

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

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<b>R.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0336</b>
	)	<b>Issued: May 13, 2021</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Indianapolis, IN, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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 December 3, 2019 appellant filed a timely appeal from September 20 and November 7, 2019 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 4, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</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 June 25 and October 24, 2019 requests 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 on different issues.<sup>3</sup> 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 May 27, 1987 appellant, then a 48-year-old mail handler, sustained a low back strain, chronic pain syndrome, and aggravation of arachnoiditis radiating into his lower extremities when pulling a mail tub while in the performance of duty on May 27, 1987. It assigned OWCP File No. xxxxxx584.<sup>4</sup> In 1998, OWCP accepted under a separate occupational disease claim, assigned OWCP File No. xxxxxx561, that he sustained an employment aggravation of spinal stenosis of the cervical and lumbar regions.<sup>5</sup> Appellant underwent OWCP-authorized surgeries, including cervical discectomy/fusion surgery in 1999 and decompressive lumbar laminectomy in 2001.

By decision dated August 19, 2016, OWCP granted appellant a schedule award for three percent permanent impairment of his right upper extremity. It determined that he had 41 percent permanent impairment of his left upper extremity and 10 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

In a January 12, 2017 report, Dr. John Meding, a Board-certified orthopedic surgeon, indicated that appellant reported that he fell on his left knee in December 2016 after receiving an epidural injection.<sup>6</sup> He noted that x-rays showed osteoarthritis of both knees.

In mid-2017, appellant asserted that he sustained a left knee injury as a consequence of his accepted May 27, 1987 employment injury because he fractured his left knee due to a January 3, 2017 fall at home, which he believed occurred due to residuals of the back conditions accepted in

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<sup>3</sup> Docket No. 10-1672 (issued June 6, 2011); Docket No. 07-2042 (issued June 3, 2008); Docket No. 05-1125 (issued July 20, 2006).

<sup>4</sup> Under a separate occupational disease claim, to which OWCP assigned OWCP File No. xxxxxx676, appellant also claimed that he sustained conditions of the neck and upper extremities. OWCP denied this claim by decisions dated September 16, 1996, and March 18 and September 10, 1997.

<sup>5</sup> OWCP administratively combined OWCP File Nos. xxxxxx584, xxxxxx676, and xxxxxx561, designating OWCP File No. xxxxxx584 as the master file.

<sup>6</sup> Appellant later submitted a December 1, 2016 report in which Dr. Weldon Egan, a Board-certified anesthesiologist, described an epidural injection he applied to appellant's back on that date.

connection with the May 27, 1987 employment injury.<sup>7</sup> He further asserted that his left knee fracture necessitated a total left knee replacement, which he underwent on May 16, 2017.

OWCP referred appellant's case record along with a statement of accepted facts (SOAF) and a series of questions to Dr. William Tontz, Jr., a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he evaluate appellant's left knee condition. In an August 30, 2017 report, Dr. Tontz indicated that x-rays of the left knee did not show a patellar fracture.

In June 2018, OWCP referred appellant for a second opinion examination to Dr. Thomas Cittadine, a Board-certified orthopedic surgeon. It provided Dr. Cittadine with the case record, including a SOAF, and requested that he evaluate the permanent impairment of appellant's extremities. Appellant did not appear for the examination scheduled for July 17, 2018.

In a January 16, 2019 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his consequential injury claim. It afforded him 30 days to respond.

In response, appellant submitted a February 25, 2019 statement in which he argued that he sustained a left knee injury as a consequence of his accepted May 27, 1987 employment injury because he fractured his left knee due to a January 3, 2017 fall at home, which he believed that occurred due to residuals of the back conditions accepted in connection with the May 27, 1987 employment injury. He also claimed that his left knee fracture necessitated the total left knee replacement, which he underwent on May 16, 2017. Appellant also asserted that a December 1, 2016 epidural injection weakened his legs and contributed to his January 3, 2017 fall. He claimed that OWCP improperly handled his consequential injury claim and that employing establishment participated in physician shopping as a means of obtaining unfavorable medical opinions. Appellant asserted that it was improper for Dr. Tontz, the DMA, to find that appellant did not have a left knee fracture, and appellant asserted that Dr. Tontz violated fiduciary rules. He further alleged that he did not attend a second opinion examination regarding the evaluation of his permanent impairment because OWCP failed to fully discuss his medical condition after the May 27, 1987 low back injury in the SOAF, which was provided to the examiner. Appellant indicated that the reports of Dr. Meding demonstrated that appellant had a left knee fracture and appellant questioned the ability of an OWCP claims examiner to adjudicate consequential injury claims. He claimed that he had established all the elements of a consequential injury as explained in the Board cases and legal treatises. Appellant asserted that OWCP incorrectly calculated his August 19, 2016 schedule award and refused to correct the calculations. He maintained that he would attend a second opinion examination if the examiner were provided accurate facts about his medical condition.

