

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On September 13, 1999 appellant, then a 62-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that she developed knee pain due to factors of her federal employment. She noted that she first became aware of her condition on August 30, 1999 and realized its relationship to factors her federal employment. Appellant stopped work on August 30, 1999.

In an October 5, 1999 medical report, Dr. Vahdatyar Amirpour, an attending orthopedic surgeon, examined appellant and provided an impression of “recovering right knee sprain.” He released her to return to work on October 11, 1999 and recommended that she wear a knee brace at work for another month. Dr. Amirpour indicated that management of appellant’s condition was “See [per as needed] prn.”

On October 7, 1999 OWCP accepted appellant’s claim for right knee strain.

Appellant returned to work on October 14, 1999.

In a December 4, 2015 letter, counsel, on behalf of appellant, requested that OWCP reopen appellant’s claim for medical care and further examination of her right knee condition. She noted that the claim was retired on April 13, 2006 and requested an explanation for such action.

OWCP, in a response letter dated December 21, 2015, advised appellant to file a notice of recurrence (Form CA-2a) so that a claim may be formally reviewed for an additional request for medical treatment.

In a letter dated January 28, 2016, counsel declined to file a Form CA-2a. OWCP informed appellant that the evidence submitted was insufficient to establish her recurrence claim. It advised her of the type of evidence needed and afforded her 30 days to submit the necessary evidence. On June 24, 2016 OWCP resent the May 20, 2016 recurrence development letter to counsel. No additional medical evidence was received.

By decision dated July 29, 2016, OWCP denied appellant’s claim of a medical condition commencing in December 2015 due to her accepted employment injury. It explained that Dr. Amirpour had released her to return to regular-duty work on October 11, 1999 and to return for medical treatment as needed.

On January 19, 2017 appellant, through counsel, appealed to the Board. Counsel cited to *Sandra Jones*,⁴ and contended that OWCP erred in placing the burden of proof on appellant to file a Form CA-2a to establish her entitlement to continuing medical treatment. She further cited to

³ Docket No. 17-0581 (issued June 13, 2017).

⁴ Docket No. 05-1562 (issued March 7, 2006).

Samuel D. Harrell, Jr.,⁵ and contended that administrative closure of a case by OWCP does not shift the burden of proof to appellant.

By decision dated June 13, 2017, the Board affirmed the July 29, 2016 OWCP decision.⁶ The Board noted that as more than 90 days had passed since appellant's release from medical care, she had the responsibility to submit an attending physician's report containing a description of the objective findings and supporting causal relationship between her current condition and the previously accepted work injury. The Board found that she had not submitted such evidence as requested and thus, she did not meet her burden of proof to establish her claim. The Board further found that cases cited by counsel were not relevant to the medical issue of whether appellant had established a need for further medical treatment due to a recurrence of her accepted work injury.

On August 10, 2017 counsel, on behalf of appellant, requested reconsideration. She asserted that the definition of a recurrence of a medical condition as set forth in 20 C.F.R. § 10.5(y) was not applicable to the facts of appellant's claim. Counsel noted that Dr. Amirpour's October 5, 1999 report did not indicate that appellant had been released from medical care of her accepted condition. Rather, she contended that his report documented her ongoing residuals. Counsel further contended that the Board ignored its findings in *Jones*⁷ and *Samuel D. Harrell, Jr.*⁸

By decision dated February 5, 2018, OWCP denied modification of its denial of appellant's recurrence claim.

On January 31, 2019 appellant, through counsel, requested reconsideration. She reiterated that the Board's findings in *Jones*⁹ supported her contention that OWCP erred in placing the burden of proof on appellant to establish her entitlement to continuing medical treatment. Counsel asserted that OWCP's reliance on the 90-day rule was misplaced, again noting that appellant was not released from Dr. Amirpour's medical care in 1999. Additionally, she asserted that Dr. Amirpour's undisputed use of the medical term PRN carried no legal weight in establishing that appellant had been released from his medical care. Counsel also disagreed with OWCP's definition of PRN. Further, she cited to *Kenneth W. Mussett*¹⁰ and contended that appellant's case should be remanded because OWCP ignored appellant's request for medical examination of her accepted right knee condition.

In support of the reconsideration request, OWCP received correspondence and e-mails dated March 9 through December 28, 2018 between counsel and OWCP regarding administrative FECA case closures by OWCP and the medical definition or opinion of PRN.

