

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

R.R., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Ashland, KY, Employer**

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**Docket No. 18-0068
Issued: May 16, 2019**

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 October 10, 2017 appellant filed a timely appeal from a July 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 18, 2016, 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 to review the merits of appellant's claim.

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 January 31, 2002 appellant, then a 47-year-old correctional counselor, filed a traumatic injury claim (Form CA-1) alleging that on that date he was walking down stairs while in the

¹ 5 U.S.C. § 8101 *et seq.*

performance of duty, when he overstepped. This caused the heel of his left foot to hit the edge of the steps, which in turn caused him to slip and twist his left knee.²

In an attending physician's report (Form CA-20) dated June 7, 2002, Dr. Jack R. Steel, a Board-certified orthopedic surgeon, evaluated appellant and reported the history of injury and noted that x-rays showed no degenerative changes or fractures. He diagnosed torn medial meniscus, left knee and indicated that he was temporarily totally disabled.

In a report dated January 27, 2003, Dr. Steel noted that appellant initially injured his left knee on January 22, 2002, when he missed the last step and twisted his knee while at work. He noted that the knee was swollen and sore for a while, but it improved and he was able to resume his regular activities. Dr. Steel noted that on May 5, 2002 appellant was playing softball and as he passed first base, he planted his left foot, his knee buckled, and his pain became severe, such that he was not able to resume his regular activities. He further noted that on May 22, 2002 appellant complained of a painful, swollen, left knee. Dr. Steel again diagnosed an acute injury to the medial compartment of the knee, most likely a torn medial meniscus. He explained that appellant underwent arthroscopic evaluation and treatment on May 24, 2002. Dr. Steel explained that his operative findings revealed a torn medial meniscus, which he presumed occurred at some point before the more recent injury of May 5, 2002. He advised that the medial femoral condyle fracture with loose cartilage fragments floating in the knee, were related to the injury of May 5, 2002. Dr. Steel explained that the meniscus had been torn with the injury in January, hence the intermittent symptoms of pain in the knee which were not debilitating. He advised that the subsequent incident of May 5, 2002 caused a significant increase in discomfort and contributed to additional problems related to the medial meniscus. Dr. Steel opined that the new injury of May 5, 2002 "precipitated the knee for more expeditious treatment."

By decision dated February 18, 2003, OWCP accepted the claim for left medial meniscus tear and the resultant left knee arthroscopy, which had been performed on May 24, 2002.³

In a report dated January 19, 2005, Dr. Steel advised that appellant had excellent strength in his quads and was regaining quad mass. He indicated that appellant was asymptomatic and since he had retired, he was "not likely to abuse his knees as much."

On September 21, 2015 appellant filed a notice of recurrence (Form CA-2a) claiming time lost from work. He explained that as the years progressed, his left knee and leg became weaker and more painful. Appellant asserted that this was the same knee for which OWCP had accepted a meniscus tear and Dr. Steel had recommended a knee replacement. He noted that he was presently employed as a custodian for a local school district. Appellant described his current duties as cleaning restrooms, classrooms, and hallways with other duties as assigned.

² The record reflects that appellant previously sustained an injury to his left knee while playing softball on May 5, 2002, which required surgery on his left knee.

³ By decision dated November 21, 2003, OWCP issued a schedule award for 21 percent left lower extremity permanent impairment. The award covered a period of 60.48 weeks for the period February 26, 2003 to April 24, 2004.

In a development letter dated October 6, 2015, OWCP noted that it had not received evidence in support of the recurrence claim. It requested that appellant submit factual and medical evidence to support his claim for a recurrence and instructed him to complete an attached questionnaire. OWCP afforded him 30 days to respond.

Appellant submitted his response to the development questionnaire on October 17, 2015. He noted that his left knee continued to worsen over time. Appellant explained that he was currently working as a custodian and that it was difficult to complete his tasks. He advised that he did not have a problem with his right knee, but his injured left knee continued to worsen. Appellant indicated that he swept, mopped, collected garbage, did general cleaning and his symptoms were “present continuously.”

In an October 14, 2015 report, Dr. Steel noted his treatment of appellant for osteoarthritis. He advised that appellant’s symptoms had worsened over the years and provided a diagnosis of osteoarthritis, consistent with progression of osteoarthritic changes following medial meniscectomy in 2002 for his accepted employment injury. Dr. Steel advised that it appeared that the original injury contributed to appellant’s current state and that a total knee arthroplasty was likely the only available treatment option.

