

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

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**R.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Santa Monica, CA, Employer**

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**Docket No. 16-0572  
Issued: June 16, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 2, 2016 appellant filed a timely appeal from a January 15, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision dated December 9, 2014 to the date of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied merit review of his claim under 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

Appellant, a 53-year-old mail handler, filed an occupational disease claim (Form CA-2) on August 12, 2014, alleging that he sustained a bilateral knee condition causally related to employment factors.

On October 2, 2014 OWCP advised appellant that it required factual and medical evidence in support of his claim for compensation benefits. It instructed him to submit a comprehensive report from a treating physician describing his symptoms and the medical reasons for his condition, with an opinion as to whether his claimed condition was causally related to his federal employment. OWCP afforded appellant 30 days to submit this evidence.

In an October 28, 2014 report, Dr. I. Grant Orlin, a specialist in occupational medicine, advised that appellant had complaints of bilateral knee pain. He related that appellant believed that his knee injuries had inhibited his ability to perform basic domestic chores and engage in prolonged standing or walking. Appellant also experienced intermittent difficulty sleeping through the night due to throbbing in his knees. He underwent magnetic resonance imaging (MRI) scans of both knees on July 7, 2014. Dr. Orlin reported that the results of the left knee MRI scan showed degenerative tears of the posterior horn of the bilateral medial meniscus; full thickness articular cartilage loss; medial joint compatible with degenerative disease opposing articular surface; an oblique tear of the posterior horn of the lateral meniscus; degenerative tear of the anterior horn of the lateral meniscus; full thickness articular cartilage loss in the medial aspect and lateral joint; five millimeter full-thickness articular cartilage defect in mid-patella; and moderate joint effusion. The MRI scan of the right knee demonstrated comparable pathology: oblique tears of the posterior horn of medial meniscus and tears of the lateral meniscus, and full-thickness articular cartilage loss. Dr. Orlin concluded that the MRI scan of both knees demonstrated bilateral tri-compartmental degenerative joint disease, bilateral medial meniscus tears, and bilateral knee lateral meniscus tears. He noted that appellant had worked 30 years as a full-duty letter carrier with a park and loop route. Dr. Orlin advised that he had to repetitively jump in and out of his mail truck, go to different houses along the block, climb steps, walk on uneven ground, pivot, deliver mail, and case mail between two-sided cubicles. He noted that in addition, he had to lift up to 70 pounds of parcels and carry a satchel over his shoulder weighing as much as 35 pounds. Dr. Orlin also noted that for about 15 years appellant had a steep route which increased the stress on his knees because he had to walk up an incline.

Dr. Orlin opined that appellant's work activities over so many years, with significant weight-bearing, resulted in cumulative trauma and a progressive increase in degenerative changes and the development of significant osteoarthritis of both knees. He noted that this deterioration would not have occurred through the aging process alone. Dr. Orlin reasoned that appellant's MRI scan findings of medial meniscus tears and bilateral lateral meniscus tears reflected conditions caused by appellant's repetitive pivoting and torsioning during casing and deliver of mail.

Dr. Orlin reported that appellant denied any other history of injuries and denied any history of hobbies, recreational, or sport activities other than jogging. He opined that there was more than a reasonable medical probability that appellant's employment factors contributed to his condition as a result of cumulative trauma and that, as a result, his condition should be

considered industrially related. Dr. Orlin advised that appellant's treating physician had recommended that he consider knee replacement surgery.

In order to determine whether appellant's bilateral knee condition was causally related to factors of his federal employment, OWCP scheduled a second opinion examination with Dr. Richard Rogachefsky, Board-certified in orthopedic surgery. By letter dated November 6, 2014, OWCP informed appellant that his examination with Dr. Rogachefsky would be held on December 3, 2014 at 2:15 p.m. The letter was mailed to appellant's last known address, the address appellant provided to OWCP in his Form CA-2 claim for compensation, and to which all correspondence had been mailed. Appellant did not appear for the second opinion examination.

By decision dated December 9, 2014, OWCP denied appellant's claim finding that appellant failed to submit medical evidence establishing a bilateral knee condition causally related factors of his employment duties as a mail handler.

Thereafter, OWCP received a December 11, 2014 form report from Dr. Orlin noting that appellant continued to have pain in both knees, with occasional swelling. He diagnosed cumulative trauma with bilateral degenerative joint disease, bilateral knee medical meniscus tears, and bilateral lateral meniscus tears. Dr. Orlin noted that appellant could return to modified duty on December 11, 2014, with the same restrictions previously provided.

On January 21, 2015 appellant requested reconsideration.

By decision dated June 30, 2015, OWCP denied appellant's application for review as it neither raised substantive legal questions nor included pertinent and relevant new evidence sufficient to require OWCP to review its prior decision.

On October 14, 2015 appellant requested reconsideration.

In a November 18, 2015 report, Dr. Tony Liu, an osteopath and appellant's treating physician, noting that appellant failed to attend the second opinion physician appointment with Dr. Rogachefsky because he never received the notice. Dr. Liu advised that OWCP's records did not reflect a change of address or receipt that the letter was returned due to an incorrect address. The physician's report claimed that appellant was willing to attend a second opinion physician if another appointment was made.

By decision dated January 15, 2016, OWCP denied appellant's application for review as it neither raised substantive legal questions nor included pertinent and relevant new evidence sufficient to require OWCP to review its prior decision.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>2</sup> Section 10.608(a) of OWCP's regulations provide that a timely

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<sup>2</sup> 5 U.S.C. § 8128(a).

request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>3</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

### ANALYSIS

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP; or presented new evidence that is relevant and pertinent to the issue on appeal.

The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>6</sup> Dr. Liu's November 18, 2015 report merely asserts that appellant failed to attend a second opinion physician appointment with Dr. Rogachefsky because he never received notice of the appointment.<sup>7</sup> The issue in this case is medical; *i.e.*, whether he submitted probative, rationalized medical evidence sufficient to establish that his claimed bilateral knee condition was causally related to employment factors. OWCP explained that appellant had not met his burden of proof to establish his claim, because the medical evidence he submitted did not provide a rationalized opinion on the cause of the diagnosed conditions. Appellant's benefits were not suspended because he did not attend the second opinion evaluation.<sup>8</sup>

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a relevant legal argument not previously considered by OWCP, nor did it constitute pertinent new and relevant evidence.

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<sup>3</sup> 20 C.F.R. § 10.608(a).

<sup>4</sup> *Id.* at § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> *See David J. McDonald*, 50 ECAB 185 (1998).

<sup>7</sup> Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *See George F. Gidicsin*, 36 ECAB 175 (1984) (when OWCP sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice). This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *See Michelle Lagana*, 52 ECAB 187 (2000). The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of OWCP itself, will raise the presumption that the original was received by the addressee. *See Larry L. Hill*, 42 ECAB 596 (1991).

<sup>8</sup> *See R.S.*, Docket No. 15-476 (issued February 19, 2016).

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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