

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

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<b>D.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1308</b>
	)	<b>Issued: January 7, 2020</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Point Pleasant Beach, NJ, Employer</b>	)	
_____	)	

*Appearances:*  
Jason S. Lomax, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 24, 2019 appellant, through counsel, filed a timely appeal from a December 21, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated August 16, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that appellant submitted additional evidence on appeal. 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.*

## 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 November 12, 2016 appellant, then a 49-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2016 he strained his left knee while turning to reach for dropped mail while in the performance of duty.

In a development letter dated November 29, 2016, OWCP advised appellant that further factual and medical evidence was necessary to establish his claim. It provided him a questionnaire for completion and afforded him 30 days to submit the necessary evidence. Appellant did not respond.

By decision dated December 30, 2016, OWCP denied appellant's traumatic injury claim finding that the evidence of record was insufficient to establish the medical component of fact of injury as no medical condition was diagnosed. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 17, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held telephonically on June 30, 2017.

In a July 10, 2017 report, Dr. Karl R. Blum, a Board-certified orthopedic surgeon, noted that he examined appellant on November 10, 2016 for a twisting injury of the left knee which appellant indicated occurred at work on November 1, 2016. He indicated that the magnetic resonance imaging (MRI) scan revealed a medial meniscal tear and some bone marrow edema at the posteromedial aspect of the tibial plateau consistent with either a contusion or degenerative changes. Dr. Blum identified the diagnosis as "rule out medial meniscal tear." He then opined that appellant sustained a medial meniscal tear to appellant's left knee causally related to the November 1, 2016 employment incident.

By decision dated August 16, 2017, an OWCP hearing representative modified the December 30, 2016 decision to reflect that, although there was a medical diagnosis, the claim remained denied as the medical evidence of record was insufficient to establish that appellant's diagnosed left knee condition was causally related to the accepted November 1, 2016 employment incident.

On August 1, 2018 appellant, through counsel, requested reconsideration. Counsel discussed Dr. Blum's previously submitted report of July 10, 2017 and indicated that Dr. Blum had access to the MRI scan. He argued that it was error for OWCP's hearing representative to deny appellant's claim when Dr. Blum specifically opined that the medial meniscal tear to appellant's left knee was causally related to the claimed November 1, 2016 employment injury.

A November 15, MRI scan left knee was submitted to the record which revealed: bone marrow edema at the posterior aspect of the medial tibial plateau, consistent with osseous

contusion; a horizontal tear, reaching inferior meniscal surface at the posterior horn of the medial meniscus; small joint effusion; and cystic lesion, suggestive of ganglion.

By decision dated December 21, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>4</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>5</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>6</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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>7</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration, without reopening the case for a review on the merits.<sup>8</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>9</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>10</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>11</sup>

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<sup>4</sup> This section provides in pertinent part: [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>7</sup> *Id.* at § 10.606(b)(3).

<sup>8</sup> *Id.*

<sup>9</sup> *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

<sup>10</sup> *C.F.*, Docket No. 18-0360 (issued July 19, 2018); *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>11</sup> *See T.B.*, Docket No. 19-0029 (issued June 21, 2019); *C.F.*, *id.*; *Annette Louise*, 54 ECAB 783 (2003).

The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a claim.<sup>12</sup>

### 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).

The Board notes that the underlying issue in this case was whether appellant's left knee condition was causally related to the accepted November 1, 2016 employment incident. That is a medical issue which must be addressed by relevant medical evidence not previously considered.<sup>13</sup>

In his August 1, 2018 request for reconsideration, counsel alleged that it was error for appellant's claim to be denied as he concluded that the medical evidence demonstrated that appellant sustained a medial meniscal tear of the left knee causally related to the November 1, 2016 employment incident. Causal relationship is a medical issue which must be addressed by relevant medical evidence not previously considered.<sup>14</sup> As the issue is medical in nature, it can only be resolved through the submission of medical evidence. Counsel's opinion regarding the sufficiency of the medical evidence is not medical evidence and is therefore irrelevant to the medical issue of causal relationship.<sup>15</sup> Thus, the arguments on reconsideration 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 was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of his request for reconsideration. While OWCP received the November 15, 2016 MRI scan report, the Board has explained that diagnostic studies lack probative value as they do not address whether the accepted employment incident caused any of the diagnosed conditions.<sup>16</sup> This report is therefore irrelevant and does not constitute a basis for reopening the claim as it does not address the particular issue involved.<sup>17</sup> Appellant was therefore not entitled to a review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).

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<sup>12</sup> See *M.E.*, Docket No. 18-0553 (issued November 5, 2018); *S.T.*, Docket No. 17-0790 (issued May 22, 2018); *M.E.*, 58 ECAB 694 (2007).

<sup>13</sup> *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

<sup>14</sup> *Id.*

<sup>15</sup> *B.S.*, Docket No. 17-0697 (issued April 25, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>16</sup> *N.P.*, Docket No. 18-0173 (issued August 21, 2019); *M.S.*, Docket No. 19-0587 (issued July 22, 2019).

<sup>17</sup> See *supra* note 12.

The Board accordingly finds that appellant did not meet 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>18</sup>

On appeal counsel asserts that OWCP erred in issuing a nonmerit decision as appellant had offered both new medical evidence and legal argument not previously considered by OWCP. For the reasons set forth above, appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

### **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).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *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).