

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

S.A., Appellant)	
)	
and)	Docket No. 18-1638
)	Issued: April 5, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, West Palm Beach, Florida,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 29, 2018 appellant, through counsel, filed a timely appeal from a July 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that counsel did not appeal an OWCP merit decision dated May 7, 2018, which denied appellant's traumatic injury claim. Counsel appealed only the nonmerit OWCP decision dated July 3, 2018. Therefore, the Board does not have jurisdiction to review the May 7, 2018 OWCP merit decision on appeal. *See* 20 C.F.R. § 501.3.

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 June 29, 2016 appellant, then a 53-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on June 28, 2016 he experienced a deep sharp pain in his left knee upon standing up after completing a pat down on a passenger's ankle while in the performance of duty. He called a coworker to assist him in standing up. Appellant added that his left knee was previously injured in a similar scenario.⁴

On July 15, 2016 the employing establishment controverted appellant's claim. It asserted that while he claimed a traumatic injury had occurred on June 8, 2016 he had not sought medical treatment until July 6, 2018.

On July 6, 2016 Dr. Mondo completed a physical examination and noted that the date of injury was June 28, 2016, the place of occurrence was "Job site," and the activity was "Coming Up From A Pat-Down." He also noted an October 21, 2014 injury, but he did not elaborate. Dr. Mondo diagnosed "overuse, right knee"⁵ and indicated that the "right knee examination" showed moderate anterior knee pain.

Appellant submitted a State of Florida workers' compensation form, completed by Dr. Mondo on July 6, 2016, in which he noted an October 21, 2014 date of accident, assessed functional limitations of lifting no more than 20 pounds and no squatting, and noted that appellant was limited to performing light-duty work.

OWCP also received medical reports from Dr. Mondo dated July 6, August 3, and December 5, 2016, and February 3, 2017, reiterating his diagnoses and discussing functional limitations and treatment plans. Appellant also submitted notes from Emily Harper, a physical therapist, dated April 22, 2015.

By development letter dated December 12, 2016, OWCP advised appellant that the evidence of record was insufficient to establish his claim. Specifically, it informed him that the evidence of record did not include a medical diagnosis of a condition resulting from his injury or a physician's opinion as to how his injury resulted in a diagnosed condition. OWCP advised appellant of the medical and factual evidence needed, provided him a copy of the employing establishment's controversion letter, and afforded him 30 days to respond.

⁴ The Board notes that, under File No. xxxxxx559, OWCP accepted that the claimant sustained a left knee sprain and left knee medial meniscus tear on October 21, 2014. Appellant underwent OWCP-approved left knee arthroscopic surgery with Dr. Paul Mondo, a Board-certified orthopedic surgeon, on December 4, 2014.

⁵ The Board notes other portions of this report that refer to appellant's left knee as the injured body part, as well as statements from appellant, his counsel, and other medical reports (*passim*) that indicate this portion of the report refers to the incorrect knee.

Appellant subsequently submitted duplicates of Dr. Mondo's December 5, 2016 reports, which were previously of record. He also submitted a December 5, 2016 x-ray examination report of his left knee, in which Dr. Mondo interpreted the findings as demonstrating minimal medial joint space narrowing of the left knee.

By decision dated January 27, 2017, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish causal relationship between a diagnosed medical condition and the June 28, 2016 employment incident. Specifically, it found that "overuse of right knee" is a symptom, not a secure diagnosis.

On February 9, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The request was made again on March 1, 2017.

In a July 6, 2016 medical report, Dr. Mondo briefly discussed the June 28, 2016 work incident. He indicated that appellant "felt pain along the anterior aspect of his right knee" when he stood up from a squatted position while checking a passenger. Dr. Mondo also noted an October 21, 2014 injury, but provided no additional detail on the earlier injury.

In a report dated June 16, 2017, Dr. Dipesh Patel, a Board-certified family practitioner, indicated that appellant had ongoing, chronic left knee pain. He noted a magnetic resonance imaging (MRI) scan study that showed medial compartment chondral loss and deficiency in the medial meniscus, as well as an x-ray that showed varus malalignment and decreased joint space narrowing.

