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

| | | |
|---|---|---|
| **J.V., Appellant** | ) | |
| **and** | ) | **Docket No. 20-0937** |
| | ) | **Issued: November 24, 2020** |
| **DEPARTMENT OF THE AIR FORCE, TRAVIS AIR FORCE BASE, CA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On March 25, 2020 appellant filed a timely appeal from a January 23, 2020 merit decision and a March 12, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant has met his burden of proof to establish bilateral knee conditions causally related to the accepted factors of his federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On October 26, 2019 appellant, then a 62-year-old retired cargo scheduler, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral knee conditions due to factors of his federal employment, including frequent stair usage and constant jumping on and off cargo storage grids. He indicated that he first became aware of his condition on June 2, 2014, and first realized its relationship to his federal employment on June 4, 2018.[2]

In a development letter dated November 18, 2019, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

In a letter dated December 5, 2019, appellant noted that he had worked for the employing establishment for 28 years. He indicated that he sustained serious damage to both of his knees as a result of frequently using stairs multiple times a day at work. Appellant also stated that he had to jump on and off 3-to-4-foot-high cargo storage platforms approximately 50 to 60 times per day. He noted that he experienced more than normal knee pain in 2014 and first realized that it was related to his federal employment in 2018. Appellant indicated that he had a total replacement of his left knee and was scheduled for a total replacement of his right knee. He stated that he did not engage in any outside activities that could have resulted in damage to his knees. Appellant listed his medical treatment history from June 2, 2014 through October 10, 2019.

On January 7, 2020 the employing establishment responded to OWCP's development questionnaire. It confirmed that appellant had retired on November 25, 2016, and indicated that his employee personnel folder was destroyed. The employing establishment attached a position description with its response.

OWCP subsequently received a February 5, 2018 note from Dr. Mark Bernstein, a Board-certified orthopedic surgeon, who examined appellant and diagnosed left knee osteoarthritis. Dr. Bernstein indicated that appellant would need left knee total replacement in the future.

An x-ray report on appellant's left knee, dated October 10, 2018, revealed no acute abnormalities.

In an October 10, 2018 note, Dr. Steven Schule, a Board-certified orthopedic surgeon, noted that appellant presented with left anteromedial knee pain. He examined appellant and reviewed x-rays of his left knee. Dr. Schule diagnosed left knee osteoarthritis and discussed that although appellant was not interested at this time, there was the possibility for the need of a left total knee arthroplasty in the future.

[2] Appellant retired from the employing establishment on November 25, 2016.

Appellant submitted hospital records, orders, and results, dated October 10 and December 17, 2018.

On December 17, 2018 Dr. Schule performed a left total knee arthroplasty and described the technique and results in an operative note. He listed a postoperative diagnosis of left knee osteoarthritis.

An x-ray report on appellant's left knee, dated December 17, 2018, revealed no abnormalities and noted expected postoperative findings.

Appellant submitted physical therapy treatment notes, dated December 17, 2018 and January 4, 2019.

On January 15 and March 19, 2019 Dr. Schule noted that he examined appellant and advised that he was recovering from his left total knee arthroplasty and had no restrictions.

In a note dated July 16, 2019, Dr. Deborah Valtierra, a Board-certified specialist in internal medicine, noted that appellant was experiencing right knee pain. She indicated that he had constant pain in the right, medial knee that worsened at night.

On July 25, 2019 Andrew Bloom, a physician assistant, administered a cortisone injection to appellant's right knee joint. On August 21, 2019 he administered a viscosupplement injection to appellant's right knee joint.

A magnetic resonance imaging (MRI) scan report on appellant's right knee, dated October 1, 2019, revealed severe medial compartment osteoarthritis with degenerative meniscal tearing and scattered high-grade patellofemoral chondral wear and fissuring.

In an October 10, 2019 note, Mr. Bloom examined appellant and diagnosed right knee osteoarthritis.

In a note dated November 20, 2019, Dr. Schule examined appellant and also diagnosed right knee osteoarthritis. He discussed the possibility of right total knee arthroplasty.

In a January 19, 2020 note, Dr. Brian Knapp, a specialist in occupational medicine, noted that appellant worked as a cargo scheduler for 28 years, frequently climbing stairs and jumping to platforms, three to four feet high. He reviewed appellant's medical record and scheduled a right total knee replacement for January 24, 2020.

By decision dated January 23, 2020, OWCP denied appellant's occupational disease claim, finding that that the medical evidence of record was insufficient to establish causal relationship between his diagnosed bilateral knee conditions and the accepted factors of his federal employment.

On February 28, 2020 appellant requested reconsideration. In an accompanying statement, he noted that Dr. Knapp concurred that his injuries were a direct result of his federal employment. Appellant attached a copy of appellant's December 5, 2019 letter, along with his request.

By decision dated March 12, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## ***LEGAL PRECEDENT -- ISSUE 1***

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[7]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

## ***ANALYSIS -- ISSUE 1***

The Board finds that appellant has not met his burden of proof to establish bilateral knee conditions causally related to the accepted factors of his federal employment.

