



## **ISSUE**

The issue is whether OWCP properly determined that appellant's May 14, 2013 application for reconsideration was insufficient to warrant merit review of the claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

The case has been before the Board on two prior appeals. In a decision dated June 28, 2010, the Board affirmed OWCP's November 6, 2008 decision terminating appellant's compensation and medical benefits effective that date and a June 18, 2009 decision denying merit review.<sup>3</sup> The Board found that the weight of the medical evidence, which was represented by the report of a referee physician, established that appellant had no further disability or residuals due to his accepted left foot injury. In a decision dated August 1, 2012, the Board affirmed a December 7, 2011 OWCP merit decision with respect to the termination of compensation.<sup>4</sup> The Board found that OWCP properly terminated appellant's compensation for wage-loss and medical benefits effective November 6, 2008 and appellant did not establish a continuing disability or residuals of an employment-related condition. The facts and the law contained in those decisions are incorporated herein by reference.

By letter dated May 14, 2013, appellant, through his representative, requested reconsideration. The representative stated that appellant had requested a schedule award in 2010 and OWCP had not issued a decision. Appellant submitted a May 31, 2013 report from Dr. Carol De Costa, a Board-certified physiatrist, who provided a history and results on examination. In discussing an impairment to the left leg, Dr. De Costa opined that appellant's "knee strain is a consequential injury caused by the left lower extremity neurologic as well as tendinous damage due to his on-the-job injury."<sup>5</sup> She opined that appellant had a 70 percent lower extremity impairment.

By decision dated July 30, 2013, OWCP found that the application for reconsideration was insufficient to warrant merit review of the claim. It found that the evidence regarding a schedule award was irrelevant to the issue presented.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>6</sup> OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains

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<sup>3</sup> Docket No. 09-1911 (issued June 28, 2010).

<sup>4</sup> Docket No. 12-444 (issued August 1, 2012).

<sup>5</sup> The accepted conditions are left foot contusion, left ankle strain, left tarsal tunnel syndrome and lesion of the left plantar nerve.

<sup>6</sup> 5 U.S.C. § 8128(a) (providing that "[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").

evidence that either “(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP.”<sup>7</sup> Section 10.608(b) of the Code of Federal Regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.<sup>8</sup>

### ANALYSIS

In the present case, appellant submitted an application for reconsideration dated May 14, 2013. Appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument. He submitted a new medical report<sup>9</sup> from Dr. De Costa and stated that this was relevant evidence to the issue presented.

The underlying merit issue in the case was the termination of compensation November 6, 2008, and a continuing employment-related condition or disability. Although OWCP stated that medical evidence regarding permanent impairment was irrelevant, Dr. De Costa did provide new and relevant evidence with respect to a continuing employment-related condition. In her May 31, 2012 report, Dr. De Costa opined, for the first time, that appellant had sustained a left knee sprain as a consequence of the employment injuries. Dr. De Costa noted in her medical history that she had treated appellant on July 2, 2009, and she had noted pain in the left knee due to direct trauma on the job. There is no indication in the record of a prior medical report discussing a consequential left knee strain. Since one of the merit issues was whether appellant continued to have an employment-related condition after November 6, 2008, this is new and relevant evidence to the issue presented. It is not necessary that appellant establish the claim, but only that he submit “relevant and pertinent evidence not previously considered by OWCP.”

The Board finds that appellant submitted evidence sufficient to require a merit review. Pursuant to 20 C.F.R. § 10.606(b)(2), the case must be remanded to OWCP for a proper merit decision on the issues presented.

### CONCLUSION

The Board finds that appellant’s application for reconsideration was sufficient to require a merit decision by OWCP.

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<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>9</sup> The May 31, 2012 report was initially submitted on July 19, 2012, and resubmitted on May 21, 2013. On the prior appeal, the Board reviewed only evidence that was before OWCP at the time of the December 7, 2011 OWCP decision. Evidence submitted after that date has not been reviewed in a merit decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 30, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 6, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board