

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

S.W., Appellant)	
)	
and)	Docket No. 20-1317
)	Issued: February 24, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Plainfield, NJ, Employer)	
)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
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 June 23, 2020 appellant, through counsel, filed a timely appeal from a May 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 5, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on October 5, 2009 appellant, then a 34-year-old letter carrier, sustained a medial meniscus tear of her left knee due to a fall down stairs while in the performance of duty. It assigned OWCP File No. xxxxxx003. Appellant stopped work on October 5, 2009 and OWCP paid her wage-loss compensation on the supplemental rolls for disability commencing November 20, 2009. On January 12, 2010 Dr. Jeffrey F. Augustin, an attending Board-certified orthopedic surgeon, performed OWCP-authorized left knee arthroscopy with lateral meniscectomy and excision of plica.⁴

By decision dated June 17, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 17, 2010 because she ceased to have residuals/disability from her accepted October 5, 2009 employment injury as of that date. By decision dated November 17, 2010, it modified its June 17, 2010 termination decision to reflect that only her wage-loss compensation was terminated, effective June 17, 2010.

On June 21, 2012 appellant filed a traumatic injury claim (Form CA-1) alleging that on June 20, 2012 she injured her left knee when she stepped down off a curb while in the performance of duty. OWCP assigned OWCP File No. xxxxxx402.⁵

By decision dated August 9, 2012, OWCP denied appellant's claim for a June 20, 2012 traumatic injury under OWCP File No. xxxxxx402 because she failed to establish the medical component of fact of injury.

On October 22, 2012 Dr. Allen Glushakow, an attending Board-certified orthopedic surgeon, performed left knee surgery, including abrasion arthroplasty, chondroplasty, arthrotomy, and partial lateral meniscectomy. He noted that during the surgery he observed an effusion and

³ Docket No. 18-1529 (issued April 19, 2019); Docket No. 17-1319 (issued December 7, 2017); Docket Nos. 14-1187; 14-1215 (issued February 2, 2015).

⁴ OWCP paid appellant wage-loss compensation on the periodic rolls commencing March 14, 2010.

⁵ In April 2013 OWCP administratively combined OWCP File Nos. xxxxxx402 and xxxxxx003, with the latter designated as the master file.

osteochondral fracture of the medial femoral condyle, as well as a partial tear of the lateral meniscus. The surgery was not authorized by OWCP.⁶

By decision dated February 20, 2013, a representative of OWCP's Branch of Hearings and Review modified OWCP's August 9, 2012 decision to accept the condition of left knee sprain as having been sustained on June 20, 2012 "with entitlement to medical benefits being limited to the claimant's emergency room visit on June 20, 2012." OWCP's hearing representative noted, "The district [office's] denial of the claim for any other left knee condition and for benefits subsequent to June 20, 2012 is affirmed."

By decision dated April 30, 2013, OWCP advised appellant that her claim for a traumatic injury on June 20, 2012 was formally accepted for a left knee sprain. It indicated that, per the February 20, 2013 decision of OWCP's hearing representative, authorization for medical treatment was limited to treatment at the emergency room on June 20, 2012.

On May 10, 2013 appellant filed claims for compensation (Form CA-7) for the periods June 21 through October 21, 2012 and October 22, 2012 through March 18, 2013.⁷ The first period of compensation was filed under OWCP File No. xxxxxx402 and the latter period under OWCP File No. xxxxxx003. With respect to the period June 21 through October 21, 2012, OWCP advised appellant by letter dated May 13, 2013 that she should pursue her appeal rights associated with the February 20, 2013 decision.

In an informational letter dated June 10, 2013, OWCP advised appellant that her claim for compensation for the period October 22, 2012 to March 18, 2013 was not payable. It explained that, in its November 17, 2010 decision, it had terminated her wage-loss compensation effective June 17, 2010.

