

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

S.B., Appellant	)	
. and	)	
U.S. POSTAL SERVICE, LITTLE ROCK	)	Docket No. 20-0708
POSTAL & DISTRIBUTION CENTER,	)	Issued: February 11, 2022
Little Rock, AR, Employer	)	
	)	

*Appearances:*  
Lisa Varughese, Esq., for the appellant<sup>1</sup>  
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 February 11, 2020 appellant, through counsel, filed a timely appeal from an August 15, 2019 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated September 24, 2018, 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 over the merits of the claim.<sup>3</sup>

---

<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. 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, following the August 15, 2019 decision, OWCP received additional evidence. 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 her claim, pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On July 6, 2015 appellant, then a 43-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on July 6, 2015 her right knee popped when pushing a manual pallet jack with a heavy box while in the performance of duty. She stopped work on July 6, 2015. Appellant received continuation of pay for the period July 11 through August 20, 2015. On July 23, 2015 OWCP accepted the claim for a right knee strain.<sup>4</sup>

On August 19, 2015 Dr. Nguyen diagnosed right knee lateral meniscus tear. He opined that appellant did not aggravate her preexisting lateral meniscus tear since there was no apparent change from the August 13, 2015 magnetic resonance imaging (MRI) scan of the right knee in comparison with a prior MRI scan of the right knee, which showed an anterior horn lateral meniscus abnormal appearance consistent with a meniscus tear or injury and a moderate sized effusion with mild patella chondromalacia. Dr. Nguyen related that "[appellant] is being released from her [w]orkers' [c]ompensation [c]laim." He concluded that appellant's medical treatment should not be continued under her workers' compensation claim and indicated that she wished to pursue her private insurance and undergo an outpatient surgery. Dr. Nguyen recommended that she undergo a right knee arthroscopy and lateral meniscus debridement.

On August 28, 2015 appellant filed a claim for compensation (Form CA-7) claiming disability from work for the period commencing August 21, 2015 due to an upcoming surgery recommended by Dr. Nguyen. On August 31, 2015 she underwent the recommended right knee arthroscopy, which he performed.

In an October 2, 2015 report, Dr. Nguyen related that comparison of appellant's MRI scans of the right knee did not show any objective findings or change to indicate a new acute injury on July 6, 2015. He advised that she could perform full-duty work regarding her right knee from a workers' compensation standpoint, and noted that she was restricted to sedentary duty due to postoperative restrictions, which were unrelated to her employment injury.

In a memorandum dated October 2, 2015, OWCP field nurse, Carolyn Hobbs, related that she had met with Dr. Nguyen that day to obtain clarification regarding his "workers' compensation claim release." Ms. Hobbs noted that he dictated a note explaining that appellant had no objective findings on comparison of her MRI scans to indicate an acute injury on July 6 2015.

By decision dated October 28, 2015, OWCP denied appellant's claim for disability from work commencing August 21, 2015. It found that Dr. Nguyen had reaffirmed his earlier conclusions in his October 2, 2015 treatment note that there were no objective findings or changes noted by the radiologist or himself to indicate a new acute injury on July 6, 2015. OWCP

---

<sup>4</sup> The accepted condition was based upon the July 6, 2015 opinion of Dr. Susan L. Besser, a Board-certified family practitioner, the July 7, 2015 opinion of Dr. Sikandar Murad, a Board-certified family practitioner, and the August 4, 2015 opinion of Dr. Larry Nguyen, a Board-certified orthopedic surgeon, all of whom opined that appellant could work with restrictions.

explained that the evidence indicated that the cause of appellant's disability was the nonrelated surgery, which he opined that was unrelated to the July 6, 2015 workers' compensation claim. On October 30, 2015 Dr. Nguyen indicated by a check mark "Yes" that after his examination of appellant on October 2, 2015 it was his opinion that appellant's work-related knee strain had resolved.

By notice dated November 16, 2015, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits as the weight of the medical evidence established that she no longer had residuals or continuing disability causally related to the accepted employment injury. It afforded appellant 30 days to submit additional evidence.

By decision dated January 7, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective January 8, 2016, as she no longer had residuals from her accepted employment-related medical condition or disability from work as a result of the July 6, 2015 employment injury.

On July 18, 2016 appellant requested reconsideration of the January 7, 2016 decision. She asserted that there were inconsistencies in Dr. Nguyen's medical reports as he did not note her accepted right knee condition, therefore, termination of her compensation benefits based on his reports was improper.

OWCP also received an April 5, 2016 report from Dr. Marilyn Watts, a pediatrician, who noted appellant's history of injury on July 6, 2015 and continuing complaints of right knee stiffness and pain. Dr. Watts diagnosed right knee and leg sprain.

By decision dated August 12, 2016, OWCP denied modification of the January 7, 2016 decision.

On April 7, 2017 appellant requested reconsideration of the August 12, 2016 decision. She argued that she had a prior work-related injury to her right knee on June 26, 2015. OWCP also received additional evidence. In a report dated February 27, 2017, Dr. Murad related that appellant was seen for suspected streptococcal pharyngitis on June 22, 2015. At that time appellant mentioned right knee discomfort while standing at work. Dr. Murad also related that she was not treated for any right knee or lower extremity injury prior to July 2, 2015.

By decision dated June 30, 2017, OWCP denied modification of the August 12, 2016 decision.

