

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 May 9, 2017 appellant, then a 59-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a left knee condition causally related to factors of his federal employment. He attributed his condition to walking during his light-duty employment, noting that in April 2017 he had undergone a total knee replacement. Appellant advised that he became aware of his condition on December 1, 2010 and realized that it was caused or aggravated by his employment on April 5, 2011. He was last exposed to the conditions alleged to have caused his condition on April 1, 2017, the date he stopped work.

In a report dated June 13, 2017, Dr. David A. Alessandro, a Board-certified orthopedic surgeon, indicated that appellant had undergone a left total knee replacement on April 4, 2017 due to osteoarthritis. He noted that he worked as a letter carrier and indicated that the progressive arthritis had developed over the course of years and was "probably related to his occupation. This was supposedly addressed in a claim during the 2000s."

By decision dated July 26, 2017, OWCP denied appellant's occupational disease claim. It found that he had not factually established his claim as he failed to provide a statement describing the work factors to which he attributed his condition.

On August 18, 2017 appellant requested an oral hearing before an OWCP hearing representative. On January 22, 2018 appellant, through counsel, requested a review of the written record by an OWCP hearing representative in lieu of an oral hearing. Enclosed was an August 15, 2017 statement from appellant describing in detail his employment duties.

Subsequently, appellant submitted a progress report dated 2011 and progress reports dated 2015 through 2017 from Dr. Allessandro, who treated him for left knee arthritis. On January 25, 2016 Dr. Allessandro noted that he had a history of a right knee replacement on May 31, 2007. He diagnosed primary osteoarthritis of the left knee. On April 17, 2017 Dr. Allessandro performed a left total knee arthroplasty.

In a report dated January 16, 2018, Dr. Allessandro advised that he had reviewed appellant's description of his employment duties. He opined that his 31 years "of impacting loading activities that he experienced in his duties as a letter carrier are a probable cause of his left knee osteoarthritis. This can/occur from accumulative stresses that were placed upon his left knee as a result of the performance of his work responsibilities."

By decision dated April 20, 2018, OWCP's hearing representative affirmed the July 26, 2017, as modified to show that appellant had factually established the work duties identified as causing his condition. He determined, however, that the medical evidence of record was insufficient to show causal relationship between a diagnosed condition and the identified employment factors. The hearing representative found that Dr. Allessandro had not explained how

appellant's work duties caused or aggravated his left knee arthritis or discussed the effect of his employment activities on his left knee condition.

In a letter dated March 29, 2019, Dr. Allesandro described appellant's employment duties. He related that the medical rationale for his opinion was research that has established that regularly performing impact loading activities contributed to hip and knee arthritis. Dr. Allesandro related, "[Appellant's] history confirms the progression of his arthritis while performing the duties of a letter carrier and the correlation between these activities and the progression of arthritis is firmly established and fully accepted by medical science. Repetitive impact activity including stairs can likely advance arthritis." He advised that appellant's arthritis would "very likely" not have progressed as quickly if he had performed sedentary work.

On April 18, 2019 appellant, through counsel, requested reconsideration. He alleged that the March 29, 2019 report from Dr. Allesandro was in fact sufficient to establish causal relationship as he provided rationale for his finding that appellant's employment duties caused his left knee arthritis and discussed his specific work duties. Counsel asserted that as there was no opposing evidence, OWCP must further develop the evidence.

By decision dated May 7, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a). It found that the evidence submitted was cumulative in nature and thus insufficient to warrant reopening his case for further 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 compensation at any time on his own motion or on application.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens

³ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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). Chapter 2.1602.4b.

and reviews the case on its merits.⁶ 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.⁷

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 finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. Counsel asserted that appellant had submitted uncontroverted medical evidence sufficient to warrant further development. He further asserted that the newly submitted report from Dr. Allesandro was sufficient to establish causal relationship. Causal relationship, however, is a medical issue that must be addressed by relevant medical evidence.⁸ Counsel's lay opinion is not relevant to the underlying issue in this case, which is whether the medical evidence establishes that appellant sustained an employment-related left knee condition. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).⁹

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. Appellant submitted a March 29, 2019 letter from Dr. Allesandro, who diagnosed progressive arthritis. Dr. Allesandro noted that he based his medical rationale on medical research that established that impact load activities contributed to progressive arthritis. He opined that appellant's repetitive activities "can likely advance" his arthritis and that his arthritis would "very likely" not have progressed as quickly if he had worked in a sedentary position. While this report is new, it is not relevant as it is substantially similar to Dr. Allesandro's July 13, 2017 report finding that appellant's left knee arthritis was "probably related" to his work as a letter carrier and his January 16, 2018 report finding his letter carrier duties were a "probable cause" of his osteoarthritis of the left knee. Dr. Allesandro's March 29, 2019 report was still couched in speculative terms and was therefore substantially similar to his prior reports. 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.¹⁰ As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹¹

⁶ *Id.* at § 10.608(a); *see also A.F.*, Docket No. 19-1832 (issued July 21, 2020); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *A.G.*, Docket No. 20-0290 (issued June 24, 2020).

⁹ *A.G.*, *id.*; *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁰ *See G.J.*, Docket No. 20-0071 (issued July 1, 2020); *V.Q.*, Docket No. 19-1309 (issued January 3, 2020).

¹¹ 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

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.¹²

On appeal counsel contends that appellant had submitted new evidence sufficient to require reopening of his case for further merit review. He further contends that he had advanced a new legal argument and shown that OWCP erred in interpreting law. As discussed, however, OWCP properly determined that appellant had not met any of the requirements for reopening his case for further merit review under section 10.606(b)(3).¹³

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 May 7, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

¹³ *Id.*