In a July 17, 2013 letter counsel, on behalf of appellant, requested authorization for her October 22, 2012 left knee surgery and compensation for any periods of disability related to her accepted work-related left knee condition. He noted, "[Appellant] underwent surgery by Dr. Glushakow under the above file in October 2012. Clearly, this is new evidence and was not available on June 17, 2010. Appellant is now disabled as a result of the effects of the surgery."⁸

By decision dated November 14, 2013, OWCP denied appellant's July 17, 2013 reconsideration request, finding that it was untimely filed with respect to the November 17, 2010 decision and failed to demonstrate clear evidence of error. It indicated that the June 10, 2013 "decision" for which she was considered to have requested reconsideration was an informational letter rather than a final decision of OWCP, and therefore she could not request reconsideration of

⁶ The case record contains an August 24, 2012 magnetic resonance imaging (MRI) scan of appellant's left knee which contains an impression of small joint effusion, moderate-sized popliteal cyst, and no evidence of meniscal tear.

⁷ The employing establishment indicated on the claim forms that appellant's employment had been terminated, effective November 27, 2012, due to the expiration of her appointment.

⁸ Counsel also noted that he wished to appeal June 17, 2010 and June 10, 2013 decisions of OWCP.

that decision. OWCP further noted, “Your attorney does not argue that the decision dated November 17, 2010 was incorrect when it was issued.”

On January 10, 2014 appellant filed a notice of recurrence (Form CA-2a) under OWCP File No. xxxxxx402 for disability from work commencing June 21, 2012 due to her work-related left knee condition. On January 30, 2014 she filed a Form CA-2a under OWCP File No. xxxxxx003 for a recurrence of disability commencing October 22, 2012 due to her work-related left knee condition.

On March 5, 2014 appellant, through counsel requested reconsideration. In the attached June 25, 2013 report, Dr. Glushakow asserted that her need for repeat left knee surgery on October 22, 2012 was due to her June 20, 2012 employment injury rather than an earlier injury. He indicated that appellant had fully recovered from the January 12, 2010 surgery and that prior operative reports did not note an osteochondral fracture and did not note synovitis. Dr. Glushakow concluded, “Therefore, the combination of these findings point to the cause of [appellant’s] surgery being the incident of June 20, 2012.”

By decision dated March 19, 2014, OWCP denied appellant’s March 5, 2014 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board, and in a February 2, 2015 decision,⁹ the Board set aside OWCP’s November 14, 2013 and March 19, 2014 decisions, and remanded the case to OWCP for further development. The Board found that OWCP improperly determined that counsel’s communications on behalf of appellant constituted a request for reconsideration of its November 17, 2010 decision. OWCP determined that counsel expressly sought compensation for appellant’s October 22, 2012 left knee surgery and any periods of disability related to her accepted left knee conditions. Consequently, the Board found that OWCP improperly analyzed her case and wrongly determined, in its November 14, 2013 and March 19, 2014 decisions, that she filed an untimely request for reconsideration and failed to demonstrate clear evidence of error in its November 17, 2010 decision. The Board further found that appellant had an outstanding claim related to her October 22, 2012 left knee surgery and any periods of disability arising after June 21, 2012. The Board remanded the case to OWCP for consideration of that claim and directed OWCP to issue an appropriate decision after considering all the relevant documents relating to both her accepted October 5, 2009 and June 20, 2012 work-related left knee injuries.

On remand OWCP issued a June 11, 2015 decision denying appellant’s request for authorization of her October 22, 2012 surgery and her claim for a recurrence of disability commencing June 21, 2012.

Appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review. Following a preliminary review, by decision dated January 8, 2016, OWCP’s hearing representative set aside OWCP’s June 11, 2015 decision, finding that the case should be forwarded to an OWCP medical adviser to address Dr. Glushakow’s medical opinions regarding the October 22, 2012 surgery and to discuss whether there were additional medical conditions causally related to the June 20, 2012 employment injury. OWCP’s

⁹ *Supra* note 3.

hearing representative indicated that OWCP's medical adviser should be asked whether referral to a second opinion examiner would be appropriate. She noted that, after any additional development deemed necessary, OWCP should issue a *de novo* decision as to whether appellant was disabled from work commencing June 21, 2012 and whether the left knee surgery on October 22, 2012 was causally related to the June 20, 2012 work event.