On June 28, 2018 appellant requested reconsideration of the June 30, 2017 decision. She presented arguments pertaining to her July 26, 2015 employment injury and submitted duplicative evidence. By decision dated September 24, 2018, OWCP denied modification of its prior decision. It found that the evidence and arguments submitted by appellant failed to establish continuing residuals from the July 26, 2015 accepted employment injury.

On June 4, 2019 appellant requested reconsideration of the September 24, 2018 decision. In a May 30, 2019 letter, she referenced Dr. Nguyen's April 3, 2019 addendum statement, and alleged that OWCP's field nurse interviewed Dr. Nguyen at his office, without informing appellant of this visit. Appellant further alleged that the field nurse had done everything she could to close the case. She also referenced the field nurse's letter of October 26, 2015 and invoice as evidence

that the field nurse was following her case and made appointments without informing her. Appellant contended that, based on the newly submitted evidence, none of the documents, which referenced the October 2, 2015 appointment with Dr. Nguyen should be considered as the field nurse exhibited extreme bias in her case. She also requested that the accepted knee sprain be expanded to include a meniscus tear or the case converted to an occupational disease claim.

Appellant also submitted documents from the field nurse in support of her argument. In an October 26, 2015 statement, OWCP's field nurse indicated that she had not followed this case or attended medical appointments since appellant's surgery as it appeared that this case would be covered under private insurance. She noted that Dr. Nguyen's October 5, 2015 note was a letter of clarification. A copy of the field nurse's invoice for dates of service from September 30 through October 29, 2015 was also submitted.

In an April 3, 2019 addendum, Dr. Nguyen indicated that on October 2, 2015 he had met with appellant's case manager and that appellant was not seen in the office that day.

By decision dated August 15, 2019, OWCP denied appellant's request for reconsideration of the merits of her 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 own motion or on application.<sup>5</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>6</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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</sup> If the request is timely, but fails to meet at least one of the

---

<sup>5</sup> 5 U.S.C. § 8128(a); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *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>6</sup> 20 C.F.R. § 10.606(b)(3); *see P.M., id., J.W.*, Docket No. 19-1795 (issued March 13, 2010); *L.G.*, Docket No. 091517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *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). *Id.* at Chapter 2.1602.4b.

<sup>8</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>9</sup>

### 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).

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. She alleged that the field nurse following her case had improperly interacted with her physician without her presence. Under OWCP procedures, the field nurse is a contracted registered nurse who assists in the management of disability claims by coordinating medical care, facilitating a safe and timely return to work, and aiding the claims examiner in moving a disability case towards resolution. Specific field nurse activities may include making assessments of the initial extent of the injury, coordinating treatment necessary for recovery, communicating return-to-work expectations, and acting as a liaison between the claims examiner, claimant, employing establishment, and medical providers.<sup>10</sup>

Pursuant to OWCP procedures, the field nurse will contact the treating physician to develop a treatment and return to work plan. The treating physician should participate in the process by producing a treatment plan and a projected length of disability which are commensurate with appellant's signs and symptoms. OWCP's procedures contemplate that a field nurse will contact appellant's physician in writing, by telephone, or face to face.<sup>11</sup> Thus, appellant's argument that the field nurse improperly contacted Dr. Nguyen lacks a reasonable color of validity. Where a legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.<sup>12</sup>

The Board further notes that appellant's requests that the accepted knee sprain be expanded to a meniscus tear or the case converted to an occupational disease claim are cumulative, duplicative, or repetitive in nature and are insufficient to warrant reopening a claim for merit review.<sup>13</sup> Consequently, the Board finds that she 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).<sup>14</sup>

Appellant also failed to submit relevant and pertinent new evidence in support of her May 30, 2019 request for reconsideration. OWCP received an April 3, 2019 addendum statement

---

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *Supra* note 7 at Chapter 7.0100.7 (July 2012).

<sup>11</sup> *Supra* note 7 at Chapter 3.0201.7(b) (April 2013).

<sup>12</sup> *C.N.*, Docket No. 17-1475 (issued May 23, 2018); *see D.F.*, Docket No. 17-0694 (issued June 22, 2017); *D.T.*, Docket No. 14-1239 (issued December 9, 2014); *Constance G. Mills*, 40 ECAB 317 (1988).

<sup>13</sup> *See B.H.*, Docket No. 18-0832 (issued December 4, 2018); *T.B.*, Docket No. 16-1130 (issued September 11, 2017).

<sup>14</sup> 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 091517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

in which Dr. Nguyen reported that she was not present during the October 2, 2015 visit with appellant's field nurse. The content of the note reflects that Dr. Nguyen was merely reaffirming his earlier conclusions. While the April 3, 2019 addendum is new, it is substantially similar to the prior evidence of record where Dr. Nguyen confirmed that the accepted right knee strain had resolved. As noted, medical evidence that either duplicates or is substantially similar to evidence of record does not constitute a basis for reopening a case.<sup>15</sup>

The underlying issue is whether the medical evidence of record is sufficient to establish that appellant had continuing disability or residuals causally related to her accepted July 6, 2015 employment injury. This is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>16</sup> However, appellant did not submit any additional evidence with her request for reconsideration addressing this issue.

As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>17</sup>

Accordingly, the Board 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.<sup>18</sup>

### 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).

---

<sup>15</sup> See *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>16</sup> See *J.H.*, Docket No. 18-0932 (issued March 24, 2020); *E.T.*, Docket No. 14-1087 (issued September 5, 2014).

<sup>17</sup> *S.H.*, Docket No. 19-1897 (issued April 21, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>18</sup> See *D.S.*, Docket No. 18-0353 (issued February 18, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2022  
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