United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 17-1264**
	)	**Issued: December 3, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Orange, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2017 appellant filed a timely appeal from a December 15, 2016 merit decision and a February 16, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective June 25, 2015; 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).

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that appellant submitted additional evidence to OWCP after the February 16, 2017 decision. 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.*

FACTUAL HISTORY

On May 18, 2012 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee sprain on May 11, 2012 as a result of falling on uneven pavement while in the performance of duty. By decision dated November 2, 2012, OWCP accepted his claim for right knee sprain of the lateral collateral ligament, bilateral knee and leg sprain of other specified sites, and bilateral ankle sprain. Appellant underwent OWCP-authorized right knee surgery on May 23, 2013 and an authorized left ankle surgery on September 6, 2013.

OWCP referred appellant to a second opinion examination with Dr. Frederic G. Nicola, a Board-certified orthopedic surgeon, who found that appellant had reached maximum medical improvement (MMI) for his May 11, 2012 employment injury and was capable of working with a 10-pound lifting restriction. Dr. Nicola noted that appellant continued to have restrictions from an accepted right shoulder injury under OWCP File No. xxxxxx383 and was capable of working with restrictions of no repetitive overhead reaching.

After participating in vocational rehabilitation services, appellant accepted a part-time, modified carrier position for four hours per day and returned to work on April 15, 2014. The duties included collections and required sitting, standing, walking, and climbing for four hours per day.[3]

In a March 10, 2015 report, Dr. Basimah Khulusi, a Board-certified physiatrist, noted that appellant was seen for a follow up for his bilateral knee and ankle condition with a date of injury of May 11, 2012. Appellant continued to rate his pain at a level of 6 on the Mankoski Scale. Dr. Khulusi opined that this meant that appellant's pain could not be ignored for too long, but he could still work and participate in social activities. Appellant described his pain as sharp, aching, crushing, tight, pinching, shooting, pulsating, and stabbing. He denied any numbness or "pins and needles." Appellant no longer underwent therapy or acupuncture treatments and he performed home exercises for half an hour every day. Dr. Khulusi reported that appellant had "been working four to six hours per day without aggravating his knees and ankles." Upon physical examination, she found that appellant limped and struggled to advance his legs bilaterally. When he was standing, appellant maintained flexion at both knees that was worse on the left side. The left knee was hypertrophied when compared to the right knee and there were significant crepitations with repetitive flexion and extension movements. When appellant was weight-bearing, he collapsed his arches bilaterally, more so on the right than on the left. Dr. Khulusi diagnosed sprain of the right lateral collateral ligament, bilateral knee and leg sprain of other specified sites, bilateral ankle sprain, right knee medial and lateral meniscus tears, right knee anterior ligament tear, severe degenerative joint disease of the right knee, and status post May 23, 2013 right knee surgery and September 6, 2013 left ankle surgery. She advised that appellant was capable of returning to his modified position that same day.

OWCP subsequently referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his March 19, 2015 report, Dr. Ma reviewed a statement of accepted facts,

[3] In a December 30, 2014 letter, OWCP informed appellant that it made a preliminary determination that he received an overpayment of compensation in the amount of $1,097.99 from April 15 to May 3, 2014 because he received compensation benefits after he returned to work on April 15, 2014. On January 10, 2015 appellant repaid the overpayment amount in full.

history of the injury, and the medical evidence of record. He conducted a physical examination and found that appellant had an antalgic gait and was unable to heel or toe walk. Appellant was also unable to squat. Examination of his knees revealed right knee arthroscopic scars and crepitation about both knees. There was no ecchymosis present. There was marked varus alignment of the left knee and appellant pointed diffusely about both knees as the location of his symptoms. There was no tenderness on compression of the patellofemoral joint bilaterally and there was a negative apprehension sign about both patellas. Appellant had no point tenderness anywhere about either knee, and there was no medial or lateral joint line tenderness. The right knee went from full extension to 110 degrees of flexion. The left knee went from 20 degrees to 100 degrees of flexion. The left knee had a 20 degree flexion contracture. Lachman's and McMurray's testing was negative. There was no ligamentous laxity about either knee. Regarding appellant's ankles, there was no swelling, no tenderness to palpation, and he was able to move all of his toes without any difficulty. There was no point tenderness about the ankles and feet bilaterally. Appellant pointed to the ankles diffusely as the location of his symptoms. Varus/valgus stressing of the ankles elicited no instability. Dr. Ma concluded that appellant no longer continued to suffer residuals of his accepted work-related conditions. He explained that, although appellant's accepted conditions had resolved, he had a preexisting nonwork-related arthritis throughout the accepted body parts. Dr. Ma diagnosed end-stage arthritis and found no objective findings to support the continued existence of the employment injury, noting that appellant's medical treatment and surgeries had resolved his accepted condition. He determined that appellant had reached MMI in February 2014 when he saw Dr. Nicola for a second opinion evaluation. Dr. Ma advised that appellant was capable of sedentary work due to his nonemployment-related arthritis condition with a 10-pound lifting restriction.