Appellant submitted reports of Dr. Meding, including a report of the May 16, 2017 total left knee replacement surgery and medical progress notes dated between May 13, 2008 and January 10, 2019. He also submitted a left knee magnetic resonance imaging (MRI) scan dated

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<sup>7</sup> Appellant also asserted that the December 1, 2016 epidural injection weakened his legs and contributed to his January 3, 2017 fall. It is noted that the January 12, 2017 report of Dr. Meding indicated that appellant reported falling on his left knee in December 2016.

April 10, 2017, left knee x-rays findings dated June 11 and November 1, 2018, and a left knee bone scan dated November 1, 2018. In an April 27, 2017 report, Dr. Meding indicated that a recent MRI scan of appellant's left knee showed full-thickness lesions about the medial femoral condyle and the patella femoral articulation.

By decision dated April 4, 2019, OWCP denied appellant's claim for a consequential left knee injury causally related to his accepted May 27, 1987 employment injury.

On June 25, 2019 appellant requested reconsideration of the April 4, 2019 decision.

In a June 21, 2019 statement, appellant claimed that OWCP engaged in obstruction with respect to his consequential injury claim and that the employing establishment participated in physician shopping as a means of obtaining unfavorable medical opinions. He asserted that it was improper for Dr. Tontz, the DMA, to find that appellant did not have a left knee fracture and asserted that Dr. Tontz violated fiduciary rules. Appellant further alleged that he refused to attend a second opinion examination because OWCP failed to fully discuss his medical condition after the May 27, 1987 low back injury in the SOAF that was provided to the examiner. He indicated that the reports of Dr. Meding demonstrated appellant had a left knee fracture and he questioned the ability of an OWCP claims examiner to adjudicate consequential injury claims. Appellant asserted that pain and weakness from his May 27, 1987 employment injury and the effects of epidural injections caused his January 3, 2017 fall, which in turn caused a left knee injury that necessitated total left knee replacement surgery. He claimed that he had established all the elements of a consequential injury as explained in the Board cases and legal treatises. Appellant claimed that his left knee injury and left knee surgery were "direct and natural" consequences of his original employment injury. He asserted that OWCP incorrectly calculated his August 19, 2016 schedule award and refused to correct the calculations. Appellant requested that OWCP send him to a second opinion examination concerning his claimed consequential injury.

In a July 16, 2019 statement, appellant again asserted that pain and weakness from his May 27, 1987 employment injury and the effects of epidural injections caused his January 3, 2017 fall, which in turn caused a left knee injury that necessitated total left knee replacement surgery. He maintained that he would attend a second opinion examination if the examiner were provided accurate facts about his medical condition. Appellant again questioned the evaluation of Dr. Tontz and alleged that OWCP engaged in obstruction and that the employing establishment engaged in doctor shopping. He continued to assert that the medical evidence of record was sufficient to establish all the elements of a consequential injury.

By decision dated September 20, 2019, OWCP denied appellant's June 25, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On October 24, 2019 appellant requested reconsideration of the September 20, 2019 decision.

In a September 29, 2019 statement, appellant asserted that OWCP did not give a credible reason for why his January 3, 2017 fall was not a consequence of the accepted May 27, 1987 employment injury. He again asserted that OWCP effectively denied him an opportunity to attend a second opinion examination because it failed to fully discuss his medical condition after the

May 27, 1987 low back injury in the SOAF that was provided to the examiner. Appellant claimed that OWCP claims examiners failed to consult the results of medical examinations, which preceded his federal employment. He again questioned the abilities and credentials of an OWCP claims examiner and asserted that OWCP improperly attributed his January 3, 2017 fall to nonwork-related osteoarthritis. Appellant claimed that OWCP violated the Health Insurance Portability and Accountability Act (HIPAA) by improperly withholding records.

In an October 24, 2019 statement, appellant again maintained that he would attend a second opinion examination regarding his consequential injury claim if the examiner were provided accurate facts about his medical condition. He continued to question the opinion of Dr. Tontz, the DMA, and to allege that an OWCP claims examiner was not knowledgeable enough to evaluate his consequential injury claim. Appellant again questioned the accuracy and completeness of the SOAF's contained in the case record, criticized OWCP's handling of second opinion examinations, and claimed that OWCP improperly withheld part of the case record from him. He further discussed the medical mechanism of his claimed consequential injury, explained his duties as a mail handler, and detailed his accepted medical conditions and medical treatment. Appellant questioned why OWCP did not accept that his employment-related lumbar stenosis condition contributed to his January 3, 2017 fall. He asserted that the medical evidence of record established a consequential injury.

