

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

A.H., Appellant)	
)	
and)	Docket No. 18-1264
)	Issued: February 11, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
HAMPTON MEDICAL CENTER, Hampton, VA,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2018 appellant filed a timely appeal from a May 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated June 14, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, 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 his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 1, 2016 appellant, then a 36-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that he injured his right knee on July 18, 2016, when conducting a foot patrol while in the performance of duty. He noted that the sidewalk was uneven and sinking and that one of his legs dropped lower than the other resulting in a meniscal tear.

On July 29, 2016 Dr. Philip Lenoach, a Board-certified orthopedic surgeon, examined appellant when he presented complaining of right knee pain and loss of range of motion after hyperextending his right knee while walking on uneven pavement on July 18, 2016. He reviewed a magnetic resonance imaging (MRI) scan of appellant's right knee and diagnosed a tear of the medial meniscus.

On August 9, 2016 the employing establishment issued appellant a properly completed authorization for examination and/or treatment (Form CA-16).

Appellant provided a report dated August 16, 2016 from Dr. Jon H. Swenson, a Board-certified orthopedic surgeon, noting that on July 18, 2016 appellant was walking on an uneven sidewalk and developed swelling and burning pain in his knee. Dr. Swenson reviewed appellant's MRI scan of the right knee, which demonstrated a medial meniscal tear. He noted a possible arthroscopic surgery.

By development letter dated September 12, 2016, OWCP advised appellant that when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, since the employing establishment did not controvert continuation of pay or challenge the case, a limited amount of medical expenses was administratively approved. It noted that it reopened his claim because he requested authorization for surgery. OWCP informed appellant of the type of factual and medical evidence necessary to establish his claim and afforded him 30 days to submit the necessary evidence.

Appellant provided an additional note from Dr. Swenson dated September 1, 2016. Dr. Swenson reported that appellant's injury occurred on July 18, 2016 and that the mechanism of injury was walking on an uneven sidewalk and the subsequent development of swelling and burning pain in his knee. He diagnosed a medial meniscal tear in appellant's right knee and recommended surgery.

By decision dated October 13, 2016, OWCP denied appellant's traumatic injury claim finding that the evidence of record was insufficient to establish that an employment incident occurred as alleged, as he had not completed the factual questionnaire.

On November 11, 2016 appellant requested reconsideration. In support of this request, he provided a completed questionnaire dated October 14, 2016. Appellant noted that he was conducting a foot patrol on employing establishment property. He reported that he traversed a staircase and the connecting sidewalk, which were collapsing or sinking unevenly into the ground. Appellant felt a slight twist then experienced burning and pain in his right knee. He further indicated that he reported his injury to his superior, his right knee became swollen and he could not bear weight on it, but remained on duty for an additional 10 hours. Appellant noted that he

was unable to walk for three days and treated his knee with rest, ice, and elevation. When he felt able to drive he sought medical attention.

By decision dated February 1, 2017, OWCP modified its October 25, 2016 decision to reflect that appellant had established the factual basis for his traumatic injury claim, but that he had failed to submit medical evidence establishing causal relationship between his diagnosed condition and his accepted July 18, 2016 employment incident.

On March 24, 2017 appellant requested reconsideration. He contended that he had provided the required medical opinion evidence. Dr. Swenson completed a report on February 28, 2017 and described appellant's history of walking on uneven ground and injuring his right knee. He concluded, "It is my medical opinion, that [appellant's] current right knee complaint and MRI [scan] confirmation of a medial meniscal tear is directly related to his injury of July 18, 2016."

By decision dated June 14, 2017, OWCP denied modification of the February 1, 2017 decision and found that Dr. Swenson had failed to provide medical rationale explaining how walking on uneven ground caused or contributed to appellant's right knee medial meniscal tear.

On May 10, 2018 appellant again requested reconsideration. He resubmitted a copy of Dr. Swenson's February 28, 2017 report.

By decision dated May 16, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that he had not submitted relevant and pertinent new evidence not previously considered by OWCP in support of his request for reconsideration.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.² Section 8128(a) of FECA³ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time on his own motion or on application.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.⁵ If

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ *Id.*; *L.S.*, Docket No. 18-0811 (issued November 13, 2018).

⁵ 20 C.F.R. § 10.606(b)(3); *see also L.S., id.*

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.⁶

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.⁷ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁸ 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 appellant's application for reconsideration and any evidence submitted in support thereof.⁹

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. 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. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁰

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).

Appellant's request for reconsideration 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 by OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board notes that the underlying issue in this case is whether appellant sustained a right knee injury causally related to the accepted July 18, 2016 employment incident. That is a medical issue which must be addressed by relevant medical evidence not previously considered.¹¹ Appellant resubmitted Dr. Swenson's February 28, 2017 report. The Board notes that this report was previously addressed and evaluated by OWCP in its June 14, 2017 merit decision. 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.¹²

⁶ *Id.* at § 10.608(b).

⁷ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

⁸ *See supra* note 3. *See also L.S.*, *supra* note 4; *Mark H. Dever*, 53 ECAB 710 (2002).

⁹ *L.S.*, *supra* note 4; *Annette Louise*, 54 ECAB 783 (2003).

¹⁰ *L.S.*, *supra* note 4; *M.E.*, 58 ECAB 694 (2007).

¹¹ *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

¹² *Id.*

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.¹³

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 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2019
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

¹³ The Board notes that the employing establishment issued a Form CA-16 authorizing medical treatment. A properly executed CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. Although OWCP denied appellant's claim for injury, it did not address whether he is entitled to reimbursement of medical expenses pursuant to the Form CA-16. See 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *F.M.*, Docket No. 17-1547 (issued November 2, 2018); *S.G.*, Docket No. 18-0209 (issued October 4, 2018).