[3] *Supra* note 1.

[4] *R.M.*, Docket No. 20-0342 (issued July 30, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *V.P.*, Docket No. 20-0415 (issued July 30, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] 20 C.F.R. § 10.115; *S.A.*, Docket No. 20-0458 (issued July 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *See B.H.*, Docket No. 18-1693 (issued July 20, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *L.S.*, Docket No. 19-1769 (issued July 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[9] *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

In support of his claim, appellant submitted progress notes from multiple physicians. On February 5, 2018 Dr. Bernstein examined appellant and diagnosed left knee osteoarthritis. On October 10, 2018 Dr. Schule diagnosed left knee osteoarthritis. On December 17, 2018 he performed a left total knee arthroplasty and noted a postoperative diagnosis of left knee osteoarthritis. Subsequently on November 20, 2019 Dr. Schule examined appellant and diagnosed right knee osteoarthritis. While the physicians provided firm medical diagnoses, they did not offer a specific opinion as to whether the accepted employment factors caused or aggravated appellant's diagnosed bilateral knee conditions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[10] As such, these notes are insufficient to meet appellant's burden of proof.

Appellant also submitted hospital records, orders, and results, dated October 10 and December 17, 2018, which did not include a medical diagnosis. He further submitted progress notes without a firm medical diagnosis. On January 15, 2019 Dr. Schule examined appellant and noted that he was improving following his left total knee arthroplasty. On March 19, 2019 he examined appellant and indicated that he had no restrictions. On July 16, 2019 Dr. Valtierra noted that appellant experienced constant pain in the right, medial knee that worsened at night. On January 19, 2020 Dr. Knapp noted that appellant worked as a cargo scheduler for 28 years and reviewed his medical record. These physicians did not provide a medical diagnosis or offer an opinion on causal relationship. The Board has held that medical notes which do not provide a firm diagnosis or fail to render an opinion on causal relationship are of no probative value and are insufficient to establish the claim.[11] These hospital records and physicians' notes are therefore insufficient to establish appellant's claim.

Appellant also submitted physical therapy treatment notes, dated December 17, 2018 and January 4, 2019. He also submitted progress notes from Andrew Bloom, a physician assistant, dated July 25, August 21, and October 10, 2019. Certain healthcare providers such as physical therapists and physician assistants are not considered "physician[s]" as defined under FECA.[12] Consequently, these notes will not suffice for purposes of establishing appellant's claim.[13]

The record contains x-ray reports of appellant's left knee, dated October 10 and December 17, 2018, and an MRI scan report of his right knee, dated October 1, 2019. The Board has held that diagnostic studies standing alone lack probative value on the issue of causal

[10] *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[11] *Id.*; *see also A.K.*, Docket No. 20-0003 (issued June 2, 2020).

[12] Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *M.M.*, Docket No. 20-0019 (issued May 6, 2020); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006); *see also C.K.*, Docket No. 19-1549 (issued June 30, 2020) (physical therapists and physician assistants are not considered physicians under FECA).

[13] *Id.*

relationship as they do not provide an opinion as to whether the accepted employment factors caused any of the diagnosed conditions.[14]

As the medical evidence of record does not contain rationalized medical evidence establishing causal relationship between appellant's diagnosed bilateral knee conditions and the accepted factors of his federal employment, the Board finds that he has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***LEGAL PRECEDENT -- ISSUE 2***

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 compensation, at any time, on his or her own motion or on application.[15]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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.[16]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[17] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[18] 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.[19]

## ***ANALYSIS -- ISSUE 2***

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).

In his timely request for reconsideration, appellant submitted a statement asserting that Dr. Knapp concurred that his injuries were a direct result of his federal employment. His narrative

[14] *C.B.*, Docket No. 20-0464 (issued July 21, 2020).

[15] 5 U.S.C. § 8128(a); *see J.T.*, Docket No. 19-1829 (issued August 21, 2020); *W.C.*, 59 ECAB 372 (2008).

[16] 20 C.F.R. § 10.606(b)(3); *see J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[17] *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020).

[18] *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

[19] *Id.* at § 10.608(b); *see J.V.*, *supra* note 16; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

statement did not attempt to show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Additionally, appellant's statement is not medical evidence, and he did not submit any medical evidence along with his request for reconsideration. The Board therefore finds that appellant failed to show that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by OWCP, or submitted relevant and pertinent new evidence not previously considered by OWCP.[20]

On appeal appellant asserts that he submitted new medical evidence that was never reviewed by OWCP. However, the Board finds that appellant did not submit any medical evidence with his request for reconsideration. The Board, therefore, finds that appellant has not met 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.[21]

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish bilateral knee conditions causally related to the accepted factors of his federal employment. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[20] *Supra* note 16.

[21] *D.M.*, Docket No. 18-1003 (July 16, 2020); *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 request for reconsideration without reopening the case for a review on the merits).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 12 and January 23, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 24, 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