⁵ Docket No. 01-1711 (issued March 21, 2002).

⁶ *Supra* note 3.

⁷ *Supra* note 4.

⁸ *Supra* note 5.

⁹ *Supra* note 4.

¹⁰ Docket No. 97-1536 (issued February 8, 1999).

By decision dated May 1, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that counsel failed to submit new and relevant legal argument or evidence in support of the January 31, 2019 request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. It may review an award for or against payment of compensation at any time based on its own motion or on application.¹¹

A claimant seeking reconsideration of a final decision must present arguments or provide evidence which: (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.¹² If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.¹³ 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.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).¹⁵

Counsel's assertion, in support of her January 31, 2019 timely request for reconsideration, that OWCP erred in placing the burden of proof on appellant to establish her entitlement to continuing medical treatment under the Board's precedent in *Jones*,¹⁶ is duplicative of an argument previously made and considered by both OWCP and the Board. The Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's July 29, 2016 decision because the Board considered that evidence in its June 13, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁷

¹¹ *Supra* note 2 at § 8128(a).

¹² 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹³ *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

¹⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁵ *See R.S.*, Docket No. 19-0312 (issued June 18, 2019); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

¹⁶ *Supra* note 4.

¹⁷ *See C.H.*, Docket No. 19-0669 (issued October 9, 2019); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

Therefore, the Board finds that it is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

Counsel further asserted on reconsideration that Dr. Amirpour's undisputed use of the term PRN carried no legal weight in establishing that appellant had been released from medical care. She also disagreed with OWCP's definition of PRN. These assertions, however, do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted medical evidence establishing that she sustained a recurrence of her medical condition causally related to her accepted employment injury. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.¹⁸ For these reasons, the Board finds that counsel's assertions are insufficient to warrant reopening appellant's claim for further merit review.

Lastly, counsel contended on reconsideration that, under the Board's precedent in *Mussett*,¹⁹ appellant's case should be remanded because OWCP ignored appellant's request for medical examination of her accepted right knee condition. However, the facts in the present case can be distinguished from *Mussett*. In *Mussett*, the Board found that OWCP had abused its discretion in refusing to reopen appellant's case for further merit review under 20 C.F.R. § 10.138 as appellant had submitted relevant and pertinent medical evidence not previously considered by OWCP. Consequently, the Board remanded the case to OWCP to conduct a merit review and issue a *de novo* merit decision on appellant's recurrence of disability claim.

In the instant case, appellant did not submit any medical evidence on reconsideration in support of her request for reconsideration warranting a merit review of her recurrence claim. The Board also notes that, unlike *Mussett*, she did not submit any medical documentation as requested by OWCP after formal development was undertaken in response to her claim for a recurrence of her medical condition due to the accepted employment injury. Thus, the Board finds that counsel's argument based on *Mussett* is not relevant to the underlying medical issue in this case and is insufficient to warrant further merit review of appellant's claim. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁰

For the reasons stated above, the Board finds that appellant is 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).

In support of her reconsideration request, appellant also submitted new correspondence and e-mails dated March 9 through December 28, 2018 between counsel and OWCP. However, this evidence does not contain rationale by a physician relating her current medical condition to the accepted employment injury, which was the issue before OWCP. Although evidence submitted on reconsideration need not carry appellant's burden entirely to suffice for reconsideration, the new evidence must at least be relevant and pertinent to the issue upon which the claim was

¹⁸ See *S.P.*, Docket No. 18-1419 (issued February 27, 2019); *L.F.*, Docket No. 17-0243 (issued June 20, 2017); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁹ *Supra* note 10.

²⁰ *J.R.*, Docket No. 19-1280 (issued December 4, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

denied.²¹ While this evidence is new, it does not address the underlying medical issue of causal relationship.

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP under 20 C.F.R. § 10.606(b)(3). Consequently, she is not entitled to a review of the merits of her claim based on the third above-noted requirements under section 10.606(b)(3). The Board, accordingly, finds that pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2020
Washington, DC

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

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

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

²¹ *S.P.*, *supra* note 18; *B.J.*, Docket No. 18-0756 (issued September 11, 2018).

²² *J.B.*, Docket No. 18-1531 (issued April 11, 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 20 C.F.R. § 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).