On remand OWCP referred appellant on October 13, 2016 for a second opinion examination to Dr. Timothy Henderson, a Board-certified orthopedic surgeon. It requested that he evaluate whether the October 22, 2012 surgery was necessitated by a work-related condition and whether she had work-related disability on or after June 21, 2012. In a November 10, 2016 report, Dr. Henderson opined that the October 22, 2012 surgery was not secondary to the October 5, 2009 employment injury. He noted that appellant appeared to have sustained a new injury to her left meniscus, but that this injury would not be a work injury. Dr. Henderson posited that she had partial disability related to nonwork-related degenerative changes.

On November 22, 2016 OWCP requested that Dr. Henderson clarify whether it should update the accepted conditions to include aggravation of osteoarthritis in the left knee. In a December 2, 2016 report, Dr. Henderson advised that the accepted conditions should not be updated to include aggravation of left knee osteoarthritis.

By decision dated December 19, 2016, OWCP found that appellant had not met her burden of proof to establish a recurrence of disability commencing June 21, 2012 due to a work-related condition. It also exercised its discretion and denied authorization for her October 22, 2012 left knee surgery.

On March 9, 2017 counsel, on behalf of appellant, requested reconsideration of the December 19, 2016 decision and argued that Dr. Henderson's November 10 and December 2, 2016 reports were not well rationalized. By decision dated April 6, 2017, OWCP denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant appealed OWCP's December 19, 2016 and April 6, 2017 decisions to the Board and, by decision dated December 7, 2017,¹⁰ the Board set aside both decisions. The Board found that there was an unresolved conflict in the medical opinion evidence between Dr. Henderson and Dr. Glushakow regarding whether appellant's October 22, 2012 surgery was necessitated by a work-related condition and whether she had work-related disability on or after June 21, 2012. The Board determined that, on remand, appellant and the case record must be referred to an impartial medical examiner for examination and opinion on these matters, to be followed by a *de novo* decision.

On remand OWCP referred appellant on December 19, 2017 to Dr. Michael Wujciak, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether her October 22, 2012 surgery was necessitated by a work-related condition and whether she established work-related disability on or after June 21, 2012.

¹⁰ *Supra* note 3.

In a February 27, 2018 report, Dr. Wujciak reported the findings of his January 10, 2018 physical examination, noting that appellant demonstrated full range of motion of her left knee upon distraction. Appellant exhibited diffuse tenderness upon palpation of her left knee, but her response was exaggerated. Dr. Wujciak noted that she did not have ligamentous laxity in her left knee and observed that her subjective complaints were disproportionately greater than her objective findings. He indicated that, after appellant suffered her October 5, 2009 work-related left knee injury, she had a good result from her January 12, 2010 surgery. Dr. Wujciak indicated that, during the October 22, 2012 surgery, Dr. Glushakow found an osteochondral fracture of the medial femoral condyle and a tear of the lateral meniscus, but noted that he failed to describe these conditions with any detail in his surgery report. He advised that he had reviewed a report of an August 24, 2012 MRI scan of appellant's left knee and indicated that it was out of the ordinary for the study to show that the left lateral meniscus had normal signal intensity/morphology given the performance of the January 12, 2010 surgery.¹¹ Dr. Wujciak asked to review the August 24, 2012 MRI scan in its original hard copy or on CD, and to review any left knee x-rays that were performed. He also recommended that the original August 24, 2012 MRI scan be reread by an independent third party. Dr. Wujciak asserted that, with the present documentation provided, he could not confirm the multiple pathologies observed by Dr. Glushakow during the October 22, 2012 surgery. He also noted that new x-ray studies were warranted.¹²