On July 14, 2017 OWCP held a telephonic hearing with appellant and counsel. The representative then held the case record open 30 days for additional evidence. No additional evidence was received.

By decision dated October 2, 2017, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish a diagnosed medical condition in connection with the accepted employment factors.

On November 15, 2017 appellant, through counsel, requested reconsideration. Accompanying the request, additional medical reports from Dr. Anthony Cerminara, a Board-certified orthopedic surgeon, were submitted in support of the claim.

In an undated report, Dr. Cerminara indicated that he first evaluated appellant on April 24, 2015 at which time appellant was suffering from medial-sided knee pain. He noted that appellant had undergone knee arthroscopy and partial meniscectomy relating to a meniscal injury sustained while standing up from performing a pat down at work on October 21, 2014. Dr. Cerminara noted additional visits with appellant on April 24, June 8, and August 10, 2017 and opined that the October 21, 2014 injury led to an increase in medial-sided knee osteoarthritis with resultant knee dysfunction and pain.

By decision dated January 31, 2018, OWCP reviewed the merits of appellant's case, but denied modification of its October 2, 2017 decision, finding that Dr. Cerminara's reports were of insufficient probative value to modify the prior decision.

On February 8, 2018 OWCP received a medical report dated October 26, 2017 from Dr. Mark A. Seldes, a Board-certified family practitioner. Dr. Seldes examined appellant and noted his review of various medical reports provided by appellant. He indicated that appellant was injured on October 21, 2014 while in the performance of duty, when he squatted down and kneeled on his left knee during a pat down of a passenger. Dr. Seldes noted that appellant underwent surgery and was off from October 21, 2014 to February 22, 2015, before returning to work in a limited-duty capacity. He indicated that appellant was reinjured on June 28, 2016, one month after returning to full-duty status, when he squatted down and knelt on his left knee while conducting a passenger pat down. Dr. Seldes diagnosed left knee internal derangement, left knee medial meniscal tear, status post left knee arthroscopy, and aggravation of left knee injury. He opined that the June 28, 2016 incident resulted in “an aggravation of his initial injury of October 21, 2014” and should not have been treated as a new claim.

On February 16, 2018 appellant requested reconsideration.

By decision dated May 7, 2018, OWCP again denied modification of its prior decision, finding that the medical evidence submitted was insufficient to establish a causal relationship between appellant’s condition and his accepted employment factors. It observed that Dr. Seldes reported that the 2016 incident aggravated appellant’s knee condition, but did not cite the specific condition(s) aggravated, nor did it explain with medical reasoning how the June 28, 2016 work incident aggravated the previously established knee conditions.

On May 31, 2018 appellant, through counsel, requested reconsideration and submitted a copy of the undated medical report by Dr. Cerminara which was previously of record.

By decision dated July 3, 2018, OWCP denied appellant’s request for reconsideration without conducting a merit review.

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.⁶ 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).⁷ 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.⁸ Section 10.608(b) provides that, when a request for reconsideration is

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.608(a).

⁸ *Id.* at § 10.606(b)(3).

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.⁹

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹¹ When reviewing an OWCP decision denying a 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.¹²

ANALYSIS

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).

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant also did not advance a relevant legal argument not previously considered by OWCP. Thus, he is not entitled to a review of the merits based on the first or second requirements under 20 C.F.R. § 10.606(b)(3).¹³

Appellant, through counsel, submitted an undated report by Dr. Cerminara with his May 31, 2018 reconsideration request. However, that report was a duplicate of a report that was previously submitted to OWCP with his November 14, 2017 request for reconsideration. 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.¹⁴ Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met 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.

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).

⁹ *Id.* at § 10.608(b).

¹⁰ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹¹ *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹² *P.L.*, *supra* note 10; *Annette Louise*, 54 ECAB 783 (2003).

¹³ *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹⁴ *See M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007).

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2019
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