



## 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

This case has previously been before the Board.<sup>5</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 14, 2012 appellant, then a 61-year-old medical supply technician, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2012 she injured her left shoulder, arm, knee, and leg while in the performance of duty.<sup>6</sup> On February 22, 2013 her claim was accepted for multiple contusions, left upper arm contusion, and left lower leg contusion under OWCP File No. xxxxxx710. Although it initially declined to accept a left shoulder tear as employment related, on March 2, 2015 OWCP expanded appellant's claim to include left shoulder rotator cuff tear and superior labral tear as accepted conditions.<sup>7</sup> On June 15, 2015 appellant underwent OWCP-approved left shoulder arthroscopic surgery. Following surgery, she received wage-loss compensation on the supplemental rolls through August 7, 2015. Appellant resumed work on August 10, 2015.

In December 2015, appellant requested that OWCP expand her claim to include left knee meniscus tear as an accepted condition. Effective December 11, 2015, OWCP resumed payment of wage-loss compensation as the employing establishment was no longer able to accommodate appellant's work restrictions. It placed her on the periodic compensation rolls beginning January 10, 2016.

By decision dated April 25, 2016, OWCP denied expansion of appellant's claim to include left knee meniscal tear. In a November 14, 2016 decision, an OWCP hearing representative affirmed the April 25, 2016 decision. Appellant then appealed to the Board. By decision dated February 2, 2018, the Board affirmed the hearing representative's November 14, 2016 decision, finding that appellant had not met her burden of proof to establish a left knee meniscal tear causally related to the accepted December 13, 2012 employment injury.<sup>8</sup>

Subsequent to its November 14, 2016 decision, OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. William P. Curran, Jr., a Board-certified orthopedic surgeon, for a second-opinion examination to determine the nature and extent

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> Appellant was positioned between two racks of inventory when a coworker pushed one of the racks to access another aisle. Consequently, she was squeezed between two racks of inventory in the aisle where she was located.

<sup>7</sup> Under File No. xxxxxx800, appellant has an accepted traumatic injury claim for right forearm/elbow contusion, face/scalp/neck contusion, left leg abrasion, and right shoulder rotator cuff strain, which arose on October 8, 2013. OWCP administratively combined File Nos. xxxxxx800 and xxxxxx710, and designated the latter claim as the master file.

<sup>8</sup> *Supra* note 1.

of her December 13, 2012 employment injuries. In a December 14, 2016 report, Dr. Curran described the December 13, 2012 employment injury and reviewed the medical record. He related appellant's current complaints of intermittent daily left shoulder pain, mid and low back pain and intermittent stiffness, and constant left knee pain. Upon examination of appellant's left knee, Dr. Curran observed tenderness to palpation in the medial and lateral joint lines and negative McMurray's test. He indicated that appellant continued to have residuals related to her accepted December 13, 2012 employment injuries. Dr. Curran also reported that appellant had "subjective and objective findings compatible with a torn lateral meniscus, left knee."

OWCP received a March 15, 2017 progress report by Dr. Michael Moon, Board-certified in physical medicine and rehabilitation and pain management, who indicated that he evaluated appellant for complaints of pain in her neck, low back, left knee, and left shoulder. Dr. Moon noted that appellant was waiting authorization for left knee surgery. Upon examination of appellant's left knee, he observed medial and lateral joint line tenderness to palpation and limited left knee extension at 10 degrees.

On March 20, 2017 appellant returned to full-time modified duty as a supply clerk.

OWCP also received progress reports from Dr. Jon P. Kelly, a Board-certified orthopedic surgeon, which covered the period November 16, 2016 to January 10, 2018. Dr. Kelly related appellant's complaints of worsening left knee, low back, and bilateral shoulder pain. Upon examination of appellant's left knee, he observed tenderness along the lateral joint line and patellofemoral tenderness. Dr. Kelly noted that appellant walked with a mildly antalgic gait. He diagnosed left knee lateral meniscal tear and indicated that it was "aggravated by impact by metal cart on date of injury." Dr. Kelly indicated that appellant could return to modified-duty work.

