

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

_____)
W.B., Appellant)

and)

DEPARTMENT OF THE NAVY,)
SUPERVISOR OF SHIPBUILDING GULF)
COAST, Pascagoula, MS, Employer)

Docket No. 22-0985
Issued: March 27, 2023

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, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 6, 2022¹ appellant filed a timely appeal from a December 9, 2021 merit decision and a March 16, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from December 9, 2021, the date of OWCP's last merit decision, was June 7, 2022. Since using June 13, 2022, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. See 20 C.F.R. § 501.3(f)(1). As appellant's appeal request was postmarked June 6, 2022, the appeal is, therefore, timely.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 16, 2022 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of the need for medical treatment commencing September 28, 2021, causally related to his accepted November 15, 2017 employment injury; 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).

FACTUAL HISTORY

On January 29, 2018 appellant, then a 62-year-old aviation engineer, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 2017, he developed left knee pain when he walked down an incline ladder while in the performance of duty. OWCP accepted the claim for derangement of anterior horn of medial meniscus of the left knee. Appellant did not stop work.

On February 19, 2019 appellant underwent OWCP-authorized surgery to his left knee by Dr. Thomas Terral, a Board-certified orthopedic surgeon, including left knee arthroscopy with debridement, medial meniscectomy, and chondroplasty.

In a report dated April 11, 2019, Dr. Terral noted that appellant related an increase in left knee pain over the past four days with burning, numbness, and swelling. He performed a physical examination, which revealed tenderness along the medial joint line. Dr. Terral diagnosed pain and unilateral primary osteoarthritis of the left knee and requested authorization for a viscosupplementation injection to the left knee.

On October 6, 2021 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of the need for medical treatment beginning September 28, 2021, causally related to the accepted November 15, 2017 employment injury. He noted that he experienced left knee pain and swelling due to increased climbing steep stairs and walking on ship deck plates since March 2021.

In a development letter dated October 8, 2021, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of additional factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a completed questionnaire dated November 4, 2021, appellant explained that he previously experienced knee pain and occasional swelling. He related that upon returning to his worksite, including climbing ladders and standing on steel deck plates, caused swelling, pain, reduced range of motion, and balance issues. Appellant asserted that these symptoms worsened over time, despite daily ice pack treatments and wraps. He indicated that by September 28, 2021, he was no longer able to manage his symptoms at home, and therefore, he requested further medical treatment by a physician.

OWCP thereafter received a series of medical reports dated February 11 through April 18, 2019 by Dr. Terral, who recommended that appellant continue to work on swelling control, range of motion, and quadriceps strength and return for reevaluation in three weeks.

In a letter dated November 5, 2021, M.C., an employing establishment human resources specialist, controverted appellant's recurrence claim, noting that he had not submitted new medical documentation.

By decision dated December 9, 2021, OWCP denied appellant's recurrence claim, finding that the evidence of record was insufficient to establish a worsening of the accepted work-related conditions requiring further medical treatment.

On February 28, 2022 appellant requested reconsideration of OWCP's December 9, 2021 decision. In support of his request, he submitted a letter which indicated that he had enclosed a medical report dated February 17, 2022; however, no such report was received.

By decision dated March 16, 2022, 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

The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability, or aid in lessening the amount of any monthly compensation.⁴

A recurrence of a medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.⁵ An employee has the burden of proof to establish that he or she sustained a recurrence of a medical condition that is causally related to his or her accepted employment injury without intervening cause.⁶ To meet this burden the employee must submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, supports that the condition is causally related and supports his or her conclusion with sound medical rationale.⁷ Where no such rationale is present, medical evidence is of diminished probative value.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of the need for medical treatment commencing September 28, 2021, causally related to his accepted November 15, 2017 employment injury.

⁴ 5 U.S.C. § 8103(a).

⁵ 20 C.F.R. § 10.5(y).

⁶ *S.P.*, Docket No. 19-0573 (issued May 6, 2021); *M.P.*, Docket No. 19-0161 (issued August 16, 2019); *E.R.*, Docket No. 18-0202 (issued June 5, 2018).

⁷ *T.B.*, Docket No. 18-0672 (issued November 2, 2018); *O.H.*, Docket No. 15-0778 (issued June 25, 2015).

⁸ *T.B.*, *id.*; *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988); *see also Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

Appellant filed a Form CA-2a due to a worsening left knee pain and swelling, beginning September 28, 2021. In a development letter dated October 8, 2021, OWCP advised him regarding the medical and factual evidence required to establish his recurrence claim. In response, appellant answered questions posed on the questionnaire and a series of reports by Dr. Terral dated from February 11 through April 18, 2019. However, he did not submit any medical evidence to establish that he sustained a recurrence of a medical condition commencing September 28, 2021 causally related to his accepted November 15, 2017 employment injury. As these reports predate the commencement date of the claimed recurrence, the Board finds that they are of no probative value and are insufficient to establish appellant's claim.⁹

It is appellant's burden of proof to submit evidence establishing that he required further medical treatment for his accepted left knee condition on or after September 28, 2021 as a result of his accepted November 15, 2017 employment injury.¹⁰ As he has not submitted any medical evidence showing a recurrence of medical condition due to his accepted November 15, 2017 employment injury, the Board finds that he has not met his burden of proof.¹¹

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 does not entitle a claimant the review of an OWCP decision as a matter of right.¹² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹³ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁴

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (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

⁹ See *X.M.*, Docket No. 22-0271 (issued February 28, 2023); *S.E.*, Docket No. 21-1230 (issued January 27, 2023); *E.B.*, Docket No. 17-0875 (issued December 13, 2018); *C.L.*, Docket No. 16-0004 (issued June 14, 2016).

¹⁰ *C.B.*, Docket No. 19-0121 (issued July 2, 2019); *E.G.*, Docket No. 18-1383 (issued March 8, 2019); see also *C.J.*, Docket No. 18-1181 (issued May 20, 2019); *A.L.*, Docket No. 16-1092 (issued May 9, 2017); *Mary A. Ceglia*, *supra* note 8.

¹¹ See *C.B.*, *id.*; *E.R.*, Docket No. 18-0202 (issued June 5, 2018).

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.607.

¹⁴ *Id.* at § 10.607(a). 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.

considered by OWCP.¹⁵ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁶

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).

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. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁷

In support of his request for reconsideration, appellant also did not submit any relevant and pertinent new evidence not previously considered by OWCP. The underlying issue on reconsideration is whether appellant has met his burden of proof to establish a recurrence of the need for medical treatment due to his accepted November 15, 2017 employment injury. This is a medical issue which can only be addressed by submission of rationalized medical evidence not previously considered.¹⁸ Although appellant indicated that he enclosed a February 17, 2022 medical report with his February 28, 2022 request for reconsideration, no such report or any other relevant and pertinent new medical evidence was received prior to OWCP's March 16, 2022 decision. Thus, he is not entitled to further review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁹

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of the need for medical treatment on or after September 28, 2021, causally related to his accepted November 15, 2017 employment injury. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

¹⁵ *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

¹⁶ *Id.* at § 10.608.

¹⁷ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁸ *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *Eugene F. Butler*, 36 ECAB 393 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2021 and March 16, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 27, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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