

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 6, 2017 appellant, then a 45-year-old materials handler, filed an occupational disease claim (Form CA-2), alleging that he developed arthritis due to factors of his federal employment. He noted that he initially injured his left knee at work in 2014 and, after reinjuring his knee in 2016, he was informed that he had moderate arthritis in the left knee.³ Appellant indicated that he first became aware of his condition on October 4, 2014 and first realized its relationship to factors of his federal employment on January 26, 2016. He did not stop work.

In reports dated October 3, 10, and 15, 2014, Dr. Milan Parekh, a Board-certified family practitioner, noted that appellant presented with complaints of left knee pain as a result of a work-related injury that occurred at 10 a.m. on October 3, 2014. Appellant reported that he injured his knee when he jacked up a pallet that rolled and hit his right knee while the left knee was hyperextended. Dr. Parekh diagnosed sprain of the left knee and noted that appellant had a history of left ankle gout and tendinitis, as well as left knee arthroscopic menisectomies performed in the 1990s. He further indicated that an x-ray of the left knee was positive for chronic osteoarthritis, mild to moderate. Dr. Parekh released appellant to sedentary work only.

In a report dated January 26, 2016, Dr. Marek J. Korzeniowski, a Board-certified physiatrist, diagnosed sprain and moderate osteoarthritis of the left knee as a result of an injury sustained when appellant was pulling pallets and his left knee popped. He noted appellant's history of left ankle gout and tendinitis, left knee arthroscopic surgery in the 1990s, and a recent left knee injury sprain/strain on October 3, 2014. Dr. Korzeniowski placed appellant on limited duty with restrictions for sedentary work only.

On February 8, 2016 Dr. Bernard C. Ong, a Board-certified orthopedic surgeon, provided the following work restrictions for the period February 8 to March 8, 2016: no stair climbing, no standing more than two hours, and no continuous walking.

In a report dated November 21, 2016, Dr. Ryhor Harbacheuski, an orthopedic surgeon, indicated that appellant presented for treatment of pain in his left knee, which he noted had gotten progressively worse, particularly over the past six months. On physical examination, he noted mild tenderness to palpitation at the joint line medially on the left, crepitus and discomfort on passive patellafemoral range of motion on the left, and positive McMurray sign on the left. Dr. Harbacheuski reviewed a January 26, 2016 x-ray of the knee and reported an impression of moderate osteoarthritis and diagnosed left knee advanced osteoarthritis. He recommended a left total knee replacement and opined that, due to the severity of appellant's arthritic changes, it was unlikely that he would benefit from conservative treatment.

³ Appellant previously filed a traumatic injury claim on October 9, 2014 for a left knee sprain/strain under OWCP File No. xxxxxx826. The claim was administratively denied *via* short form closure. Appellant's claims have not been administratively combined and OWCP File No. xxxxxx826 is not presently before the Board on appeal.

In a report dated December 14, 2016, Dr. Anna Aguila, a Board-certified family practitioner, indicated that appellant had a history of severe left knee osteoarthritis and had been suffering from progressive left knee pain for about three years, which had not improved with conservative measures. Appellant was recommended to undergo a total knee arthroplasty/replacement in the future pending losing weight or reducing his body-mass index of below 40.

In a January 18, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received February 2 and 9, 2016 reports from Dr. Korzeniowski who noted that appellant was examined and treated for a work-related injury. Dr. Korzeniowski released appellant to sedentary work with restrictions for limited walking, standing, climbing, pushing, and pulling; no lifting over 10 pounds; and limited weight bearing of the left knee.

A magnetic resonance imaging (MRI) scan of the left knee dated February 4, 2017 revealed a complete anterior cruciate ligament (ACL) tear.

Appellant also submitted a witness statement dated February 14, 2017 from B.Y., who indicated that he worked as a materials handler and in late September 2014 or early October 2014 he was assigned to work with appellant to deliver a pallet of desktop computer terminals from an employing establishment warehouse to the IT department at the main hospital. B.Y. related that as appellant picked up the last terminal, he stepped on the pallet to reach the terminal and the pallet rolled forward causing appellant to twist his knee and fall onto the pallet. When he got up, B.Y. asked him if he was “ok” and appellant replied that he twisted his knee, but thought he should be “ok.”

By decision dated February 28, 2017, OWCP denied the occupational disease claim, finding that the evidence of record was insufficient to establish the factual component of fact of injury. It noted that appellant had not responded to the January 18, 2017 development questionnaire requesting a full explanation of the work duties he believed caused or aggravated his condition in 2014 and 2016. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 2, 2018 appellant, through counsel, requested reconsideration and resubmitted a copy of the February 4, 2017 MRI scan, the February 14, 2017 witness statement from B.Y, and the December 14, 2016 report from Dr. Aguila who noted appellant’s history of severe left knee osteoarthritis. He also submitted a January 24, 2017 report from Dr. Harbacheuski, who indicated that appellant was being treated for severe left knee osteoarthritis, was required to undergo surgery, and thereafter need more than a year to fully recover.

By decision dated February 7, 2018, OWCP denied appellant’s request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵

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.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 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's January 2, 2018 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request under 20 C.F.R. § 10.606(b)(3). Appellant submitted a January 24, 2017 report from Dr. Harbacheuski, who indicated that he was being treated for severe left knee osteoarthritis and would require surgery and more than a year to fully recover. However, this evidence does not address the underlying issue in this case, *i.e.*, whether the alleged employment factors occurred as described. The Board has held that the submission of evidence or

⁴ 5 U.S.C. § 8128(a).

⁵ *Id.*

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.607(a); *see also R.W.*, Docket No. 18-1324 (issued January 21, 2020). Timeliness is determined by the document receipt date (*i.e.*, "the received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *Id.* at § 10.608(a).

⁹ *Id.* at § 10.608(b); *see also R.W.*, *supra* note 7.

argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ As such, this evidence is insufficient to warrant reopening appellant's case for a merit review.

Appellant also resubmitted copies of evidence previously of record, including a February 4, 2017 MRI scan, a February 14, 2017 witness statement, and a December 14, 2016 report from Dr. Aguila. The Board has held that evidence that repeats or duplicates evidence already of record, or is cumulative in nature, has no evidentiary value, and does not constitute a basis for reopening a case.¹¹ As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹²

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); *see also M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *A.A.*, Docket No. 18-0031 (issued April 5, 2018).

¹² *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application 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 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 16, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board