

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

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| D.J., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0130 |
| |) | Issued: June 16, 2020 |
| DEPARTMENT OF THE NAVY, MARINE |) | |
| CORPS LOGISTICS BASE, Barstow, CA, |) | |
| Employer |) | |
| _____ |) | |

Appearances:
Brett E. Blumstein, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 21, 2019 appellant, through counsel, filed a timely appeal from a July 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 20, 2018, to the filing of this appeal,

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.

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on November 16, 2009 appellant, then a 59-year-old computer assistant, sustained a torn right medial meniscus when he tripped on a rotted restroom floor while in the performance of duty. Appellant did not stop work at the time of injury.⁵ He retired from the employing establishment on April 22, 2012.

Dr. Rana T. Pathi, an attending Board-certified orthopedic surgeon performed right knee arthroscopy on May 11, 2010, with partial medial and lateral meniscectomies, abrasion of chondromalacia, lysis of adhesions, and thermal shrinkage of a partial tear of the anterior cruciate ligament.

In a February 7, 2012 letter, counsel requested that OWCP expand the acceptance of appellant's claim to include degenerative left knee and lumbar conditions.

Dr. Jacob E. Tauber, an attending Board-certified orthopedic surgeon, opined on August 29, 2013 that appellant's "long history of work duties clearly would have contributed to his knee condition." Dr. Tauber added that appellant "further aggravated his knee in the course of favoring it when he had surgery on his operative knee."

In a March 13, 2014 letter, counsel again requested that OWCP expand the acceptance of the claim to include left knee and lumbar conditions. He also provided an April 16, 2014 report

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 12, 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.*

⁴ Docket No. 14-1604 (December 18, 2014); Docket No. 16-0663 (issued October 20, 2016).

⁵ Appellant submitted treatment records regarding a 1985 right knee injury. He underwent a right knee arthroscopy on June 16, 1989 to repair a lateral meniscal tear. Appellant also submitted treatment records regarding June 1, 2001 injuries to the left hand and left leg. OWCP accepted a February 1, 2005 lumbar strain under File No. xxxxxx498.

from Dr. Tauber, in which the physician opined that prolonged standing and working in awkward positions caused a cumulative left knee condition.

By decision dated May 8, 2014, OWCP denied appellant's request to expand the acceptance of his claim for left knee and lumbar conditions as causal relationship was not established. Appellant then appealed that decision to the Board.

By decision dated December 18, 2014, the Board affirmed OWCP's May 8, 2014 decision.⁶

In a February 3, 2015 letter, counsel requested reconsideration. He provided a January 22, 2015 report from Dr. Tauber.

By decision dated July 8, 2015, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that Dr. Tauber's January 22, 2015 opinion was cumulative, as it was substantially similar to his previous August 29, 2013 and April 16, 2014 reports.

On November 4, 2015 counsel again requested reconsideration. He provided a September 22, 2015 report from Dr. Tauber in which the physician noted that appellant's job duties required prolonged standing, bending, twisting, and stooping, resulting in repetitive stress on both lower extremities. Dr. Tauber noted that appellant had to do more with his left knee as a result of his right knee injury, including compensating while squatting and stooping, as well as increased weight bearing. He contended that the increased demands on the left lower extremity as being consequential to the right and, in addition, repetitive duties clearly placed additional stresses on his left knee and would have contributed to the actual anatomic arthritis that is present.

By decision dated January 14, 2016, OWCP denied modification of its May 8, 2014 decision.

On February 2, 2016 appellant then appealed that decision to the Board. By decision dated October 20, 2016, the Board affirmed OWCP's January 14, 2016 decision.⁷

On October 30, 2017 counsel requested reconsideration. He submitted a magnetic resonance imaging (MRI) scan of the left knee dated September 26, 2017. Counsel also submitted an October 17, 2017 report from Dr. John W. Ellis, a Board-certified family practitioner, who noted a history of injury and medical treatment, including a history of right knee problems dating back to 1969 when appellant was in the U.S. Air Force, and a left knee injury occurring in 1997 when he was working for the Department of the Navy. Dr. Ellis opined that since appellant had a prior injury to his left knee he was more prone to developing left knee problems in the future. He diagnosed antalgic gait of the right knee, abnormal mechanical strains in the left knee causing tricompartmental osteoarthritis and chondromalacia. Dr. Ellis concurred with Dr. Tauber's opinion that appellant required total bilateral knee replacements.