On March 12, 2018 OWCP requested that Dr. Wujciak provide a supplemental report regarding whether appellant's October 22, 2012 surgery was necessitated by a work-related condition and whether she had disability on or after June 21, 2012 due to a work-related condition. In a March 13, 2018 report, Dr. Wujciak responded to a question about whether the October 22, 2012 surgery was necessary due to a work-related condition by noting that, based on the materials supplied and reviewed, he was unable to objectively "determine/diagnose the injuries sustained on October 22, 2012." He indicated that it was apparent that no independent "over-read" of the August 24, 2012 MRI scan had been performed. Dr. Wujciak advised that Dr. Glushakow's operative report and office records were insufficient to be used as determinative documentation in an independent evaluation. He indicated that his opinion might or might not alter with receipt of additional materials, including an independent over-read of the August 24, 2012 MRI scan by a Board-certified radiologist, inter-operative photographs of the January 12, 2010 and October 22, 2012 surgeries, and treatment records produced between June 20 and July 5, 2012.

OWCP sent Dr. Wujciak a number of treatment records dated between June 20 and July 12, 2012. In a March 15, 2018 report, Dr. Wujciak indicated that he had reviewed the provided records and noted, "My medical/surgical opinions as expressed in my prior report of February 27, 2018 and addendum of March 13, 2018 remain otherwise unchanged."

By decision dated March 23, 2018, OWCP found that appellant failed to meet her burden of proof to establish disability from work commencing June 21, 2012 due to a work-related left knee condition. It also denied her request for authorization of October 22, 2012 left knee surgery because she did not establish that it was necessitated by a work-related condition. OWCP found

¹¹ Dr. Wujciak indicated "No" in response to a question regarding whether appellant had established total disability on or after June 21, 2012 due to a work-related condition. He completed a work capacity evaluation (Form OWCP-5c) on February 25, 2018 in which he indicated that she could perform modified duty for four hours per day.

that the special weight of the medical opinion evidence with these respect to these matters rested with the well-rationalized opinion of Dr. Wujciak, the impartial medical examiner.

Appellant appealed her case to the Board and, in an April 19, 2019 decision,¹³ the Board set aside the March 23, 2018 decision. The Board noted that Dr. Wujciak felt that additional documentation was necessary before he could render a final opinion regarding whether her claims regarding surgery and disability. The Board remanded the case to OWCP and directed it to request that Dr. Wujciak provide a clarifying supplemental report, to be followed by the issuance of a *de novo* opinion regarding the surgery and disability matters.

On remand OWCP requested that Dr. Wujciak provide clarification of his opinion on the surgery and disability matters. It afforded him 30 days to provide a supplemental report. Dr. Wujciak did not respond to OWCP's request within the afforded period and, on July 9, 2019, OWCP referred appellant for an impartial medical examination with Dr. Alan M. Crystal, a Board-certified orthopedic surgeon. OWCP provided Dr. Crystal a current statement of accepted facts (SOAF) and requested that he provide an opinion regarding whether her October 22, 2012 surgery was necessitated by a work-related condition and whether she had work-related disability on or after June 21, 2012.

The case record contains a July 9, 2019 Integrated Federal Employees' Compensation System (iFECS) report with the designation "ME023 -- Appointment Schedule Notification," which indicates that an impartial medical examination had been scheduled for August 1, 2019. A document entitled, "Bypass History Report for Scheduled Appointment," contains bypass notes indicating why each of the Board-certified orthopedic surgeons contacted by OWCP was bypassed for selection as an impartial medical specialist. The report notes that OWCP telephoned Dr. Wujciak on July 9, 2019 at 11:28 a.m. and it contains the bypass note, "[Claimant] seen [sic] this [physician] in the past." It also shows that OWCP telephoned Dr. Robert Dennis on that date at 11:28 a.m. and 11:29 a.m. and, for both calls, it contains the bypass note, "The [physician] is still in court." On the same date, OWCP telephoned Dr. Leon Sultan at 11:35 a.m. and the bypass note indicates, "I spoke with the manager and I found that the [physician] do [sic] not want to do direct deposit and that is why [h]is bill is not paid." The report also contains the notation, "This report serves as certification that the Medical Management Application in [iFECS] was used to schedule this appointment." In a July 15, 2019 letter, counsel requested that OWCP provide him with the SOAF provided to Dr. Crystal and with the "selection methodology used to pick [Dr. Crystal] and the bypass history." On July 17, 2019 OWCP sent counsel the requested documents.

