

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 March 1, 2017 appellant, then a 62-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 22, 2017 he injured his right knee carrying a large package up steps while in the performance of duty. The weight of the package reportedly shifted, causing his right knee to buckle. Appellant described his injury as a dislocated kneecap, with damage to the surrounding tissue. On the reverse side of the claim form, the employing establishment noted that he stopped work on February 22, 2017, and received medical treatment that same day.

On February 22, 2017 appellant was seen by Margo A. MacFarlane, a physician assistant. Ms. MacFarlane indicated that appellant had been advised to stay off work from February 23 to March 3, 2017 due to an acute injury. She further indicated that if his symptoms improved, he may return to work after being evaluated by orthopedics.

By letter dated February 23, 2017, Dr. James Phillips, a Board-certified orthopedic surgeon, noted that appellant had been under his care for an injury to the knee and would remain off work until March 9, 2017.³

In a March 9, 2017 attending physician's report (Form CA-20), Dr. Phillips diagnosed patella subluxation and osteoarthritis, noting that appellant had a history of osteoarthritis. He checked a box marked "yes" indicating that appellant's condition was caused or aggravated by employment activity on February 22, 2017, explaining that appellant had fallen and heard a discernible "pop" while delivering mail. Dr. Phillips indicated appellant was totally disabled from work for the period February 23 through March 18, 2017.⁴ In an accompanying duty status report (Form CA-17) of the same date, he diagnosed a patella subluxation and indicated that appellant could return to work on March 18, 2017 with restrictions.

On March 16, 2017 Dr. Phillips advised the employing establishment that appellant was able to lift 25 pounds continuously, and 70 pounds intermittently for seven hours per day.

Effective March 18, 2017, appellant resumed work in a full-time, modified-duty capacity.

³ Rachel E. Furnas, a physician assistant, authored a similar letter also dated February 23, 2017, noting that appellant would remain off work until further evaluation.

⁴ OWCP also received March 9, 2017 treatment notes from Ms. Furnas.

In a March 30, 2017 development letter, OWCP requested that appellant submit additional evidence in support of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion.⁵ OWCP afforded appellant 30 days to respond.

OWCP subsequently received a limited-duty job offer, which appellant accepted on March 20, 2017. It also received an April 6, 2017 duty status report (Form CA-17) from Dr. Phillips, which identified appellant's ongoing work restrictions.

By decision dated May 5, 2017, OWCP denied appellant's claim, finding that he had not submitted sufficient medical evidence to establish a causal relationship between his right knee patella subluxation and the accepted February 22, 2017 employment incident. It noted that Dr. Phillips stated in his March 9, 2017 report that appellant had fallen while delivering mail, whereas appellant had not mentioned having fallen on his Form CA-1.

OWCP subsequently received May 18, 2017 progress notes from Ms. Furnas, a physician assistant, who diagnosed right patella subluxation.

On July 10, 2017 appellant requested reconsideration of OWCP's May 5, 2017 decision. He attached a May 19, 2017 letter from Dr. Phillips who stated that the injury occurred on "February 23, 2017" when appellant was delivering a package and the weight inside the package shifted unexpectedly, causing him to experience significant pain, a "popping" sensation, and immediate instability to his knee. Dr. Phillips noted that, although appellant was wearing a brace at the time, he felt as though his kneecap dislocated. He also noted having inadvertently stated that appellant had fallen on his route, which was incorrect. Dr. Phillips opined that appellant's condition was a work-related injury.

OWCP also received June 29, 2017 treatment notes from Ms. Furnas, which included a diagnosis of bilateral knee primary osteoarthritis.

By decision dated July 19, 2017, OWCP denied modification of the May 5, 2017 decision.

On November 20, 2017 appellant requested reconsideration of OWCP's July 19, 2017 decision. Attached was an undated letter from Dr. Phillips in which he noted that appellant had returned for a follow-up after undergoing right total knee arthroplasty on September 14, 2017. Dr. Phillips noted that "apparently" appellant sustained a work-related injury of the right knee while carrying a fairly large box. He further noted that appellant was seen a day later on February 23, 2017 by his physician assistant, Ms. Furnas, at which time he was found to have an exacerbation of an arthritic knee with possible subluxation of the patella. Dr. Phillips also noted that Ms. Furnas subsequently saw appellant on his behalf on four separate occasions between March 9 and June 29, 2017. His treatment included rest and cortisone injections. Dr. Phillips indicated that he initially examined appellant on July 20, 2017, and subsequently scheduled surgery.

⁵ With respect to the alleged February 22, 2017 employment incident, OWCP inquired whether appellant had fallen at the time of injury.

By decision dated January 3, 2018, OWCP denied modification of the decision of July 19, 2017.

In a statement dated July 28, 2018, appellant argued that he had submitted sufficient medical evidence to establish his claim.

On September 12, 2018 appellant requested reconsideration of OWCP's decision dated January 3, 2018. With his request, he attached a statement dated July 27, 2018, arguing that he had submitted sufficient medical evidence to establish his claim and that OWCP had changed the reason for denial on each request for reconsideration.

By decision dated December 6, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

⁶ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *L.D.*, *id.*; *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁹ *Id.* at § 10.608(a); *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

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).

With his September 12, 2018 request for reconsideration, appellant submitted July 27 and 28, 2018 statements contending that he had submitted sufficient medical evidence to establish his claim and that OWCP had changed the reason for denial on each request for reconsideration. As the underlying issue is medical in nature and can only be resolved by the submission of medical evidence, these contentions do 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, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Additionally, appellant did not submit any relevant and pertinent new evidence with his September 12, 2018 request for reconsideration. Therefore, he 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).

Accordingly, the Board finds that appellant did not 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.

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 December 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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