

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

R.C., Appellant	)	
	)	
and	)	<b>Docket No. 20-0269</b>
	)	<b>Issued: December 23, 2021</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>Murrieta, CA, Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 17, 2019 appellant filed a timely appeal from an August 19, 2019 merit decision and an October 31, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish total disability from work for the period February 14 to 28, 2019 due to his accepted March 7, 2016

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

<sup>2</sup> The Board notes that, following the October 31, 2019 decision, appellant submitted additional evidence to OWCP. 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.*

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 March 7, 2016 appellant, then a 53-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his knees, right elbow, and right shoulder when he fell down stairs while in the performance of duty. He did not stop work. OWCP initially accepted appellant's claim for a bilateral knee contusion, bilateral knee internal derangement, right knee transient synovitis, right elbow contusion, and strain of muscle, fascia, and tendon of the right shoulder/upper arm. It subsequently expanded the acceptance of the claim to include bilateral knee chondromalacia, right shoulder bicipital tendinitis, right elbow lateral epicondylitis, and right knee transient synovitis.

On November 11, 2016 appellant underwent OWCP-authorized right shoulder arthroscopy surgery and stopped work. OWCP paid him wage-loss compensation for disability from work on the supplemental rolls from November 12, 2016 to March 5, 2017.

Appellant underwent additional OWCP-authorized surgeries, including left knee arthroscopy on July 13, 2017, right knee arthroscopy on January 25, 2018, and right elbow arthroscopy on August 23, 2018. OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of total disability; most recently from August 23, 2018 to February 19, 2019.

In a February 13, 2019 report, Dr. Ghassan S. Tooma, a Board-certified orthopedic surgeon, recounted appellant's complaints of continued bilateral knee pain and improved right elbow pain. He reviewed appellant's medical history, including his various surgeries. Upon examination of appellant's right elbow, Dr. Tooma observed tenderness to palpation of the lateral epicondylar bone itself and some tenderness to palpation of the right proximal lateral aspect of the forearm. Examination of appellant's knees revealed tenderness to palpation of the bilateral medial compartment and bilateral patellar tendons, crepitation with patellofemoral grind maneuver of the left knee, and significant atrophy of the *vastus medialis obliquus*. Dr. Tooma diagnosed bilateral knee patellar tendinitis and bilateral knee chondromalacia. He reported that appellant could return to work on February 14, 2019 with restrictions of no forceful pushing and pulling with the right arm, no alien contact, no use of a firearm, and no prolonged standing or walking.

On February 22, 2019 OWCP received a copy of a temporary modified border patrol agent position offered to appellant by the employing establishment in a February 20, 2019 letter.<sup>3</sup> The subject line of the letter indicated that it was a "Notice of Limited[-]Duty Assignment" and that the position was based on the work restrictions provided by appellant's treating physician, effective February 14, 2019. The reporting date for the position was noted as February 22, 2019. The job responsibilities included performing dispatch duties, answering telephones, and assisting with radio communications. The physical requirements of the job included no pushing and pulling with the right arm, no alien contact, no use of a firearm, and no prolonged standing or walking.

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<sup>3</sup> Prior to the February 20, 2019 letter, appellant had been receiving wage-loss compensation on the supplemental rolls.

Appellant declined the modified-duty job position on February 21, 2019. He asserted that, because he was taking narcotic medication for his pain, he would not be able to safely perform the duties of dispatch and radio communications.

On February 27, 2019 appellant filed a claim for compensation (Form CA-7) for disability from work for the period February 14 to 28, 2019.

In a development letter dated March 13, 2019, OWCP informed appellant that it had received his claim for wage-loss compensation for the period February 14 to 28, 2019. It advised him that the temporary light-duty assignment offered by the employing establishment was within the work restrictions assigned by Dr. Tooma in his February 13, 2019 report. OWCP also informed appellant of the provisions of 20 C.F.R. § 10.500(a) and further advised that his entitlement to wage-loss compensation may be denied under this provision if he did not accept the offered temporary light-duty assignment or provide a written explanation with justification of his refusal within 30 days.

In a letter dated March 28, 2019, appellant explained that he had declined the job offer, not because of his work restrictions, but because of the mental impairment he would be under due to his narcotic medication. He related that he was taking narcotic pain medication and listed the side effects of that medication. Appellant alleged that he would be unable to perform the duties of dispatch and assist radio communications in a safe manner while under the influence of narcotic medication. He also related that driving under the influence of painkillers was a crime and quoted sections from the California Vehicle Code. Appellant provided a copy of the employing establishment's Standards of Conduct.

OWCP received state workers' compensation form reports dated March 7 and 11, 2019 from Dr. Stanley G. Katz, a Board-certified orthopedic surgeon, who noted diagnoses of status post bilateral knee arthroscopies and chondromalacia. He explained that appellant was referred for pain management of his right shoulder and knees. Dr. Katz listed the medication that appellant was using to treat his pain. He provided examination findings and indicated that appellant could return to modified work on March 7, 2019.