In an August 1, 2019 report, Dr. Crystal provided a discussion of the medical records concerning appellant's treatment since 2009 and incorporated into his report the SOAF provided by OWCP. He reported the findings of his physical examination, noting that she had normal 5/5 strength in her lower extremities and had synovitis in her left knee with crepitus upon range of motion. Dr. Crystal diagnosed degenerative osteoarthritis of appellant's left knee and opined that her October 22, 2012 left knee surgery was not necessitated by an employment-related condition. He noted that an August 24, 2012 MRI scan of the left knee showed small joint effusion, moderate

¹³ *Supra* note 3.

sized popliteal cyst, no evidence of meniscal tear, normal marrow signal in the medial compartment, and normal marrow signal in normal in the lateral meniscus. Dr. Crystal maintained that the August 24, 2012 MRI scan did not show objective evidence of a left knee injury from stepping off a curb and indicated that appellant's October 22, 2012 surgery report showed an osteochondral fracture of the medial femoral condyle, a partial tear of the lateral meniscus, and chondromalacia of the patella. He noted that the operative findings were consistent with progressive degenerative arthritis and opined that that the August 24, 2012 MRI scan results negated a finding that the osteochondral fracture of the medial femoral condyle was traumatic. Dr. Crystal indicated that, although the operative report noted a torn lateral meniscus, it did not describe the tear in any detail. He explained that meniscus degeneration with fraying and tearing was a component of knee arthritis and that, if appellant had a traumatic lateral meniscus tear, it would have been seen on the MRI scan. Dr. Crystal noted that, even if appellant had a minute lateral meniscus tear, it would have been asymptomatic and would not have caused disability. He opined that she did not have employment-related disability on or after June 21, 2012 and indicated that her inability to perform her regular work was not due to an employment-related condition. Appellant was capable of performing sedentary work on a full-time basis.

By decision September 5, 2019, OWCP denied appellant's claim for a recurrence of disability from work commencing June 21, 2012 due to a work-related left knee condition and denied her request for authorization of the October 22, 2012 left knee surgery because the procedure was not necessitated by a work-related condition. It found that the special weight of the medical opinion evidence with respect to these issues rested with the well-rationalized opinion of Dr. Crystal.

On February 19, 2020 appellant, through counsel, requested reconsideration of the September 5, 2019 decision.¹⁴ In a February 19, 2020 statement, counsel argued that Dr. Crystal did not seem to understand that, under OWCP File No. xxxxxx003, OWCP had accepted her claim for medial meniscus tear of the left knee and authorized left knee surgery which was performed on January 12, 2010. He maintained that Dr. Crystal questioned Dr. Glushakow's interpretation of an August 24, 2012 MRI scan which documented a lateral meniscus partial tear and patellar chondromalacia of appellant's left knee. Counsel asserted that Dr. Glushakow also documented an osteochondral fracture of the medial femoral condyle and traumatic chondromalacia of the left knee and that Dr. Henderson found a lateral meniscus tear and aggravation of preexisting arthritis of the left knee. He argued that, even if the January 12, 2010 surgery was unnecessary (as had been indicated by Dr. Crystal), it was performed due to appellant's employment-related injury and was part of the treatment under her workers' compensation case. Counsel noted, "As a result, OWCP must accept the surgery result." He indicated that she had undergone two surgeries and clearly had severe problems in her left knee because of her two employment-related injuries. Counsel asserted that Dr. Crystal's report was not properly rationalized and that he should not have gone beyond the findings of the SOAF. He also alleged that OWCP's selection of Dr. Crystal as an impartial medical examiner was not proper and advised that reference should be made to another February 19, 2020 statement he produced.