⁶ *Supra* note 4.

⁷ *Supra* note 4.

A report from Dr. Tauber dated August 31, 2017 related appellant's complaints of increased pain in his left knee in response to his right knee. He recommended additional diagnostic studies and a right total knee replacement. Similarly, on September 28, 2017, Dr. Tauber reported that appellant was limping and had gross crepitus causing his left knee to hurt more than the right knee. He recommended a left total knee replacement.

By decision dated July 20, 2018, OWCP denied modification of its prior decision.

On July 10, 2019 appellant, through counsel, requested reconsideration and submitted a new medical report from Dr. Tauber dated June 21, 2019. Counsel outlined Dr. Tauber's June 21, 2019 report concurring with Dr. Ellis' opinion that the left knee and lumbar conditions were causally related to the accepted November 16, 2009 employment injury. He asserted that the new medical evidence consisted of an unequivocal opinion that the diagnosed conditions were caused by the employment injury. On June 21, 2019 Dr. Tauber reported reviewing medical records and reports in addition to examining appellant. He cited extensively to Dr. Ellis' report, which diagnosed antalgic gait of the right knee, mechanical sprains in the left knee, tricompartmental osteoarthritis, and chondromalacia. Dr. Tauber concurred with Dr. Ellis' statements and opined that appellant's right knee surgery caused an abnormal antalgic gait, which caused stress on the other knee, back, and hips aggravating the underlying arthritis of the left knee and his lumbar condition. He concluded that the left knee and lumbar spine condition were consequential injuries to the right knee and were work related.

By decision dated July 22, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that the evidence submitted was insufficient to warrant a merit review.

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 payment of compensation at any time on his own motion or on application.⁸

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP's 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.⁹

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(3); *see also* *B.W.*, Docket No. 18-1259 (issued January 25, 2019); *D.K.*, 59 ECAB 141 (2007).

Section 10.608(b) of OWCP's regulations provides that when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the request for reconsideration without reopening the case for a 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).

On July 10, 2019 appellant, through counsel, timely requested reconsideration of OWCP's July 20, 2018 merit decision. However, counsel neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law nor did he advance a relevant legal argument not previously considered by OWCP.¹¹ Accordingly, the Board finds that appellant 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).¹²

The Board further finds that appellant has not submitted relevant and pertinent new evidence not previously considered relative to the underlying issue of whether the acceptance of his claim should be expanded to include the additional condition of left knee and lumbar condition as causally related to his accepted November 16, 2009 employment injury. With his reconsideration request, appellant submitted Dr. Tauber's June 21, 2019 report. Dr. Tauber quoted extensively from Dr. Ellis' October 17, 2017 report diagnosing antalgic gait of the right knee, causing mechanical sprains in the left knee, tricompartmental osteoarthritis, and chondromalacia. Dr. Tauber concurred with Dr. Ellis' statements and opined that appellant's right knee surgery caused an abnormal antalgic gait, which caused stress on the other knee, back, and hips. While this report is new, it is substantially similar to Dr. Tauber's prior reports already of record and previously reviewed. Providing additional evidence that either duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.¹³

On appeal appellant, through counsel, asserted that he submitted sufficient evidence to establish that the acceptance of his claim should be expanded to include the left knee and lumbar spine conditions. However, as noted above, the Board does not have jurisdiction over the merits of the claim. Appellant has not otherwise submitted evidence warranting further merit review.¹⁴

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).¹⁵ Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹⁰ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019); *K.H.*, 59 ECAB 495 (2008).

¹¹ *N.O.*, Docket No. 19-1481 (issued January 16, 2020).

¹² *Id.*

¹³ *See V.Q.*, Docket No. 19-1309 (issued January 3, 2020).

¹⁴ *Id.*

¹⁵ *L.S.*, Docket No. 18-0367 (issued September 23, 2019).

CONCLUSION

The Board finds that OWCP properly denied appellant's July 10, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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