In a March 8, 2019 state workers' compensation form report, Dr. Saeed T. Nick, an anesthesiologist, provided examination findings of appellant's right shoulder and bilateral knees. He diagnosed bilateral knee chondromalacia, right knee transient synovitis, and right shoulder bicipital tendinitis, and listed appellant's pain medication.

In an April 1, 2019 report, Dr. Tooma recounted that appellant was seen for follow-up of persistent bilateral knee and right elbow pain. He conducted an examination and diagnosed bilateral knee patellar tendinitis, bilateral knee chondromalacia, right shoulder primary osteoarthritis, and right rotator cuff tendinosis. Dr. Tooma related that appellant had retired on March 31, 2019 and noted that, if not for this circumstance, he would have recommended that appellant return to modified duty.

By decision dated May 10, 2019, OWCP denied appellant's claim for wage-loss compensation for the period February 14 to 28, 2019 pursuant to 20 C.F.R. § 10.500(a) based on his refusal to accept the employing establishment's offer for a temporary light-duty assignment commencing February 22, 2019. It found that the evidence of record established that during the

claimed period of disability, he had medical restrictions in place, a light-duty assignment within those work restrictions was available to him, and that he was previously notified in writing that the temporary light-duty assignment was available.

Appellant continued to submit form reports dated April 18 to May 30, 2019 regarding his continued medical treatment for his bilateral knee and right shoulder symptoms. He also provided physical therapy treatment records dated October 1 to December 13, 2018.

On June 1, 2019 appellant requested reconsideration. He related that he was providing information from his treating physician to show that he was unable to perform the radio dispatcher and communication duties of the modified border patrol agent position because of the medication he was prescribed.

Appellant resubmitted form reports dated March 7 to May 30, 2019.

Appellant also submitted a May 31, 2019 progress report, wherein Dr. Nick related that appellant continued to take medication to control his pain and listed those narcotic medications. Dr. Nick provided examination findings and diagnosed bilateral knee chondromalacia, right elbow contusion, and right shoulder bicipital tendinitis. He reported, "Due to current medications the patient is taking, he is unable to perform radio communications and dispatch duties."

By decision dated August 19, 2019, OWCP denied modification of the May 10, 2019 decision.

On October 22, 2019 appellant requested reconsideration. He asserted that Dr. Tooma did not address his pain medication and ability to work because he was no longer prescribing the medications he was taking. Appellant explained that, by the time he asked Dr. Nick for additional medical documentation regarding his work capacity, he had retired from federal employment.

In support of his reconsideration request, appellant submitted form reports dated August 22 and October 3, 2019 from Dr. Katz who related appellant's complaints of continued bilateral knee pain. Dr. Katz noted that appellant was taking medication as needed. He provided examination findings and noted diagnoses of bilateral knee chondromalacia.

By decision dated October 31, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

receiving at the time of the injury.<sup>6</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>7</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.<sup>8</sup> The opinion of the physician must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship.<sup>9</sup>

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.<sup>10</sup>

OWCP's procedures provide that, when a claimant is not on the periodic rolls, a claim for wage-loss compensation may be received on a Form CA-7 when a temporary light-duty assignment has been provided by the employing establishment. These procedures further provide that, when a formal loss of wage-earning capacity has not been issued, OWCP's claims examiner should follow certain specified procedures. If the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits (effective the date of the written notification of light-duty availability) are not payable for the period covered by the available light-duty assignment.<sup>11</sup> Such benefits are payable only for periods during which an employee's work-related medical condition prevent him or her from earning the wages earned before the work-related injury.<sup>12</sup>

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<sup>6</sup> 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>7</sup> *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

<sup>8</sup> *J.M.*, Docket No. 19-0478 (issued August 9, 2019).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a (June 2013).

<sup>11</sup> *Id.* at Chapter 2.814.9b (June 2013).

<sup>12</sup> *Id.*

## ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period February 22 to 28, 2019 due to his accepted March 7, 2016 employment injury.

On February 20, 2019 the employing establishment provided appellant a temporary full-time modified assignment as a border patrol agent with a starting date of February 22, 2019. The job offer letter indicated in the subject line that it was a “Notice of Limited[-]Duty Assignment.” The job offer reported that the modified-duty position was based on work restrictions provided by appellant’s treating physician, effective February 14, 2019.

Appellant filed a Form CA-7 for disability from work for the period February 14 to 28, 2019 causally related to his accepted March 7, 2016 employment injury. The Board finds that an examination of the medical evidence of record reveals that appellant has not submitted medical evidence demonstrating that residuals of the March 7, 2016 employment injury prevented him from working in the temporary assignment offered by the employing establishment for the portion of the claimed period of disability that it was available to him, *i.e.*, February 22 to 28, 2019.

