

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

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Y.H., Appellant )  
and ) Docket No. 19-0835  
DEPARTMENT OF VETERANS AFFAIRS, )  
KENNERSVILLE HEALTH CARE CENTER, )  
Kenmersville, NC, Employer )  
Issued: October 4, 2019

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*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 12, 2019 appellant, through counsel, filed a timely appeal from a January 23, 2019 merit decision and a February 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish a right knee condition causally related to the accepted April 26, 2017 employment incident; and (2) 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 June 20, 2017 appellant, then a 49-year-old medical technician, filed a recurrence of disability claim (Form CA-2a) alleging wage loss under OWCP File No. xxxxxx684.<sup>3</sup> She alleged that she suffered a recurrence on April 26, 2017 when she overextended her right knee when transporting a gurney from room to room and having to lift heavy materials. Appellant stopped work on April 27, 2017 and returned to regular duty on April 28, 2017. The employing establishment indicated that it appeared that she was describing a new incident and injury, rather than a recurrence of disability. It also noted that appellant had a service-connected medical condition for the same knee. As a new employment incident was implicated, OWCP converted the recurrence claim to a new traumatic injury claim (Form CA-1) and assigned OWCP File No. xxxxxx144.

OWCP received physical therapy notes dated from July 7 to August 1, 2017.

In a report dated August 30, 2017, Dr. William T. Mason, a Board-certified internist, noted that appellant's history of injury included a right knee injury from a fall that occurred 20 years prior when she was in the military service. He opined that she had early right knee arthritis and chondromalacia patella. In a November 30, 2017 report, Dr. Mason assessed arthritic changes in the lateral aspect of the patella of appellant's right knee.

A February 20, 2018 magnetic resonance imaging (MRI) scan of appellant's right knee read by Dr. Jerry Burke, Board-certified in occupational medicine, demonstrated a horizontal tear of the lateral meniscus and moderate osteoarthritis of the patellofemoral joint.

In a development letter dated April 17, 2018, OWCP advised that, while appellant had filed a notice of recurrence of disability (Form CA-2a) under OWCP File No. xxxxxx684, it had been determined that she sustained a new traumatic event on April 26, 2017. Therefore, appellant's claim was converted to a claim for new traumatic injury, assigned OWCP File No. xxxxxx144. OWCP also informed her that additional factual and medical evidence was needed to establish her claim. It advised appellant of the type of additional evidence needed and afforded her 30 days to submit the necessary evidence.

In an April 26, 2018 treatment note, Dr. Mason opined that appellant's current condition was related to an injury she sustained when she fell at the employing establishment in 2016. He reported that she had right knee pain at the medial joint line. Dr. Mason recommended

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<sup>3</sup> Appellant's claim in OWCP File No. xxxxxx684 pertained to an April 5, 2016 traumatic right knee injury when helping an unconscious patient onto the floor while in the performance of duty. The claim was closed administratively with minimal time lost from work.

arthroscopic surgery of the right knee for a probable meniscal tear to relieve appellant's pain which was caused or aggravated by the employment injury in 2016.

On May 15, 2018 OWCP received handwritten notes from Dr. Mason, which provided a history of a fall in 2016 and diagnosed mild right knee arthritis and a meniscus tear.

By decision dated June 26, 2018, OWCP denied appellant's claim. It found that the medical evidence of record did not establish that the diagnosed condition was causally related to the accepted April 26, 2017 employment incident. OWCP explained that Dr. Mason attributed appellant's right knee condition to a work injury in 2016, and not 2017.

On July 26, 2018 counsel requested an oral hearing before an OWCP hearing representative. At the November 28, 2018 telephonic hearing, appellant testified that she served in the U.S. Army from 1988 to 1990 and that during her service she fell and bruised her right knee. She further explained that on April 26, 2017 she used an empty gurney to move three 20-pound boxes of paper and sustained a right knee injury.

In a December 27, 2018 report, Dr. Ronald J. Gioffre, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment, including an injury to the right knee in April 2016 and a second injury to her knee in 2017. He indicated that she had absolutely no problem with her knee prior to these injuries. Dr. Gioffre also noted that appellant had a right knee bruise in 1990, that she underwent a debridement and abrasion chondroplasty of her lateral tibial plateau in 2000, and that she underwent right knee arthroscopic surgery on July 17, 2018. He opined that her current condition was directly related to her employment injury. Dr. Gioffre recommended a total knee arthroplasty and opined that the procedure would be directly related to her employment injury. He explained that appellant had two separate injuries at the same place of employment and otherwise she had not had any problems with her right knee in 28 years.

By decision dated January 23, 2019, OWCP's hearing representative affirmed the June 28, 2018 decision. She noted that Dr. Gioffre did not explain how the accepted April 26, 2017 employment incident caused or contributed to a right knee condition, as he referenced prior knee injuries and did not differentiate between those injuries and the effects of the April 26, 2017 employment incident.

On February 8, 2019 counsel requested reconsideration. He indicated that he was submitting the December 27, 2018 report of Dr. Gioffre, which was not previously submitted or considered.

By decision dated February 22, 2019, OWCP denied appellant's reconsideration request. It found that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of her claim.

## **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>5</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.<sup>8</sup> First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.<sup>9</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>10</sup>

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.<sup>11</sup> The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>12</sup>

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation,

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<sup>4</sup> *Id.*

<sup>5</sup> *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>8</sup> *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>9</sup> *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

<sup>10</sup> *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 8.

