

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

M.C., Appellant)	
)	
and)	Docket No. 19-1063
)	Issued: October 7, 2019
DEPARTMENT OF THE ARMY, ARMY)	
BENEFITS CENTER, Richmond, KY, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 April 15, 2019 appellant, through counsel, filed a timely appeal from a January 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant

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.

² The Board notes that counsel did not appeal from OWCP's merit decision dated December 10, 2018 which denied appellant's traumatic injury claim. Counsel appealed only the nonmerit decision dated January 17, 2019. Therefore, the December 10, 2018 merit decision is not presently before the Board. *See* 20 C.F.R. § 501.3.

to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to consider the merits of this case.⁴

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 October 16, 2018 appellant, then a 46-year-old forklift operator and material handler, filed a traumatic injury claim (Form CA-1) alleging that on September 26, 2018, when walking sideways between pallets in a narrow space, his left knee twisted the wrong way and popped while in the performance of duty. The following Monday, October 1, 2018, appellant was placing boxes on a pallet when he heard a louder pop in his knee. He did not stop work.

In a September 26, 2018 medical note with an illegible signature, diagnosed a left knee sprain due to working on September 19, 2018.

On October 18, 2018 appellant was seen by Dr. Wallace Huff, a Board-certified orthopedic surgeon. Dr. Huff noted joint pain in appellant's left knee after a September 19, 2018 injury at work. An x-ray of appellant's left knee revealed no acute findings. Dr. Huff diagnosed left knee derangement and recommended that appellant return to work with light-duty restrictions.

In an October 23, 2018 magnetic resonance imaging (MRI) scan report, Dr. Jon Kostelic, a Board-certified radiologist, diagnosed a large tear of the posterior horn of the medial meniscus of his left knee.

An October 26, 2018 medical report from Dr. Huff confirmed appellant's diagnosis and noted that appellant would need to undergo a left knee arthroscopy to repair his knee.

In a development letter dated November 1, 2018, OWCP informed appellant that his claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that continuation was not controverted by the employing establishment, and thus limited expenses had therefore been authorized. However, a formal decision was now required. OWCP advised appellant of the factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. It afforded him 30 days to provide the necessary information.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the January 17, 2019 decision, OWCP received additional evidence. However, 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 additional evidence for the first time on appeal. *Id.*

In response, appellant submitted an October 30, 2018 surgical authorization request which indicated that he would undergo three procedures on November 30, 2018. He also submitted medical records previously considered by OWCP.

In a November 20, 2018 response to OWCP's questionnaire, appellant remarked that the immediate effect of his injury was a popping effect. He stated that his knee was very tight and that he had trouble walking upwards or for long distances and that he treated the pain with ice and bandages. Appellant also stated that there were no witnesses who observed his injury and that he had no prior injuries or conditions related to the September 26, 2018 incident.

By decision dated December 10, 2018, OWCP denied appellant's traumatic injury claim finding that the evidence submitted was insufficient to establish that his diagnosed injury was causally related to the alleged September 26, 2018 employment incident.

OWCP subsequently received a copy of Dr. Huff's October 26, 2018 medical report.

On December 24, 2018 appellant requested reconsideration of the December 10, 2018 decision.

By decision dated January 17, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that Dr. Huff's October 26, 2018 report was repetitious of evidence previously considered in the prior merit decision.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ 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 payment of compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), its regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute 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 its 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

⁵ *Supra* note 3.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *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).

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

for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.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).

In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered. Accordingly, he 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).

Furthermore, appellant failed to submit relevant and pertinent new evidence with his December 18, 2018 request for reconsideration.¹¹ The underlying issue in this case is whether he submitted medical evidence sufficient to establish causal relationship between his diagnosed left knee condition and the accepted September 26, 2018 employment incident. On reconsideration, appellant submitted a copy of Dr. Huff's October 26, 2018 medical report previously considered by OWCP. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case.¹² Consequently, appellant is 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 did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, 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).

¹⁰ *Id.* at § 10.608(b); *H.H.*, *supra* note 7; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹² *J.B.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 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