As noted, section 10.500(a) of OWCP’s regulations provides that an employee is not entitled to compensation for wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.<sup>13</sup> OWCP’s procedures provide that, when a claimant is not on the periodic rolls, a claim for wage-loss compensation may be received on a Form CA-7 when a temporary light-duty assignment has been provided by the employing establishment. These procedures further provide that, when a formal loss of wage-earning capacity has not been issued, OWCP’s claims examiner should follow certain specified procedures. If the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits (effective the date of the written notification of light-duty availability) are not payable for the period covered by the available light-duty assignment.<sup>14</sup>

In the present case, the medical evidence shows that appellant had temporary light-duty work available commencing February 22, 2019, which was within the work restrictions necessitated by residuals of the accepted March 7, 2016 employment injury. In a February 13, 2019 report, Dr. Tooma determined that appellant could return to work on February 14, 2019 with restrictions of no forceful pushing and pulling with the right arm, no alien contact, no use of a firearm, and no prolonged standing or walking. The Board finds that Dr. Tooma’s February 13, 2019 report provides the best assessment of appellant’s ability to work around the time the employing establishment offered the limited-duty assignment, commencing February 22, 2019,

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<sup>13</sup> See *supra* note 10.

<sup>14</sup> See *supra* note 11.

and the restrictions contained in the report would allow appellant to perform the duties of the offered assignment.

The case record does not contain probative medical evidence demonstrating that residuals of the March 7, 2016 employment injury prevented appellant from performing the duties of the offered assignment during the latter part of his claimed period of disability, *i.e.*, February 22 to 28, 2019. Appellant asserted that medication necessitated by his injury-related condition prevented him from performing the offered assignment in February 2019. In support of his assertion, he submitted a May 31, 2019 progress report from Dr. Nick, who concluded that, “Due to current medications the patient is taking, he is unable to perform radio communications and dispatch duties.”<sup>15</sup> The Board finds, however, that he did not provide rationale explaining his opinion. As such, Dr. Nick’s report is insufficient to establish appellant’s disability claim.

The offered assignment would have paid appellant wages for the period February 22 to 28, 2019 that were at least equal to those paid by his date-of-injury position. Therefore, based on the above-described principles, OWCP properly invoked 20 C.F.R. § 10.500(a) as justification for its denial of appellant’s disability claim for the period February 22 to 28, 2019.

The Board further finds, however, that this case is not in posture for decision regarding whether appellant has met his burden of proof to establish total disability from work for the period February 14 to 21, 2019 due to his accepted March 7, 2016 employment injury. OWCP based its denial of appellant’s disability claim for the period February 14 to 21, 2019 on the supposition that appellant had appropriate work available during this period and refused to perform such work for this period. However, this basis for denial is not valid because appellant did not have such appropriate work available to him for the period February 14 to 21, 2019 in that the assignment offered by the employing establishment, if accepted, would not have commenced until February 22, 2019. As OWCP relied on this improper basis for denying appellant’s disability claim for the period February 14 to 21, 2019, it did not fully evaluate the medical evidence of record to determine whether, independent of the offered assignment, this evidence established that residuals of the March 7, 2016 employment injury prevented appellant from performing his date-of-injury job. Because OWCP failed to conduct such an evaluation with respect to appellant’s disability claim for the period February 14 to 21, 2019, the case shall be remanded to OWCP for this purpose. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant’s disability claim for the period February 14 to 21, 2019.

### **LEGAL PRECEDENT -- ISSUE 2**

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 or her own motion or on application.<sup>16</sup>

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<sup>15</sup> See *supra* note 8.

<sup>16</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *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.<sup>17</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>19</sup> 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.<sup>20</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>21</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>22</sup>

### 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), with regard to OWCP's denial of disability for the period February 22 to 28, 2019.

Appellant argued that Dr. Tooma did not address his pain medication and ability to work because he was no longer prescribing the medications he was taking. He explained that, by the time he asked Dr. Nick for additional medical documentation regarding his work capacity, he had retired from federal employment. However, OWCP had previously considered and rejected this same argument when it denied appellant's claim. The Board has held that the submission of argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>23</sup> Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

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<sup>17</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>18</sup> 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

<sup>19</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>20</sup> *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>21</sup> *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>22</sup> *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*; 31 ECAB 224, 225 (1979).

<sup>23</sup> *See supra* note 20.



In support of his reconsideration request, appellant submitted form reports dated August 22 and October 3, 2019 from Dr. Katz who related appellant's complaints of continued bilateral knee pain. Dr. Katz noted that appellant was taking medication as needed. He provided examination findings and noted diagnoses of bilateral knee chondromalacia.

While this medical evidence is new, it is not relevant because it does not directly address the underlying issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish that his injury-related condition prevented him from working in February 2019 in the light-duty assignment offered by the employing establishment. The submission of this medical evidence does not warrant a review of appellant's claim on the merits because the Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>24</sup> Therefore, appellant is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, 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 the request for reconsideration without reopening the case for review on the merits with regard to OWCP's denial of disability for the period February 22 to 28, 2019.<sup>25</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period February 22 to 28, 2019 due to his accepted March 7, 2016 employment injury. The Board further finds that this case is not in posture for decision regarding whether he has met his burden of proof to establish total disability from work for the period February 14 to 21, 2019 due to his accepted March 7, 2016 employment injury. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), with regard to OWCP's denial of disability for the period February 22 to 28, 2019.

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<sup>24</sup> See *supra* note 21.

<sup>25</sup> OWCP's October 31, 2019 decision is set aside in part as moot with regard to OWCP's denial of disability for the period February 14 through 21, 2019.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 19 and October 31, 2019 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 23, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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