

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

On December 25, 2016 appellant, then a 62-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he had developed bilateral hip and knee osteoarthritis due to factors of his federal employment. He noted that he first became aware of his condition and its relationship to his federal employment on September 30, 2016. Appellant did not stop work. On the reverse side of the claim form, a supervisor for the employing establishment indicated that he never claimed a work-related injury, but instead indicated that he would be retiring because "his body was giving out."

In a narrative statement dated September 29, 2016, appellant asserted that his knees and hips had been painful since the 1980's. He noted that he had worked as a letter carrier since May 1985. Appellant alleged that his position required 500 stops per day and for him to walk five miles per day, as well as delivering packages weighing up to 70 pounds. He noted that he was required to walk over uneven, hilly, slippery, and icy terrain and stand on concrete. Appellant listed his work duties as repetitive bending, stooping, twisting, kneeling, and turning motions. He provided calculations of the number of steps taken, miles walked, time spent standing, and exits from his vehicle. Appellant further noted that he underwent left knee surgery in 2012.

In an April 26, 1999 note, Dr. Eric E. Johnson, a Board-certified internist and cardiologist, recommended that appellant not increase his work activities due to shoulder, back, and leg problems. On May 5, 2008 he noted that appellant was requesting a reasonable accommodation due to work-related shoulder and back conditions and recommended that appellant continue his mounted/dismounted route.

On August 18, 2008 appellant requested continuance of his reasonable accommodations including a combination of a mounted and dismounted route, which was established following a work-related back and shoulder injury. On October 20, 2008 the employing establishment noted that appellant had used reasonable accommodations for at least 10 years.

Appellant provided a series of notes from Dr. Ralph Scott Oliver, an orthopedic surgeon. In a February 16, 2012 note, Dr. Oliver recounted that appellant was experiencing ongoing knee

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. 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.*

pain. He noted that appellant had difficulty standing from a squatting position and pain on stairs. On April 19, 2012 Dr. Oliver reported that appellant exhibited significant patellofemoral crepitus of both knees. He diagnosed osteoarthritis bilateral knees. In his May 1, 2012 note, Dr. Oliver diagnosed internal derangement and osteoarthritis of the left knee. On May 11, 2012 appellant underwent a left knee magnetic resonance imaging (MRI) scan which demonstrated tears of the medial meniscus, ligament strains, and early patellofemoral degenerative arthritis. On July 19, 2012 Dr. Oliver diagnosed internal derangement of the left knee and indicated that a knee arthroscopy was planned. Appellant underwent left knee arthroscopy on July 30, 2012. On December 7, 2012 Dr. Oliver opined that appellant's left knee condition was not employment related as appellant had no specific knee injury.

On February 18, 2014 Dr. Oliver examined appellant due to progressive bilateral knee discomfort and diagnosed bilateral knee osteoarthritis. In a note dated September 4, 2014, he examined appellant due to appellant's difficulties walking and diagnosed bilateral knee osteoarthritis. In subsequent notes dated January 6 through November 6, 2015, Dr. Oliver continued to treat appellant for bilateral knee and hip pain. He diagnosed right and left sciatic and repeated his diagnosis of bilateral knee osteoarthritis. On June 18, 2015 Dr. Oliver recommended knee replacement surgery.

Appellant also provided a series of notes from January 6, 2012 through December 8, 2015 from Jennifer M. Burke, a nurse practitioner.

On January 15, 2016 Dr. Brett Teran, an osteopath and a Board-certified physiatrist, examined appellant due to low back and bilateral leg pain. He reviewed appellant's lumbar spine MRI scan and found mild degenerative disc and facet disease, but no evidence of nerve compression or disc herniation. Dr. Teran noted that appellant's bilateral knee x-rays demonstrated joint space narrowing of the medial and patellofemoral compartment in both knees. He diagnosed bilateral knee pain.

In a report dated November 17, 2016, Dr. Byron V. Hartunian, an orthopedic surgeon, noted that he had examined appellant due to hip and knee arthritis. He described appellant's work duties of walking five to six miles a day while carrying a 35-pound mail satchel. Dr. Hartunian reported that, when appellant performed a park and loop route, appellant exited his truck 350 times a day. He noted that appellant had to lift up to 70 pounds and was required to perform repetitive stooping, bending, lifting, twisting, squatting, climbing, and reaching activities. Dr. Hartunian performed a physical examination and diagnosed bilateral arthritis of the hips, and knees. He explained that arthritis was a failure and loss of articular cartilage surface due to impact loading resulting from repeated local stresses that cause and accelerate the progression of arthritis through chronic inflammation. Dr. Hartunian opined that appellant's job duties, such as descending stairs, were impact loading activities which exerted repeated local stresses to appellant's lower extremities. He described the biological and chemical process by which excessive impact loading and repeated local stresses caused mechanical stress on the cartilage surface resulting in chronic inflammation which in turn resulted in an accelerated loss of articular cartilage in the affected areas of the lower extremities. Dr. Hartunian noted that the chemical change in the cartilage was the loss of proteoglycans through degradative enzymes activated by inflammation. He further explained that proteoglycans were responsible for cartilage resilience. Dr. Hartunian found that it was universally accepted in the scientific and medical communities that impact loading and

repetitive motion contributed to the development and progression of lower extremity arthritis. He also found that appellant's work duties contributed, aggravated and accelerated his significant cartilage loss in the knees and hips. Dr. Hartunian concluded that this aggravation was permanent.