<sup>11</sup> See *F.C.*, Docket No. 19-0594 (issued August 13, 2019); *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

<sup>12</sup> See *F.C.*, *id.*; *I.J.*, 59 ECAB 408 (2008).

the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish a right knee condition causally related to the accepted April 26, 2017 employment incident.

Upon receipt of appellant's notice of recurrence of disability (Form CA-2a) in OWCP File No. xxxxxx684, OWCP properly converted her claim to a claim for traumatic injury, based upon her allegations that she had overextended her right knee on April 26, 2017 while pushing a gurney.<sup>14</sup>

In support of her claim, appellant submitted medical reports from Dr. Mason dated from August 30, 2017 to May 15, 2018. In his August 30, 2017 report, Dr. Mason made reference to a right knee injury from a fall that occurred 20 years prior when she was in the military service. He indicated that appellant had early right knee arthritis and chondromalacia patella and a lateral meniscus tear of the right knee. In his April 26, 2018 report and handwritten notes received by OWCP on May 15, 2018, Dr. Mason indicated that appellant's right knee condition was caused or aggravated by a 2016 employment injury. The Board notes that these reports do not mention the accepted employment incident of April 26, 2017. Dr. Mason's reports are of no probative value as they did not provide medical rationale, based on an accurate history of injury, that appellant had a diagnosed right knee condition causally related to the accepted April 26, 2017 employment incident.<sup>15</sup>

In a December 27, 2018 report, Dr. Gioffre referred to an April 2016 injury to appellant's right knee, and a second injury to her knee in 2017. While he opined that the right knee condition was directly related to an employment incident, he provided no rationale to support a physiological basis for his conclusion. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/disability was related to employment factors.<sup>16</sup> The Board therefore finds that the report of Dr. Gioffre is insufficient to establish appellant's claim.

OWCP received a February 20, 2018 MRI scan of the right knee, which was interpreted by Dr. Burke. The Board has also held that reports of diagnostic testing lack probative value, as they do not provide an opinion on causal relationship between appellant's employment duties and a

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<sup>13</sup> See F.C., *id.*; J.F., Docket No. 19-0456 (issued July 12, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

<sup>14</sup> OWCP's procedures provide at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c)(2) (June 2011).

<sup>15</sup> See I.B., Docket No. 19-0475 (issued July 19, 2019).

<sup>16</sup> See Y.D., Docket No. 16-1896 (issued February 10, 2017).

diagnosed condition.<sup>17</sup> As this report did not contain an opinion on causal relationship, it is insufficient to establish the claim.<sup>18</sup>

OWCP also received physical therapy notes dating from July 7 to August 1, 2017. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered “physician[s]” as defined under FECA.<sup>19</sup> Consequently, the medical findings and/or opinions of a physical therapist will not suffice for purposes of establishing entitlement to FECA benefits.<sup>20</sup>

As appellant has not submitted rationalized medical evidence to establish that her diagnosed right knee condition was causally related to the accepted April 26, 2017 employment incident, she has not met her burden of proof to establish entitlement to compensation benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>21</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.<sup>22</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP’s decision for which review is sought.<sup>23</sup> If OWCP chooses to grant reconsideration, it

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<sup>17</sup> See *J.M.*, Docket No. 17-1688 (issued December 13, 2018).

<sup>18</sup> *Id.* See *L.S.*, Docket No. 19-0135 (issued April 25, 2019).

<sup>19</sup> 5 U.S.C. § 8101(2) provides that under FECA the term “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law.

<sup>20</sup> *G.S.*, Docket No. 18-1696 (issued March 26, 2019); see *M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *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).

<sup>21</sup> 5 U.S.C. § 8128(a); see *O.G.*, Docket No. 18-0359 (issued August 7, 2019); see also *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>22</sup> 20 C.F.R. § 10.606(b)(3); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>23</sup> *Id.* at § 10.607(a).

reopens and reviews the case on its merits.<sup>24</sup> 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.<sup>25</sup>

### **ANALYSIS -- ISSUE 2**

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).

Counsel requested reconsideration, but he 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, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With the reconsideration request, counsel submitted a copy of the December 27, 2018 report of Dr. Gioffre. Although he indicated that the report was not previously submitted or considered, the Board notes that the December 27, 2018 report of Dr. Gioffre was previously considered and addressed by OWCP in its January 23, 2019 decision. As Dr. Gioffre's December 28, 2018 report repeats evidence already in the case record, it is duplicative and cumulative and fails to constitute relevant and pertinent new evidence.<sup>26</sup> Therefore, this evidence is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.<sup>27</sup> As appellant did not submit relevant or pertinent new evidence in support of her request for reconsideration, she is 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.<sup>28</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a right knee condition causally related to the accepted April 26, 2017 employment incident. The Board also finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>24</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>25</sup> *Id.*

<sup>26</sup> *T.T.*, Docket No. 18-1682 (issued February 22, 2019); *P.H.*, Docket No. 18-1020 (issued November 1, 2018); *L.H.*, 59 ECAB 253 (2007).

<sup>27</sup> *Id.*; *see also L.R.*, Docket No. 18-1780 (issued June 13, 2019).

<sup>28</sup> *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 22 and January 23, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 4, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board