In an April 13, 2015 letter, OWCP notified appellant that it proposed to terminate his wage-loss compensation and medical benefits because his accepted conditions had ceased without residuals, relying on Dr. Ma's March 19, 2015 report. It afforded him 30 days to submit additional evidence or argument if he disagreed with the proposed action.

In response, appellant submitted a May 4, 2015 report from Dr. Khulusi, who disagreed with Dr. Ma and opined that appellant's accepted conditions had not resolved. He also submitted reports dated April 2 and May 14, 2015 from Dr. Stephen C. Wan, a podiatrist, who diagnosed sprain of right ankle with degenerative arthritis of the right ankle and right foot subtalar joint and sprain of the left ankle with possible residuals postoperatively.

By decision dated June 25, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of the evidence was represented by Dr. Ma.

On June 10, 2016 appellant requested reconsideration and submitted progress reports dated June 18, July 30, September 17, October 1, and December 17, 2015 and February 25, 2016 from Dr. Wan diagnosing sprain of left ankle with resultant degenerative arthritis of the left foot and ankle. Dr. Wan disagreed with Dr. Ma and opined that appellant's work duties caused significant exacerbation of his underlying osteoarthritis/degenerative arthritis issues, specifically the traumatic injury occurring on May 11, 2012. Appellant also submitted progress reports dated June 9, 2015 and January 6 and April 11, 2016 from Dr. Khulusi who reiterated her diagnoses and opinions.

By decision dated July 28, 2016, OWCP denied modification of its June 25, 2015 decision.

On September 20, 2016 appellant requested reconsideration and submitted an August 15, 2016 duty status report (Form CA-17) from Dr. Khulusi who provided work restrictions and an August 15, 2016 report reiterating appellant's diagnoses and opinions.

By decision dated December 15, 2016, OWCP denied modification of its July 28, 2016 decision.

On February 15, 2017 appellant requested reconsideration and submitted a February 9, 2017 report from Dr. Khulusi, who argued that there was a conflict in the medical opinion evidence between appellant's treating physicians and the second opinion physician, Dr. Ma. Dr. Khulusi cited Chapter 2 of the Federal (FECA) Procedure Manual and argued that appellant should be referred for a referee evaluation. In a January 10, 2017 report and duty status report (Form CA-17) dated January 10, 2017, she reiterated her work restrictions, diagnoses, and opinions.

By decision dated February 16, 2017, OWCP denied appellant's request for reconsideration without conducting a merit review because he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.[4] It found that the January 10, 2017 reports were largely identical to prior medical evidence submitted by Dr. Khulusi and the February 9, 2017 report provided no new medical rationale and addressed legal issues outside the scope of the physician's qualifications.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.[5] After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[6] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[8] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[9]

[4] In a decision dated August 2, 2017, OWCP denied modification of its December 15, 2016 decision. The Board and OWCP may not have concurrent jurisdiction over the same issue in a case. Consequently, any decision by OWCP on an issue pending before the Board is null and void. *See Douglas E. Billings*, 41 ECAB 880, 895 (1990). As OWCP issued the August 2, 2017 decision after appellant's appeal to the Board on May 22, 2017 and as it is on the same issue pending before the Board, it is null and void. *See* 20 C.F.R. § 501.2(c)(3).

[5] *See S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[6] *See I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[7] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[8] *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[9] *See James F. Weikel*, 54 ECAB 660 (2003).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective June 25, 2015.

OWCP accepted appellant's claim for right knee sprain of the lateral collateral ligament, bilateral knee and leg sprain of other specified sites, and bilateral ankle sprain and authorized a May 23, 2013 right knee surgery and a September 6, 2013 left ankle surgery. It subsequently terminated his wage-loss compensation and medical benefits effective June 25, 2015 based on reports from Dr. Ma, a Board-certified orthopedic surgeon serving as a second opinion examiner.

OWCP referred appellant to Dr. Ma for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his March 19, 2015 report, Dr. Ma found that appellant had an antalgic gait and was unable to heel to toe walk. Appellant was also unable to squat. Examination of his knees revealed right knee arthroscopic scars and crepitation about both knees. The right knee went from full extension to 110 degrees of flexion. The left knee went from 20 degrees to 100 degrees of flexion. Lachman's and McMurray's testing was negative and there was no ligamentous laxity about either knee. Regarding appellant's ankles, there was no swelling, no tenderness to palpation, and he was able to move all of his toes without any difficulty. There was no point tenderness about the ankles and feet bilaterally. Dr. Ma concluded that appellant no longer continued to suffer residuals of his accepted work-related conditions. He explained that, although appellant's accepted conditions had resolved, he had a preexisting nonwork-related arthritis throughout the accepted body parts. Dr. Ma diagnosed end-stage arthritis and found no objective findings to support the continued existence of the employment injury, noting that appellant's medical treatment and surgeries had resolved his accepted condition. He determined that appellant had reached MMI in February 2014 when he saw Dr. Nicola for a prior second opinion evaluation. Dr. Ma advised that appellant was capable of sedentary work due to his nonemployment-related arthritis condition with a 10-pound lifting restriction.