On January 7, 2017 appellant's supervisor, D.D., noted that appellant had requested accommodations in 2008 due to arm and neck pain. He reported that appellant's physician limited appellant to working eight hours a day six days a week. D.D. indicated that appellant had a route of all single family homes that were close to the street and that his assertion that he walked 20 steps per stop was an exaggeration. He noted that appellant's route was adjusted in August 2014, in which appellant currently had 453 stops, but prior to that he was delivering less stops.

In an April 17, 2017 development letter, OWCP advised appellant of the deficiencies of his claim. It requested additional factual and medical evidence and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On May 4, 2017 counsel responded and asserted that appellant had provided a detailed narrative statement and a comprehensive report from Dr. Hartunian. He contended that appellant had provided sufficient documentation for the acceptance of appellant's occupational disease claim.

In a May 3, 2017 response to OWCP's development questionnaire, appellant asserted that he worked six days a week for most of his career at the employing establishment. He alleged that beginning in 2008 he worked only eight hours a day. Appellant noted that his reasonable accommodations began in 2008 and continued until he retired and that these accommodations were partially related to his hips and knees as he could not walk long distances, but were also due to difficulties lifting.

By decision dated July 6, 2017, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted factors of his federal employment.

On July 11, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a November 2, 2017 report, Dr. Hartunian again opined that appellant's duties as a letter carrier contributed to his bilateral hip and knee arthritis. He noted that appellant was not performing his full duties following his July 30, 2012 knee surgery and that he had accommodations including a mount/dismount route. Dr. Hartunian reported that, even assuming that appellant was performing light-duty beginning in 2008, at that time appellant had worked for 23 years with impact loading activities which would be more than enough to contribute to his bilateral hip and knee osteoarthritis. He found that appellant's conditions were aggravated by the accumulative stresses as a result of the performance of appellant's work responsibilities.

During the hearing, held on November 28, 2017, counsel contended that Dr. Hartunian's reports were sufficient to meet appellant's burden of proof to establish his occupational disease claim.

OWCP subsequently received additional evidence. On December 18, 2017 appellant responded to D.D.'s remarks and noted that he began his career at the employing establishment in 1985 and that D.D. became his supervisor in December 2007. He agreed that in 2008 he began working only eight hours a day six days a week. Appellant alleged that prior to 2008 he worked longer hours and longer routes. He contended that over the course of his career his delivery routes averaged approximately 500 stops per day and required him to walk five miles a day. Appellant also again asserted that each stop averaged 20 steps round trip.

In a report dated August 27, 2015, Dr. Justin W. Kung, a Board-certified diagnostic radiologist, reviewed appellant's bilateral knee and hip x-rays and found severe degenerative changes on the right patellofemoral compartment, moderate degenerative changes in the left medial compartment, and mild-to-moderate degenerative changes of both femoroacetabular joints.

On March 2, 2017 Dr. Teran recounted that appellant was experiencing chronic bilateral knee pain and low back pain. He also noted that appellant reported weakness in his hips and thighs. Dr. Teran diagnosed bilateral primary osteoarthritis of the knees and low back pain.

By decision dated February 7, 2018, OWCP's hearing representative affirmed the July 6, 2017 decision, finding that the medical evidence was insufficient to establish causal relationship between appellant's bilateral knee and hip osteoarthritis and his employment duties.

On January 30, 2019 appellant, through counsel, requested reconsideration of the February 7, 2018 decision. He submitted a January 29, 2019 memorandum and addendum which contended that Dr. Hartunian's November 17, 2016 and November 2, 2017 reports were sufficient to require further development of the medical evidence and that OWCP's hearing representative erred in not directing such further development as appellant had established a *prima facie* case. Counsel further contended that OWCP's hearing representative's decision was based on factual inaccuracy as there was no evidence that appellant did not engage in impact loading activities from 2012 through 2014.

Appellant provided an additional narrative statement dated October 26, 2018 and asserted that, while he may have overestimated the number of stops on his route, he still went up and down millions of stairs, steps, and curbs during his 32 years as a letter carrier. Appellant also submitted a copy of his position description as a city carrier, which included a description of a dismount route on which 50 percent or more of the possible deliveries are made by dismount delivery to the door.

By decision dated March 26, 2019, OWCP denied appellant's request for reconsideration of the merits of his 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.⁵

⁵ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

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 filed a timely request for reconsideration of OWCP's February 7, 2018 decision on January 30, 2019.¹⁰ The Board finds, however, that he 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. While counsel contended that Dr. Hartunian's reports were sufficient to meet appellant's burden of proof or to require further development on the part of OWCP, these arguments were previously raised and considered by OWCP in its prior decisions. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹¹ With regard to counsel's contention that OWCP's hearing representative based her decision on an incorrect assessment of the facts, this contention does not show a legal error by OWCP or a new and relevant legal argument. For these reasons, the Board finds that counsel's assertions are insufficient to warrant reopening appellant's claim for further review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

⁶ 20 C.F.R. § 10.606(b)(3); *L.D.*, *id.*

⁷ *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 the merit 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.

⁸ *Id.* at § 10.608(a); *M.S.*, 59 ECAB 231 (2007).

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

¹⁰ *Supra* note 7.

¹¹ *B.O.*, Docket No. 20-0156 (issued May 13, 2020); *D.K.*, 59 ECAB 141 (2007).

Appellant also failed to submit relevant and pertinent new evidence in support of his January 30, 2019 request for reconsideration. The underlying issue is whether he submitted sufficient evidence to establish a causal relationship between the accepted employment factors and his diagnosed medical conditions. This is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹² However, appellant did not submit any additional medical evidence with his request for reconsideration. Because he did not provide any relevant and pertinent new evidence, he is also not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

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).

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹² *S.H.*, Docket No. 19-1578 (issued August 12, 2020).