In a November 3, 2015 report, Dr. Steel explained that appellant had, over the years, done remarkably well with his left knee. He advised that at the time of the surgery in 2002 that he had expected that appellant would have had rapid progression of degenerative arthritic changes of the knee, but they had not been as rapid as he had anticipated. Dr. Steel noted that appellant was presently symptomatic and definitive treatment would be a unicompartmental or total knee arthroplasty. He opined that it appeared that the original injury contributed to “the current state of affairs with his left knee.” Dr. Steel also noted that diagnostic testing of the right knee revealed degenerative changes in the right knee, which had not been involved in the injury at work.

By decision dated December 15, 2015, OWCP denied the claim for recurrence finding that the evidence submitted in support of his claim failed to establish that appellant required additional medical treatment due to a worsening of his accepted work-related conditions without an intervening cause.

On January 15, 2016 appellant requested a review of the written record. He did not submit additional evidence in support of his claim.

By decision dated June 14, 2016, OWCP’s hearing representative affirmed the December 15, 2015 decision. She found that appellant had not provided a rationalized medical opinion explaining how the 2002 injury, which had been entirely asymptomatic and required no medical attention for 10 years, was the cause of his current left knee condition.

On July 25, 2016 appellant requested reconsideration. He noted that in support of his request that he was submitting three pieces of additional evidence including a letter from his physician, a surgical note from a left total knee replacement, and a pamphlet on knee osteoarthritis and medication. In notes dated May 2 and July 13, 2016 and an August 22, 2015 report, Dr. Richard Manis, a Board-certified orthopedic surgeon, noted that appellant had a total left knee replacement on May 2, 2016 and opined that “this surgery may be related to his previous injury in

2002 at the [employing establishment].” He explained that appellant attempted many treatments and procedures to control the pain in the left knee since his original injury in 2002, which resulted in a diagnosis of osteoarthritis of the left knee. Dr. Manis advised that appellant was progressing well and a full recovery was expected.

By decision dated November 18, 2016, OWCP reviewed the merits of the claim, but denied modification of the June 14, 2016 decision, finding that appellant had not established a recurrence.

On January 30, 2017 appellant submitted a medical report containing diagnostic test results which were unrelated to his left knee condition.

On June 30, 2017 appellant requested reconsideration. In a separate letter, he asserted that meniscal tears were associated with a progression of knee osteoarthritis. Appellant provided a March 22, 2017 functional capacity evaluation which indicated that he was capable of sedentary work. He argued that the claims examiner did not describe the injury correctly and she was not qualified to review his case. Appellant also submitted a medical article on meniscal tears and knee osteoarthritis as well as a March 22, 2017 report from a physical therapist.

By decision dated July 19, 2017, OWCP denied appellant’s request for reconsideration finding that the evidence submitted was irrelevant or immaterial and insufficient to warrant review of its prior decision.

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.⁴

A timely application for reconsideration, including all supporting documents, must 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.⁵ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration, without reopening the case for a review on the merits.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁷ If OWCP chooses to grant reconsideration, it

⁴ 5 U.S.C. § 8128(a); *see also 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).

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.*

⁷ *Id.* at § 10.607(a).

reopens and reviews the case on its merits.⁸ 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.⁹

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 did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to further 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).

In support of his reconsideration request, appellant submitted a March 22, 2017 functional capacity evaluation which indicated that he was capable of sedentary work, a medical article on meniscal tears and knee osteoarthritis, as well as a March 22, 2017 report from a physical therapist. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit such evidence in this case.¹⁰ The underlying issue in this case is whether appellant has provided sufficient evidence to meet his burden of proof to establish a recurrence of disability causally related to his accepted employment injury without an intervening cause. The Board finds that the evidence submitted is not relevant and pertinent evidence as it does not contain a reasoned medical report from a physician explaining how his current disability is causally related to his accepted employment injury. Appellant is therefore not entitled to a review of the merits of his 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.¹¹

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).

⁸ *Id.* at § 10.608(a); *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *D.N.*, Docket No. 18-1630 (issued March 7, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹¹ *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).

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2019
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