



## 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).

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

## FACTUAL HISTORY

On December 10, 2002 appellant, then a 46-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that on August 1, 2002 he first became aware of his bilateral Achilles tendon condition. OWCP accepted the claim for bilateral calcaneous spurs. It also accepted sprain of the right shoulder rotator cuff and upper arm. OWCP authorized resection of the fractured bone and multiple bone fragments posterior of the left calcaneus, repair of Achilles tendon of the left ankle, resection of the bone posterior right calcaneus and repair of Achilles tendon of the right ankle with removal of a calcified bone. The procedures were performed on July 16, 2003 and March 3, 2004 by Dr. Brad A. Katzman, a Board-certified podiatrist.

In a March 14, 2007 decision, OWCP granted appellant a schedule award for one percent permanent impairment of the right arm and one percent permanent impairment of each leg.<sup>3</sup>

On subsequent dates, OWCP expanded the accepted conditions to include bilateral Achilles tendinitis; crushing injury of the ankle and foot; multiple and unspecified open wound of the leg without complications; and bilateral shoulder, upper arm, and rotator cuff sprain; and bilateral shoulder impingement syndrome. It authorized right and left shoulder open subacromial decompression with open rotator cuff repair performed on March 24, 2009 and October 26, 2010, respectively, by Dr. Scott Goldman, an attending Board-certified orthopedic surgeon.

On March 25, 2013 appellant returned to modified-duty work as a customer care agent. He stopped work on July 18, 2013 and filed a recurrence claim (Form CA-2a) alleging that he sustained right knee, left hip, and lower back injuries on that day due to his accepted work-related injuries.<sup>4</sup> Subsequently, appellant requested expansion of his claim to include conditions of the right knee, lower back and left hip.

In a January 14, 2014 decision, OWCP denied expansion of appellant's claim because the medical evidence of record failed to demonstrate that the diagnosed conditions were caused by the accepted work injuries.

On February 5, 2014 appellant requested a telephone hearing before an OWCP hearing representative from the January 14, 2014 decision. This was held on August 12, 2014.

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<sup>3</sup> In a January 20, 2016 decision, OWCP granted appellant a schedule award for an additional 10 percent permanent impairment of the right upper extremity for a total of 11 percent permanent impairment.

<sup>4</sup> In a January 17, 2014 decision, OWCP denied appellant's claim for a recurrence of disability commencing on July 18, 2013. It found that the medical evidence of record was insufficient to establish that he was disabled due to a material change or worsening of his accepted work-related conditions. That decision was affirmed on October 24, 2014 by an OWCP hearing representative.

Following the hearing, appellant submitted an August 15, 2014 report from Dr. Goldman. Dr. Goldman noted that appellant had been under his care for treatment of a painful condition affecting his bilateral shoulders and bilateral ankles (Achilles tendons). He related, however, that due to an altered gait, appellant complained about low back, left hip, and right knee pain. Dr. Goldman maintained that it was medically most probable that the injury to his left hip, low back, and right knee was due to the altered gait (limp) that developed from his bilateral ankle injuries. He noted that due to this limp, the left hip, low back, and right knee were overcompensating which eventually caused pain in these areas. Dr. Goldman concluded that it was medically most probable that appellant would benefit from conservative care. In a report dated September 8, 2014, he noted a history of the accepted work injuries and appellant's medical treatment. Dr. Goldman reported findings on examination of the bilateral shoulders, ankles, and upper and lower limbs. He diagnosed right shoulder impingement syndrome with rotator cuff injury, left shoulder impingement syndrome that was doing well status postsurgery, right Achilles tendinitis that was doing well, and left Achilles tendinitis that was inflamed and thickened. Dr. Goldman addressed appellant's treatment plan, which included a request for authorization to evaluate and treat his right knee condition as it was a compensable consequence secondary to overcompensating for his bilateral ankle (Achilles tendon) injuries.

