

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

A.G., Appellant	)	
	)	
and	)	<b>Docket No. 18-0755</b>
	)	<b>Issued: November 2, 2018</b>
<b>DEPARTMENT OF COMMERCE, U.S.</b>	)	
<b>CENSUS BUREAU, Long Beach, CA, Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 26, 2018 appellant filed a timely appeal from an October 12, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 18, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**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 October 10, 2013 appellant, then a 53-year-old field representative, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral foot, ankle, Achilles

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

tendon, and knee conditions due to his employment duties which required excessive walking, standing, bending, and turning while carrying heavy equipment. On December 3, 2013 OWCP accepted appellant's claim for bilateral Achilles tendinitis.

In a report dated October 23, 2014, Dr. Rick F. Pospisil, a Board-certified orthopedic surgeon, found that appellant had reached maximum medical improvement (MMI) from his accepted condition of bilateral Achilles tendinopathy. He found that appellant had loss of range of motion in dorsiflexion bilateral to 10 degrees. Dr. Pospisil provided impairment ratings in terms of the whole person.

On October 1, 2015 OWCP referred Dr. Pospisil's report to OWCP's medical adviser for review under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup>

Appellant filed a claim for a schedule award (Form CA-7) on October 7, 2015.

In a report dated October 7, 2015, OWCP's medical adviser, utilizing Dr. Pospisil's findings, found that appellant had seven percent permanent impairment of each of his lower extremities due to loss of range of motion based on his 10 degrees of dorsiflexion bilaterally<sup>3</sup> in accordance with the A.M.A., *Guides*.

In a report dated January 7, 2016, Dr. Raymond M. Bautista, a podiatrist, found that appellant had reached MMI due to his bilateral foot and ankle conditions. On physical examination he found normal muscle strength, no pain with range of motion, and *pes planus* foot-type bilaterally. Dr. Bautista found moderate pronation of both feet while walking. He diagnosed bilateral Achilles tendinitis, bilateral plantar fasciitis, and *pes planus* foot deformity. Dr. Bautista found that appellant had no ratable permanent impairment under the fifth edition of the A.M.A., *Guides*.<sup>4</sup>

On February 5, 2016 appellant provided a completed Form CA-7 claim for a schedule award.

In a letter dated March 24, 2016, OWCP requested that appellant provide a medical report assessing his percentage of permanent impairment based on the sixth edition of the A.M.A., *Guides*. It afforded him 30 days for a response.

On March 24, 2016 OWCP referred Dr. Bautista's January 7, 2016 report to the medical adviser for review of appellant's percentage of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>3</sup> *Id.* at 549, Table 16-22.

<sup>4</sup> *Id.* (5<sup>th</sup> ed. 2001).

Dr. Bautista submitted a supplemental report dated March 31, 2016. He applied the sixth edition of the A.M.A., *Guides* to his findings and in accordance with Table 16-2,<sup>5</sup> found that appellant had one percent permanent impairment of each of his lower extremities. Dr. Bautista found that appellant had a class 1 tendinitis with palpatory or radiographic findings, he rated the grade modifiers finding that appellant had no gait derangement under functional history.<sup>6</sup> He found grade modifier 1 under physical examination due to minimal palpatory findings<sup>7</sup> and no adjustment for clinical studies.<sup>8</sup> Dr. Bautista applied the net adjustment formula and determined that appellant had one percent permanent impairment of each of his lower extremities entitling him to schedule award compensation.<sup>9</sup>

In a report dated March 25, 2016, OWCP's medical adviser reviewed all of the medical evidence and agreed with Dr. Bautista's permanent impairment rating.

By decision dated November 22, 2016, OWCP granted appellant schedule award compensation for one percent permanent impairment of each of his lower extremities. The period of the award of compensation was from January 7 through February 16, 2016.

On December 14, 2016 appellant requested an oral hearing before an OWCP hearing representative. He testified during the oral hearing on May 23, 2017 and asserted that he was entitled to greater schedule award compensation. Appellant also asserted that his schedule award compensation should have been based on the higher impairment rating.

By decision dated July 18, 2017, OWCP's hearing representative found that appellant had no more than one percent permanent impairment of each of his lower extremities for which he previously received schedule award compensation.

On October 3, 2017 appellant requested reconsideration of the July 18, 2017 decision and contended that he was entitled to schedule award compensation based on findings of Dr. Pospisil rather than that of Dr. Bautista. He further contended that OWCP should schedule a second opinion evaluation regarding the extent of his percentage of permanent impairment due to his accepted employment injuries, that he required further medical treatment for his accepted conditions, and that he should receive schedule award compensation based on his date of injury, August 13, 2013 and not only for a five-week period determined by his employing establishment.

By decision dated October 12, 2017, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a). It found that he had not submitted evidence addressing that his schedule award compensation was miscalculated and that his letter

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<sup>5</sup> *Id.* at 501, Table 16-2.

<sup>6</sup> *Id.* at 516, Table 16-6.

<sup>7</sup> *Id.* at 517, Table 16-7.

<sup>8</sup> *Id.* at 519, Table 16-8.

<sup>9</sup> *Id.* at 521.

did not constitute the necessary relevant and pertinent new medical evidence to establish entitlement to an additional schedule award.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>10</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>12</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.<sup>13</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>14</sup>

### **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's October 3, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. The schedule award provisions of FECA<sup>15</sup> and its implementing regulations<sup>16</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Appellant has not alleged or demonstrated a specific error in the payment of his schedule award pursuant to FECA or its regulations. As well, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Appellant made his allegations regarding his entitlement to increased schedule award compensation before OWCP's hearing representative on May 23, 2017. The Board has held that

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<sup>10</sup> 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>11</sup> 20 C.F.R. § 10.606(b)(3).

<sup>12</sup> *Id.* at § 10.607(a).

<sup>13</sup> *Id.* at § 10.608(b).

<sup>14</sup> *M.E.*, 58 ECAB 694 (2007).

<sup>15</sup> 5 U.S.C. § 8107.

<sup>16</sup> 20 C.F.R. § 10.404.

the submission of argument which repeats or duplicates argument already in the case record does not constitute a basis for reopening a case.<sup>17</sup> Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

Appellant also did not include any relevant and pertinent new evidence in support of his reconsideration request. As OWCP relied on medical evidence in reaching his percentage of permanent impairment for schedule award compensation purposes, medical evidence addressing the percentage of permanent impairment for schedule award compensation purposes would be necessary to reopen his claim. The submission of factual evidence does not address the particular issue involved, schedule award compensation, and appellant's allegations do not constitute a basis for reopening a case.<sup>18</sup> Therefore, appellant's assertions in his October 3, 2017 request for reconsideration are insufficient to require OWCP to reopen the claim for consideration of the merits.<sup>19</sup>

As appellant did not satisfy any of the three requirements under section 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

### **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>17</sup> See *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

<sup>18</sup> *J.R.*, Docket No. 17-0346 (issued July 24, 2018).

<sup>19</sup> When a claimant does not submit any relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision. See *K.K.*, Docket No. 15-1684 (issued October 23, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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