

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

J.P., Appellant	)	
	)	
and	)	Docket No. 19-0799
	)	Issued: August 15, 2019
U.S. POSTAL SERVICE, HAVERTOWN POST OFFICE, Havertown, PA, Employer	)	
	)	

*Appearances:*  
Aaron B. Aumiller, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 25, 2019 appellant, through counsel, filed a timely appeal from an August 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days has elapsed from the last merit decision, dated May 30, 2017, to the filing of this

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<sup>1</sup> 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.

<sup>2</sup> "Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from August 28, 2018, the date of OWCP's last decision was February 24, 2019. As this fell on a Sunday, appellant had until the following business day, Monday, February 25, 2019 to file the appeal. Since using March 1, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is February 25, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

appeal, pursuant to the Federal Employees' Compensation Act<sup>3</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**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 9, 1993 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 5, 1993 he injured his right knee while in the performance of duty. OWCP accepted the claim for right knee sprain, a dislocation and sprain of the anterior cruciate ligament (ACL), a tear of the ACL, patellofemoral arthritis, a lateral meniscus tear, and synovitis.

By decision dated July 16, 2001, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity.

By decision dated April 8, 2002, an OWCP hearing representative vacated the July 16, 2001 decision finding that appellant was entitled to a schedule award for an additional 17 percent permanent impairment of the right lower extremity.

On remand, by decision dated May 1, 2002, OWCP granted appellant a schedule award for an additional 17 percent permanent impairment of the right lower extremity.<sup>5</sup> Appellant appealed to the Board. By decision dated July 21, 2003, the Board affirmed the May 1, 2002 decision as modified to reflect that he had a total right lower extremity impairment of 27 percent.<sup>6</sup>

By decision dated October 6, 2003, OWCP granted appellant a schedule award for an additional 8 percent permanent impairment of the right lower extremity, for a total right lower extremity impairment of 27 percent.

On March 22, 2012 appellant underwent bilateral total knee replacements.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Docket No. 03-0817 (issued July 22, 2003).

<sup>5</sup> By decision dated May 22, 2002, OWCP reduced appellant's compensation to zero based on its determination that his actual earnings as a modified letter carrier, effective May 8, 2002, fairly and reasonably represented his wage-earning capacity.

<sup>6</sup> *See supra* note 4.

In a report dated January 10, 2014, Dr. Arthur Becan, an orthopedic surgeon, noted that appellant had a history of employment injuries in 1993 and 1998. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found 25 percent permanent impairment of each lower extremity due to his bilateral total knee arthroplasties.

On August 12, 2014 appellant filed a claim for an increased schedule award.

By decision dated May 15, 2015, OWCP denied appellant's request for an increased schedule award. It found that the medical evidence failed to establish more than the previously awarded 27 percent permanent impairment of the right lower extremity. OWCP advised that it had not accepted the claim for a left knee condition.

On May 21, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

By decision dated March 4, 2016, OWCP's hearing representative affirmed the May 15, 2015 decision. He noted that appellant had a separate claim for a left knee condition from a 1998 employment injury, assigned OWCP File No. xxxxxx327, and had pursued a schedule award claim under that file number. OWCP's hearing representative found that he was attempting to adjudicate a left knee impairment under two separate file numbers. He determined that appellant had no more than the previously awarded 27 percent right lower extremity impairment.

In a report dated March 3, 2017, Dr. Becan indicated that appellant had injured his right knee on November 4, 1993 and in 1998. He related that, as a result of "altered body mechanics, [he] developed a derivative injury to his left knee which necessitated a left total knee arthroplasty on March 22, 2012." Dr. Becan attributed appellant's left knee condition to his right knee injuries.

On March 3, 2017 appellant, through counsel, requested reconsideration. He asserted that Dr. Becan, in his March 3, 2017 supplemental report, attributed his left knee condition related to his right knee injury and that he was thus entitled to a schedule award for the left knee under the current claim.

By decision dated May 30, 2017, OWCP denied modification of its March 4, 2016 decision. It found that Dr. Becan's March 3, 2017 report was of diminished probative value as he failed to describe how altered body mechanics resulted in a consequential left knee injury that required a left total knee arthroplasty.

On May 30, 2018 appellant, through counsel, requested reconsideration. He contended that OWCP used the wrong standard in evaluating the evidence. Counsel further contended that Dr. Becan had explained in his March 3, 2017 report how appellant sustained a consequential left knee condition from the accepted right knee injury.

By decision dated August 28, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim under 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 payment of compensation at any time on his own motion or on application.<sup>7</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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>8</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.<sup>9</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>10</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>11</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).

By decision dated May 30, 2017, OWCP found that appellant had not met his burden of proof to establish a consequential left knee condition entitling him to a schedule award as a result of his November 5, 1993 employment injury. On May 30, 2018 appellant requested reconsideration. The underlying issue on reconsideration is the medical question of causal relationship. Thus, the Board must determine whether appellant presented sufficient evidence or argument regarding causal relationship to warrant a merit review pursuant to 5 U.S.C. § 8128(a).<sup>12</sup>

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. On reconsideration appellant, through counsel, generally asserted that OWCP used an improper standard in evaluating the evidence. He further

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>9</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. 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>10</sup> *Id.* at § 10.608(a); *see also A.P.*, Docket No 19-0224 (issued July 11, 2019).

<sup>11</sup> *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

<sup>12</sup> *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

alleged that Dr. Becan's report was sufficient to meet his burden of proof to establish a consequential left knee condition entitling him to a schedule award. However, appellant failed to raise any specific error by OWCP in its evaluation of the medical evidence or provide any support for his allegations. Thus, the Board finds that he has not advanced a relevant legal argument not previously considered by OWCP.<sup>13</sup> Consequently, 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).<sup>14</sup>

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. As he did not provide relevant and pertinent new evidence, appellant is not entitled to a merit review based on the third requirement under section 10.606(b)(3).<sup>15</sup>

The Board, accordingly, finds that appellant did not 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.<sup>16</sup>

On appeal counsel asserts his previous claims that the medical evidence established that appellant sustained a consequential left knee condition and was, thus, entitled to a schedule award for his left knee arthroplasty. As discussed, however, the evidence appellant submitted on reconsideration has not met the requirements to reopen his case for a review of the merits of the claim.<sup>17</sup>

### **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>13</sup> *P.W.*, Docket No. 17-1911 (issued June 6, 2018).

<sup>14</sup> *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>15</sup> *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

<sup>16</sup> *See L.A.*, Docket No. 18-1226 (issued December 28, 2018) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

<sup>17</sup> *See J.V.*, Docket No. 18-1534 (issued February 25, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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