

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

_____)	
R.O., Appellant)	
)	
and)	Docket No. 22-0718
)	Issued: September 23, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Roosevelt, NY, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 12, 2022 appellant filed a timely appeal from an April 4, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a decision of the Board dated January 31, 2022, which became final after 30 days of issuance, and is not subject to further review.² As there is no merit decision issued by OWCP within 180 days

¹ 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 an 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. *Id.* 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.

² 20 C.F.R. § 501.6(d); *see R.H.*, Docket No. 21-1405 (issued July 26, 2022); *M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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

This case has previously been before the Board.⁵ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 24, 2020 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left knee when he jumped from the street to the sidewalk in an effort to clear a large puddle while in the performance of duty. He asserted that, when he landed, he experienced a sharp pain in his left knee. On the reverse side of the claim form, the employing establishment contended that appellant was not in the performance of duty when he was injured, as he had called out sick earlier that week due to a knee injury. It further indicated that his injury was a result of misconduct. Appellant stopped work that same day and returned to part-time modified-duty work on September 14, 2020.

OWCP received a July 24, 2020 x-ray of the left knee which revealed no fracture or other acute osseous findings.

In a July 28, 2020 letter, the employing establishment controverted appellant's claim, noting that he had previously called in sick on July 21, 2020 due to left knee pain and had been wearing a knee band every day at work. OWCP also received a position description for a city carrier.

In a July 28, 2020 report, an unidentifiable healthcare provider noted that appellant was seen that day at urgent care and excused him from work for the period July 24 through 29, 2020.

In a July 31, 2020 work status note, Dr. Paul Kubiak, a Board-certified orthopedic surgeon, diagnosed left knee contusion and advised that appellant was unable to work. In a duty status report (Form CA-17) of even date, he diagnosed left knee contusion and provided work restrictions.

³ 5 U.S.C. § 8101 *et seq.*

⁴ *R.H.*, *supra* note 2; *S.S.*, Docket No. 21-0627 (issued June 22, 2022); *D.B.*, Docket No. 19-0648 (issued October 21, 2020).

⁵ Docket No. 21-0473 (issued January 31, 2022); *Order Dismissing Appeal*, Docket No. 21-0923 (issued April 20, 2022)

In an August 18, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional factual and medical evidence needed to establish his claim and provided a development questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In medical reports dated July 31, 2020, Dr. Kubiak noted that appellant presented with left knee pain after injuring his left knee at work on July 24, 2020. He recounted that appellant experienced a sharp pain after he leaped over a puddle/object on a rainy day. Dr. Kubiak noted that appellant reported a history of left knee arthroscopy with a meniscus tear, but that he experienced minimal symptoms prior to the claimed July 24, 2020 employment incident. He conducted a physical examination, reviewed the left knee x-ray, and diagnosed left knee pain with contusion and a possible meniscus tear.

An August 22, 2020 magnetic resonance imaging (MRI) scan of the left knee demonstrated an oblique tear involving the posterior horn and body of the medial meniscus extending to the inferior surface, as well as small knee joint effusion and mild osteoarthritis in the anterior compartment.

In an August 19, 2020 work capacity evaluation (Form OWCP-5c), Dr. Kubiak diagnosed a left knee medial meniscus tear and provided work restrictions.

In a September 11, 2020 medical report, Dr. Kubiak noted that appellant continued to experience left knee pain and occasional locking. He conducted a physical examination, reviewed an MRI scan and diagnosed left knee pain with a medial tear and recommended physical therapy treatment. In a Form CA-17 of even date, Dr. Kubiak diagnosed a left knee meniscus tear and provided work restrictions.

On September 14, 2020 the employing establishment offered appellant a modified-duty assignment.

In a September 15, 2020 attending physician's report (Form CA-20), Dr. Kubiak reported that appellant injured his left knee after stepping over an object and landing awkwardly at work. He diagnosed a left knee medial meniscus tear.

By decision dated October 2, 2020, OWCP denied appellant's traumatic injury claim, finding that the medical evidence submitted was insufficient to establish causal relationship between his diagnosed left knee condition and the accepted July 24, 2020 employment incident.