By decision dated October 24, 2014, an OWCP hearing representative set aside the January 14, 2014 decision and remanded the case to OWCP for further development of the medical evidence as Dr. Goldman's August 15 and September 8, 2014 reports provided an uncontroverted inference of causal relationship between the accepted work injuries and the claimed additional conditions. She directed OWCP to refer appellant to an OWCP district medical adviser (DMA) to determine whether the claimed additional medical conditions resulted from his accepted work injuries.

On October 4, 2015 an OWCP DMA reviewed the medical record and found that appellant's right knee, lower back, and left hip conditions were not causally related to the accepted work conditions.

By decision dated October 8, 2015, OWCP again denied expansion of appellant's claim. It accorded the weight of the medical evidence to the DMA's October 4, 2015 opinion.

Appellant submitted medical reports and diagnostic test results dated October 11, 2006 to August 29, 2016 which addressed his bilateral ankle, foot, and shoulder conditions, permanent impairment, work capacity and restrictions, and medical treatment. He also submitted a February 9, 2016 report from Dr. Goldman who requested that OWCP expand the acceptance of appellant's claim. Dr. Goldman restated his prior opinion that it was most reasonably, medically probable that appellant's right knee condition was a compensable consequence caused by his altered gait from his bilateral Achilles tendinitis. He suspected that he may have a meniscal right knee injury and maintained that treatment was necessary because he currently had internal derangement of the right knee. Dr. Goldman noted that once appellant was evaluated, he would know whether a magnetic resonance imaging (MRI) scan would be beneficial. In a March 7, 2016 report, he reiterated his request for authorization to treat appellant's right knee symptoms and pain because he walked with an altered gait due to his bilateral Achilles tendons.

In a September 8, 2016 letter, appellant, through counsel, requested reconsideration of the October 8, 2015 decision and resubmitted Dr. Goldman's February 9, 2016 letter.

Appellant also submitted a September 1, 2016 progress note from his physical therapist which noted a diagnosis of right shoulder impingement syndrome and addressed the treatment of his right shoulder pain.

By decision dated December 16, 2016, OWCP denied reconsideration of the merits of appellant's claim. It found that the evidence submitted was duplicative and irrelevant.

### **LEGAL PRECEDENT**

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>5</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>6</sup> This section provides that the application for reconsideration must be submitted in writing and 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 by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup> Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### **ANALYSIS**

On September 8, 2016 appellant requested reconsideration of OWCP's October 8, 2015 decision which found he had failed to sustain right knee, left hip, and lower back conditions as a consequence of his accepted bilateral calcaneous spurs, bilateral shoulder, upper arm, and rotator sprain, bilateral Achilles tendinitis, crushing injury of the ankle and foot, multiple and unspecified open wound of the leg without complications, and bilateral shoulder impingement syndrome. It authorized July 16, 2003, March 3, 2004, March 24, 2009 and October 26, 2010 bilateral foot and ankle and shoulder surgeries. The underlying issue on reconsideration was whether appellant established a causal relationship between his claimed additional conditions and the accepted work conditions. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> *Id.* at § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

In his September 8, 2016 request for reconsideration, counsel did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant has failed to submit relevant and pertinent new evidence in support of reconsideration. Dr. Goldman's February 9 and March 7, 2016 reports, while new, essentially reiterated his prior opinion that appellant's accepted claim should be expanded to include a right knee condition and medical treatment should be authorized for this condition as it was caused by appellant's altered gait resulting from his accepted bilateral Achilles tendinitis. 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.<sup>10</sup>

The new progress note dated September 1, 2016 from appellant's physical therapist is insufficient to warrant merit review as a physical therapist is not considered a physician as defined under FECA.<sup>11</sup> The Board finds, therefore, that this evidence is not relevant to the underlying medical issue on appeal and is insufficient to warrant further merit review of appellant's claim.

The Board accordingly finds that appellant failed to meet 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.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. However, as found, OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits.

### **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).

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<sup>10</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>11</sup> *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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