

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

S.P., Appellant)	
)	
and)	Docket No. 18-1419
)	Issued: February 27, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Jackson, MS, Employer)	
)	

<i>Appearances:</i> Wilbert Rainey, Esq., for the appellant ¹ Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

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

JURISDICTION

On July 17, 2018 appellant, through counsel, filed a timely appeal from a May 10, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 3, 2017, to the filing of this

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.

appeal, 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

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 October 11, 2012 appellant, then a 26-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained a bruise on both knee caps while helping an employee change a patient. She related that a patient's bed was not on all four wheels and while turning the bed, it ran over her and caused her to fall on her legs. No additional evidence was submitted.

In a development letter dated October 2, 2014, OWCP notified appellant of the medical deficiencies of her claim. Appellant was instructed to provide a narrative medical report from her physician which contained a detailed description of findings and diagnoses, explaining how the reported work incident caused or aggravated her medical condition. OWCP afforded her 30 days to submit the requested information. Appellant did not respond.

By decision dated November 7, 2014, OWCP denied appellant's traumatic injury claim, finding that she had not provided medical evidence which diagnosed a medical condition in connection with the accepted work events of October 11, 2012. It noted that she failed to respond to its October 2, 2014 development letter.

Appellant requested reconsideration on December 26, 2014 and submitted medical records from the employing establishment's health unit. A progress note dated September 22, 2014 signed by Dr. David M. Walker, a Board-certified psychiatrist, and a consultation note dated September 29, 2014 by Dr. Ashish Anand, an orthopedic surgeon, diagnosed a right knee sprain and chondromalacia. Dr. Walker opined that appellant's right knee sprain was caused by the accepted October 11, 2012 employment incident.

By decision dated January 14, 2015, OWCP reviewed the merits of appellant's claim, vacated its November 7, 2014 decision, and accepted her claim for right knee sprain.

On August 7, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of the October 11, 2012 work injury on July 3, 2017. She stated that she experienced constant popping in both of her knees while bending, which caused major pain. Appellant related

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that on appeal, appellant submitted additional evidence. However, section 501.2(c)(1) of the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

that a magnetic resonance imaging (MRI) scan performed at the employing establishment on August 2, 2017 suggested bone islands and mild effusion. The MRI scan also indicated that no tears of meniscus, collateral, or cruciate ligaments were seen. Appellant did not stop work.

Appellant submitted additional medical records from the employing establishment's health unit. A progress note dated July 21, 2017 from Dr. Charles E. Morris, Board-certified in occupational medicine, provided a diagnosis of recurrence of bilateral knee arthralgia. The progress note indicated that appellant could return to work with restrictions.

An August 2, 2017 left knee MRI scan read by Dr. Stephen L. Curry, Board-certified in diagnostic radiology, provided an impression of some fluid anterior to the patellar tendon which could indicate prepatellar bursitis. He also provided an impression that structures of the knee were otherwise unremarkable.

By development letter dated August 15, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish her recurrence claim. It afforded her 30 days to complete an attached questionnaire posing questions about her work activities and medical symptoms, and to submit additional medical evidence.

OWCP subsequently received an additional progress note of Dr. Morris dated July 31, 2017. The progress note provided a diagnosis of bilateral knee strain and reiterated that appellant could return to work with restrictions.

On September 12, 2017 Dr. James A. Hurt, III, a Board-certified orthopedic surgeon, examined appellant and diagnosed pain in both knees, unspecified chronicity.

Dr. Robert W. Morris, Board-certified in diagnostic radiology, read an x-ray of appellant's bilateral knees on September 12, 2017. He reported that her bilateral knees had a normal appearance.

By decision dated October 3, 2017, OWCP denied appellant's recurrence claim, finding that the evidence of record contained no medical evidence explaining how her current condition was causally related to her accepted employment injury. It found that there was no bridging medical evidence to establish an ongoing work-related injury as she had not submitted medical evidence for over two years during the period from October 2014 to June 2017. OWCP indicated that appellant's diagnosis of chondromalacia had not been accepted as work related.

OWCP received a duplicate copy of Dr. Robert Morris' September 12, 2017 bilateral knee x-ray report.

On March 2, 2018 appellant requested reconsideration regarding the October 3, 2017 decision. She contended that OWCP erred in not accepting her claim for bilateral knee plica syndrome causally related to the accepted October 11, 2012 employment injury. Appellant asserted that employing establishment health care providers misdiagnosed her having right knee sprain.

In response to OWCP's development questionnaire, dated February 21, 2018, appellant related that she had since been removed from nursing services to a position in medical services,

which required walking and standing. She described her work-related conditions and symptoms. Appellant believed that her disability was caused by her accepted work injury because that was what emergency room physicians told her. She reiterated that she had been misdiagnosed and she should have been diagnosed as having plica syndrome, bilateral knees.

A progress note dated September 15, 2017 by appellant's physical therapist was also submitted. The physical therapist discussed examination findings and diagnosed plica syndrome, bilateral knees. The report included a handwritten note, which indicated that the diagnosed condition occurred when appellant was pinned against a hospital bed five years ago and the condition was misdiagnosed by the employing establishment's health unit. The note also indicated that, as a result, her knee sprain diagnosis had escalated to plica syndrome, as the plica of the knee had been aggravated.

By decision dated May 10, 2018, OWCP denied further merit review of appellant's claim. It found that the medical evidence submitted was immaterial to the issue of causal relationship.

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.⁴ 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).⁵ 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.⁶ Section 10.608(b) provides that, when a request for reconsideration is 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.⁷

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁸ and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁹ *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

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).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim. The Board finds that she has not shown that OWCP erroneously applied or interpreted a specific point of law. In her March 2, 2018 request for reconsideration, appellant contended that she had been misdiagnosed as having a right knee sprain by employing establishment's health care providers and that OWCP had erred in not accepting her claim for bilateral knee plica syndrome causally related to the accepted October 11, 2012 employment incident. These assertions, however, do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted medical evidence establishing that she sustained a recurrence of her medical condition causally related to the accepted work injury. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.¹⁰ Accordingly, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant has failed to submit relevant and pertinent new evidence not previously considered by OWCP in support of her request for reconsideration. Appellant submitted her February 21, 2018 response to OWCP's August 15, 2017 development questionnaire. The Board finds that submission of this document did not require reopening her case for merit review as it does not contain rationale by a physician relating her current medical condition to the accepted October 11, 2012 employment injury, which was the issue before OWCP. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ Therefore, this document does not constitute relevant and pertinent new evidence and is insufficient to require OWCP to reopen the claim for further consideration of the merits.

The new progress note dated September 15, 2017 from appellant's physical therapist is insufficient to warrant merit review as a physical therapist is not considered a physician as defined under FECA.¹² The Board finds, therefore, that this evidence is not relevant to the underlying medical issue on appeal and is insufficient to warrant further merit review of appellant's claim.¹³

¹⁰ See *L.F.*, Docket No. 17-0243 (issued June 20, 2017); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ *B.J.*, Docket No. 18-0756 (issued September 11, 2018).

¹² See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law). *R.C.*, Docket No. 17-1314 (issued November 3, 2017).

¹³ *R.C.*, *id.*

Appellant resubmitted Dr. Robert Morris' September 12, 2017 bilateral knee x-ray report. As previously noted, the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ Accordingly, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 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.¹⁵

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 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 27, 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

¹⁴ See *S.S.*, Docket No. 18-0647 (issued October 15, 2018); *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

¹⁵ See *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).