In an October 23, 2020 medical report, Dr. Kubiak again noted that appellant sustained an injury on July 24, 2020 when he leaped over a puddle and landed directly on his left leg with a sharp pain. He conducted a physical examination and diagnosed left knee pain with a medial meniscus tear. Dr. Kubiak opined that the accepted July 24, 2020 employment incident was the "direct cause of the left knee damage, including the meniscus tear, as well as associated increased pain from inflammatory conditions, including irritation of the underlying cartilage injury." In a work status note of even date, he advised that appellant could work with restrictions.

On November 3, 2020 appellant requested reconsideration.

By decision dated December 1, 2020, OWCP denied modification of its prior decision dated October 2, 2020.

On January 28, 2021 appellant requested reconsideration of OWCP's December 1, 2020 decision and attached additional evidence. In a January 28, 2021 report, Dr. Kubiak amended his previous narrative statement regarding causal relationship. He related that on July 24, 2020 appellant injured himself when he leaped over a large puddle and that there was no preexisting medical condition of the left knee that would cause or aggravate his condition. Dr. Kubiak reiterated his opinion that appellant's left knee meniscus tear was causally related to the accepted employment incident.

A January 29, 2021 letter of controversion from the employing establishment reiterated its previous arguments from its July 28, 2020 statement.

On February 8, 2021 appellant, through counsel, appealed OWCP's December 1, 2020 decision to the Board. On January 31, 2022 the Board affirmed OWCP's December 1, 2020 decision.⁶

On February 7, 2022 appellant, through counsel, requested reconsideration.

Appellant submitted a duplicate copy of Dr. Kubiak's January 28, 2021 narrative report.

OWCP received an undated letter from C.H., an employing establishment supervisor, who indicated that appellant notified him on July 21, 2020 that he was experiencing knee pain. C.H. further noted that appellant was wearing a knee band prior to the employment incident.

By decision dated April 4, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), finding that his request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

⁶ The Board notes that during the pendency of the February 8, 2021 appeal, by decision dated April 22, 2021, OWCP denied modification of its December 1, 2020 decision. The Board, by its January 31, 2022 decision, affirmed OWCP's December 1, 2020 decision, and also set aside OWCP's April 22, 2021 decision as null and void. The Board found that, pursuant to 20 C.F.R. § 501.2(c)(3), it and OWCP may not simultaneously exercise jurisdiction over the same issue(s). *See* Docket No. 21-0473 (issued January 31, 2022). On May 28, 2021 appellant appealed the purported April 22, 2021 OWCP decision to the Board. By order dated April 20, 2022, the Board dismissed the appeal finding that, as it had previously set aside the purported April 22, 2021 OWCP decision as null and void under Docket No. 21-0473, there was no adverse final OWCP decision from which appellant could properly file an appeal. *See Order Dismissing Appeal*, Docket No. 21-0923 (issued April 20, 2022).

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.⁷

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.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.¹¹

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).

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered by OWCP. Consequently, 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).¹²

Furthermore, appellant resubmitted a copy of Dr. Kubiak's January 28, 2021 medical report. The Board, however, has held that the submission of evidence or argument which repeats

⁷ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁸ 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).

⁹ *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 (September 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.

¹⁰ *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *see B.S.*, Docket No. 20-0761 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case and thus, this report is insufficient to warrant a merit review.¹³ OWCP also received an undated letter from C.H., an employing establishment supervisor, who related that appellant complained of knee pain prior to the employment incident. However, the underlying issue on reconsideration is whether appellant had met his burden of proof to establish causal relationship. This is a medical issue which can only be addressed by submission of rationalized medical evidence not previously considered.¹⁴ As appellant did not provide relevant and pertinent new evidence related to the underlying issue of causal relationship, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁵

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly declined merit review.¹⁶

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).

¹³ *V.L.*, Docket No. 19-0069 (issued February 10, 2020); *A.K.*, Docket No. 19-1210 (issued November 20, 2019); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *Richard Yadron*, 57 ECAB 207 (2005); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁴ *F.L.*, Docket No. 20-1288 (issued July 13, 2021); *D.P.*, Docket No. 20-1225 (issued January 8, 2021); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

¹⁵ *Y.L.*, Docket No. 20-1025 (issued November 25, 2020).

¹⁶ *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 April 4, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board