26, 2015 decision. It found that the medical evidence submitted was insufficient to establish a diagnosed medical condition causally related to the accepted March 7, 2014 employment incident.<sup>5</sup>

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<sup>4</sup> Katherine A. Cummings, a certified physician assistant, had requested that OWCP authorize this surgery on February 23, 2015.

<sup>5</sup> The senior claims examiner noted that, because the initial traumatic injury claim had not been approved, there was no need to discuss the January 18, 2015 fall which appellant alleged was a consequential injury. Also, because the initial traumatic injury claim was not approved, no action would be taken on the Form CA-2a claim for a recurrence of disability under this file number (File No. xxxxxx307).

On December 1, 2015 appellant requested a review of the written record before an OWCP hearing representative. In a December 7, 2015 statement, appellant contended that she immediately reported her March 7, 2014 injury to her supervisor. Appellant submitted a letter of grievance dated November 27, 2015 and e-mail communications to support her contention that her supervisor had delayed submission of her workers' compensation claim.<sup>6</sup> By decision dated May 4, 2016, the hearing representative affirmed OWCP's November 18, 2015 denial of continuation of pay. He found that, because appellant's claim for traumatic injury had been denied, continuation of pay was not payable under any circumstances and the issue of whether the claim was filed on an OWCP approved form within 30 days is moot.<sup>7</sup>

On December 13, 2016, appellant requested reconsideration of the May 4, 2016 hearing representative's decision. With her request, appellant attached statements dated September 16 and November 12, 2016, in which she alleged that her supervisor acted in a racially discriminatory manner toward her, and delayed her claim. She alleged that her supervisor had caused her claim and request for continuation of pay to be denied, because she had delayed issuing the Form CA-1 for the claim. Appellant also submitted an e-mail from her supervisor dated September 24, 2016 stating that appellant's Form CA-1 was completed on March 7, 2016 at 2:00 p.m.

In a letter dated September 28, 2016, another supervisor notified appellant that she had only signed the claim form on April 30, 2014, and that claims are not submitted to the Department of Labor until after the claimant signs the form.

By decision dated March 8, 2017, OWCP denied appellant's request for reconsideration. It noted that the May 4, 2016 hearing representative's decision specifically found that, because appellant's traumatic injury claim had been denied, the issue of whether the claim for continuation of pay was filed on an OWCP-approved form within 30 days was moot, and her claim for continuation of pay was not payable under any circumstances. Thus, OWCP found that appellant's request for reconsideration did not include a relevant legal argument not previously considered and the evidence submitted was cumulative and substantially similar to documentation already of record.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a), 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

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<sup>6</sup> In a record of a conversation dated March 7, 2016, a hearing representative of OWCP's Branch of Hearings and Review informed appellant that it only had jurisdiction over OWCP's denial of continuation of pay, since she had already requested reconsideration of the denial of her traumatic injury claim. OWCP's representative further noted that there is no basis for payment of continuation of pay in a claim that has already been denied. He advised that to have the denial of the claim overturned, appellant would have to pursue reconsideration. Appellant, however, stated that she wanted a review of the written record to "punish" the employing establishment for failing to submit her claim. The representative advised that he would proceed with the review of the written record.

<sup>7</sup> The hearing representative noted, however, that even if the traumatic claim had been accepted, appellant would not have been entitled to continuation of pay because it was not claimed on an OWCP approved form within 30 days of the injury.

evidence not previously considered by OWCP.<sup>8</sup> Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

### 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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument. With her December 13, 2016, request for reconsideration, she submitted statements dated September 16 and November 12, 2016, in which she alleged that her supervisor acted in a racially discriminatory manner toward her in that the supervisor had delayed submitting the Form CA-1, causing her claim and request for continuation of pay to be denied. Appellant also submitted an e-mail from her supervisor dated September 24, 2016 stating that the Form CA-1 was completed on March 7 at 2:00 p.m., and a letter dated September 28, 2016 in which another supervisor notified her that she had only signed the claim form on April 30, 2014. Appellant previously raised these contentions with her request for a review of the written record before an OWCP hearing representative. The hearing representative considered appellant's contentions, but found in the May 4, 2016 decision, that continuation of pay was not payable under any circumstances and the issue of whether the claim was filed on an OWCP-approved form within 30 days was moot. Thus, the evidence does not contain a relevant legal argument not previously considered by OWCP.<sup>10</sup>

Furthermore, the evidence submitted on reconsideration is cumulative and substantially similar to the grievance letter and e-mail communications submitted with her request for review of the written record. The Board has held that evidence which is cumulative or duplicative of material already in the case record is insufficient to warrant reopening a claim for merit review.<sup>11</sup> Thus appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

<sup>10</sup> *Supra* note 8.

<sup>11</sup> *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

**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 March 8, 2017 is affirmed.

Issued: May 18, 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