¹⁴ Appellant resubmitted copies of Dr. Crystal's August 1, 2019 report.

In another February 19, 2020 statement, counsel requested that OWCP provide a statement of services and proof of payment for the August 1, 2019 impartial medical examination conducted by Dr. Crystal. He indicated that he had received an iFECS report showing the following: that Dr. Wujciak was bypassed because he previously served as an impartial medical examiner; that Dr. Robert Dennis was bypassed because he was in court on July 9, 2019 (with telephone conversations occurring at 11:28 a.m. and again at 11:29 a.m. on that date); and that Dr. Sultan was bypassed for “some reason regarding direct deposit.” Counsel requested a complete and total explanation regarding the iFECS process. He maintained that it seemed every physician on the list was a “regular for OWCP,” rather than a “referee-type physician,” and alleged that the physicians had been used for second opinions and had performed many examinations for OWCP in the past. Counsel requested an explanation as to why Dr. Dennis was bypassed and why his office was called on two occasions one minute apart, and noted that he wished to receive better explanations as to why the other physicians were bypassed. He indicated that he understood that Dr. Wujciak was bypassed because he previously served as an impartial medical examiner. Counsel noted, however, that appellant lived in the area of Irvington, New Jersey, and asserted that there were many orthopedists in her area that could have been considered for an impartial medical examiner.

By decision dated May 19, 2020, OWCP denied appellant’s request for reconsideration of the merits of her 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 or her own motion or on application.¹⁵ 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.¹⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.¹⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁸ 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

¹⁵ 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).

¹⁶ 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).

¹⁷ *Id.* at § 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 iFECS. *Id.* at Chapter 2.1602.4b.

¹⁸ *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

reopening the case for review on the merits.¹⁹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On February 19, 2020 appellant filed a timely request for reconsideration from a September 5, 2019 decision.²¹ The Board finds that she did not establish that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. In a February 19, 2020 statement, counsel argued that Dr. Crystal was improperly selected as an impartial medical examiner and maintained that therefore his August 1, 2019 report could not serve as the basis for denying appellant's claim that her October 22, 2012 left knee surgery should be authorized as necessitated by a work-related condition and her claim that she should receive wage-loss compensation for work-related disability commencing June 21, 2012. However, he did not provide support for the argument that Dr. Crystal was improperly selected as an impartial medical examiner. Counsel merely detailed the contents of documents already in the case record which contained information regarding why other physicians were bypassed before the selection of Dr. Crystal. He did not cite OWCP's procedures/regulations or Board precedent to support his assertion that OWCP improperly selected Dr. Crystal. In another February 19, 2020 report, counsel asserted that the opinions contained in Dr. Crystal's August 1, 2019 report were insufficiently well rationalized to serve as the basis for OWCP's denial of appellant's surgery and disability claims. He alleged that Dr. Crystal had not accepted the factual underpinnings of the SOAF because of the manner in which he interpreted the findings of an August 1, 2019 MRI scan of appellant's left knee. However, there is no indication that Dr. Crystal had not acknowledged the facts contained in the SOAF, including OWCP's acceptance that appellant sustained a medial meniscus tear of the left knee on October 5, 2019 and that it authorized January 12, 2010 left knee surgery. He only noted that the August 1, 2019 MRI scan did not show a lateral meniscus tear of the left knee, a condition which has not been accepted as employment related. For these reasons, 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).

On reconsideration, appellant resubmitted copies of Dr. Crystal's August 1, 2019 report which were already in the case record. The submission of this evidence does not warrant a review of appellant's claim on the merits because Board has held that the submission of evidence which

¹⁹ *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).

²⁰ *N.L.*, Docket No. 18-1575 (issued April 3, 2019).

²¹ *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²²

Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3). The Board accordingly finds that she 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 OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 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

²² See *supra* note 20.