The Board finds that Dr. Ma's March 19, 2015 report represents the weight of the medical evidence at the time OWCP terminated benefits and that OWCP properly relied on his report in terminating appellant's compensation benefits. The Board finds that he had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Ma is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Ma addressed the medical records to make his own examination findings to reach a reasoned conclusion regarding appellant's conditions.[10] At the time benefits were terminated, he found no basis on which to attribute residuals or continued disability to appellant's accepted conditions. Dr. Ma's opinion as set forth in his March 19, 2015 report is found to be probative evidence and reliable. The Board finds that Dr. Ma's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted conditions.

[10] *See Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

In her reports, Dr. Khulusi diagnosed sprain of the right lateral collateral ligament, bilateral knee and leg sprain of other specified sites, bilateral ankle sprain, right knee medial and lateral meniscus tears, right knee anterior ligament tear, severe degenerative joint disease of the right knee, and status post May 23, 2013 right knee surgery and September 6, 2013 left ankle surgery. Upon physical examination, she found that appellant limped and struggled to advance his legs bilaterally, his left knee was hypertrophied when compared to the right knee, and there were significant crepitations with repetitive flexion and extension movements. When appellant was weight-bearing, he collapsed his arches bilaterally, more so on the right than on the left. In a May 4, 2015 report, Dr. Khulusi disagreed with Dr. Ma and opined that appellant's accepted conditions had not resolved. The Board finds, however, that Dr. Khulusi failed to provide sufficient medical rationale explaining how appellant's conditions were causally related to his federal employment or his accepted conditions and why they rendered him disabled. Thus, Dr. Khulusi's reports are of diminished probative value and insufficient to overcome the weight of Dr. Ma's report or to create a medical conflict.

In his reports, Dr. Wan diagnosed sprain of right ankle with degenerative arthritis of the right ankle and right foot subtalar joint and sprain of left ankle with resultant degenerative arthritis of the left foot and ankle. He disagreed with Dr. Ma and opined that appellant's work duties caused significant exacerbation of his underlying osteoarthritis/degenerative arthritis issues, specifically the traumatic injury occurring on May 11, 2012. The Board finds that Dr. Wan failed to provide medical rationale explaining how appellant's preexisting arthritis conditions were causally related to his federal employment or his accepted conditions and why they rendered him disabled. Therefore, Dr. Wan's reports are of diminished probative value and insufficient to overcome the weight of Dr. Ma's report or to create a medical conflict.

Accordingly, the Board finds that Dr. Ma's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of appellant's wage-loss compensation and medical benefits, effective June 25, 2015.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[11] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[12] 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.[13] A timely application 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

[11] This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.607.

[13] *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 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.

by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[14] When a timely application 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.[15]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[16] 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.

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).[17]

Appellant's February 15, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

In support of his reconsideration request, appellant submitted two reports dated January 10, 2017 from Dr. Khulusi who reiterated her work restrictions, medical diagnoses, and opinions. The Board finds that submission of this evidence did not require reopening appellant's case for merit review as these reports are cumulative of evidence already of record and thus do not constitute relevant and pertinent new evidence. Therefore, they are insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted a February 9, 2017 report from Dr. Khulusi arguing that there was a conflict in the medical opinion evidence between appellant's treating physicians and OWCP's second opinion physician, Dr. Ma. Dr. Khulusi cited Chapter 2 of the Federal (FECA) Procedure Manual and contended that appellant should be referred for a referee evaluation. Dr. Khulusi did not provide new medical rationale related to appellant's employment-related conditions, merely her unqualified procedural opinion. The Board finds that submission of this report did not require reopening appellant's case for merit review as it failed to address the underlying issue before

[14] 20 C.F.R. § 10.606(b)(3).

[15] *Id*. at § 10.608(a), (b).

[16] *Id*. at § 10.607(a).

[17] *Id*. at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

OWCP.[18] Thus, this report does not constitute relevant and pertinent new evidence and is therefore insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

The Board thus finds that OWCP properly denied further review of the merits of the claim pursuant to the three requirements under section 10.606(b)(3).

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective June 25, 2015. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2017 and December 15, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 3, 2018
Washington, DC

Christopher J. Godfrey, 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

[18] The Board has held that submission of submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case. *P.H.*, Docket No. 18-1020 (issued November 1, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).