Additionally, OWCP received a May 22, 2018 letter from Dr. Curran, Jr., who described the December 13, 2012 employment injury and noted that appellant's claim was not accepted for a left knee condition. Dr. Curran, Jr. related appellant's current complaints of constant pain in her cervical, thoracic, and lumbar spine and intermittent, daily left knee pain with constant stiffness, swelling, and instability. Upon examination of appellant's left knee, he noted that appellant had an antalgic gait and was unable to squat. Dr. Curran, Jr. diagnosed postoperative left shoulder surgery, multiple contusions to her left upper and lower extremities, and complaints referable to the cervical, thoracic, and lumbar spine. He reported that he was unable to provide an opinion regarding the causal relationship of appellant's diagnosed conditions. Dr. Curran, Jr. completed a duty status report (Form CA-17), which indicated that appellant could return to work with restrictions.

On June 15, 2018 appellant requested reconsideration. She argued that the Board reached an erroneous conclusion based on factually incorrect information. Appellant explained that the Board's February 2, 2018 decision incorrectly noted that Dr. David C. Majors, a Board-certified physiatrist, did not mention any left knee condition in his February 16, 2016 report. She included the first page of Dr. Majors' February 16, 2016 report, which related appellant's complaints of left knee pain. Appellant argued that the Board's negligence and disregard of the facts denied her right to a fair and objective decision.

OWCP also received several laboratory test results dated July 6, 2017 and January 24, 2018.

By decision dated September 12, 2018, OWCP denied further merit review of appellant's claim under 5 U.S.C. § 8128(a) finding that appellant's reconsideration request neither raised substantive legal questions nor included new and relevance evidence sufficient to warrant further merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>9</sup> 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>10</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>11</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>12</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>13</sup>

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.<sup>14</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>15</sup> 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 the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>16</sup>

### **ANALYSIS**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Following its November 14, 2016 decision, OWCP received additional medical reports, including a December 14, 2016 second-opinion report by Dr. Curran, Jr. He discussed the status of appellant's accepted left shoulder, left upper arm, and left leg injuries and also reported that she

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<sup>9</sup> 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.

<sup>10</sup> 20 CFR § 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>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>13</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>14</sup> *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

<sup>15</sup> *Id.*; *see also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>16</sup> *Supra* note 13; *Annette Louise*, 54 ECAB 783 (2003).

had “subjective and objective findings” compatible with a left knee lateral meniscus tear. Similarly, in reports dated November 16, 2016 to January 10, 2018, Dr. Kelly noted left knee examination findings of tenderness along the lateral joint line and patellofemoral tenderness. He diagnosed left knee lateral meniscal tear and indicated that it had been “aggravated by impact by metal cart on date of injury.”

The Board finds that the reports of Dr. Curran Jr. and Dr. Kelly constitute relevant and pertinent new evidence not previously considered by OWCP. Moreover, both physicians provided opinions supportive of a causal relationship, which is the relevant underlying issue on reconsideration.<sup>17</sup> By decision dated September 12, 2018, OWCP referenced Dr. Kelly’s previously submitted February 16, 2016 report, but did not specifically address either Dr. Curran’s or Dr. Kelly’s medical reports. As the current record includes relevant and pertinent evidence not previously considered by OWCP in its November 14, 2016 decision, appellant has met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3). Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608.<sup>18</sup>

The case will be remanded for OWCP to properly conduct a merit review of the claim. Following this and such other additional development as deemed necessary, OWCP shall issue an appropriate merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>17</sup> See *K.J.*, Docket No. 19-0146 (issued July 10, 2019); see also *E.R.*, Docket No. 17-1055 (issued August 17, 2017).

<sup>18</sup> *W.D.*, Docket No. 18-1530 (issued February 14, 2019); *K.M.*, Docket No. 15-1290 (issued September 23, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 12, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 6, 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