By decision dated November 7, 2019, OWCP denied appellant's October 24, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **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 or her own motion or on application.<sup>8</sup>

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.<sup>9</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>10</sup> If it chooses to grant reconsideration, it reopens

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<sup>8</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

<sup>9</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>10</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2020). 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.

and reviews the case on its merits.<sup>11</sup> 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.<sup>12</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>13</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>14</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's June 25 and October 24, 2019 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Considering appellant's June 25, 2019 reconsideration request first, the Board finds that on that date he filed a timely request for reconsideration of an April 4, 2019 decision denying his consequential injury claim.<sup>15</sup> The Board finds, however, that he neither established that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP.

Along with his June 25, 2019 reconsideration request, appellant submitted June 21 and July 16, 2019 statements in which he discussed his belief that residuals of his May 27, 1987 employment injury, as well as treatment for that injury, weakened his legs such that he experienced a fall at home on January 3, 2017. He further alleged that he fractured his left knee due to the fall and that this condition necessitated a total left knee replacement on May 16, 2017. Appellant provided an extensive discussion of his belief that OWCP and, to a lesser extent, the employing establishment, engaged in improper actions and generally misinterpreted the medical evidence of record. He criticized the evaluation conducted by Dr. Tontz (the DMA), asserted that Dr. Tontz violated fiduciary rules, challenged the competency of an OWCP claims examiner, criticized OWCP's handling of a referral to a second opinion examiner on an unrelated schedule award matter, and claimed that OWCP incorrectly calculated his August 19, 2016 schedule award. Appellant asserted that the existing medical evidence of record established his consequential injury claim.

However, OWCP had previously considered and rejected these same arguments when it denied appellant's claim. The Board finds that his June 21 and July 16, 2019 statements are substantially similar to his previously submitted February 25, 2019 statement that was reviewed by OWCP prior to issuing its April 4, 2019 decision denying his consequential injury claim. The

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<sup>11</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>12</sup> *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>13</sup> *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>14</sup> *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper I*, 31 ECAB 224, 225 (1979).

<sup>15</sup> *See supra* note 10.

submission of these statements would not require reopening the case for merit review because the Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>16</sup> Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3) with respect to the June 25, 2019 reconsideration request.

The Board notes that the underlying issue of the present case is medical in nature, *i.e.*, whether appellant submitted sufficient medical evidence to establish a left knee condition (and resultant left knee surgery) as a consequence of his accepted May 27, 1987 employment injury. However, appellant did not submit any medical evidence in connection with his June 25, 2019 reconsideration request. Therefore, he also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3). The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) with respect to his June 25, 2019 reconsideration request. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

In considering appellant's October 24, 2019 reconsideration request, the Board finds that on that date he filed a timely request for reconsideration of the April 4, 2019 decision denying his consequential injury claim.<sup>17</sup> The Board finds, however, that he neither established that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP with respect to this reconsideration request.

Appellant submitted September 29 and October 24, 2019 statements in which he discussed his consequential injury claim. However, the Board finds that his September 29 and October 24, 2019 statements are substantially similar to his previously submitted statements, which were reviewed and rejected by OWCP. With respect to the repetitious arguments contained in the September 29 and October 24, 2019 statements, the Board has held, as previously noted, that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>18</sup> The Board notes that the September 29 and October 24, 2019 statements contain some arguments not previously presented, however, these unsupported arguments are not relevant to the underlying medical issue of the present case. For example, appellant claimed without explanation or supporting evidence that OWCP violated HIPAA regulations by withholding medical documents. He also asserted OWCP claims examiners failed to consult the results of medical examinations that preceded his federal employment, but he did not further explain this argument or its relevance to his consequential injury claim. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>19</sup> Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either

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<sup>16</sup> See *supra* note 13.

<sup>17</sup> See *supra* note 10.

<sup>18</sup> See *supra* note 13.

<sup>19</sup> See *supra* note 14.

the first or second requirement under 20 C.F.R. § 10.606(b)(3) with respect to the October 24, 2019 reconsideration request.

The Board notes that appellant did not submit any medical evidence in connection with his October 24, 2019 reconsideration request. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3). The Board accordingly finds that he has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) with respect to his October 24, 2019 reconsideration request. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's June 25 and October 24, 2019 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7 and September 20, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 13, 2021  
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