



pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### **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 June 29, 2017 appellant, then a 38-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) for a torn left Achilles tendon that allegedly occurred while he was playing basketball on June 27, 2017 while in the performance of duty. He reported that as he jumped, his Achilles snapped. The alleged June 27, 2017 incident occurred at 2:20 p.m. at the employing establishment's on-premises Warrior Fitness Center.<sup>4</sup> Appellant stopped work on the date of injury.

Appellant was treated at the employing establishment's occupational health unit by an unknown provider who noted that appellant was seen on June 27, 2017 for left ankle pain. He was released to work with medical restrictions.

In a July 5, 2017 examination note, Dr. Robert S. Rice, a Board-certified orthopedic surgeon, related that appellant was under his care following surgery on June 30, 2017 to repair his left Achilles tendon. He requested that appellant be excused from work from June 30 to July 13, 2017.

In a July 13, 2017 doctor's note, Michael Pulley, a certified physician assistant, related that appellant was under his care following a recent Achilles surgery. He noted that appellant could not work for another two weeks.

In a July 14, 2017 letter, the employing establishment controverted appellant's claim, including entitlement to continuation of pay, noting that physical exercise was not a requirement of his position as a maintenance mechanic. It provided a copy of a maintenance mechanic position description.

In an August 14, 2017 occupational health note, Dr. Neal Taylor, a Board-certified family practitioner, reported that appellant could return to work with restrictions.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>4</sup> Appellant's regular tour of duty was Monday through Friday, 6:00 a.m. to 3:30 p.m.

Mr. Pulley continued to treat appellant and completed work status notes dated July 28 to August 14, 2017. He related that appellant was under his care following recent surgery and could work light duty with restrictions of no lifting more than 25 pounds; no running, and jumping, climbing; and no bending or squatting with more than 15 pounds.

On August 14, 2017 appellant returned to full-time modified-duty work.

By development letter dated August 15, 2017, OWCP informed appellant that his claim had initially been accepted as a minor injury, but was now being reopened for consideration of the merits. It requested that he respond to an attached development questionnaire and provide medical evidence to establish that he sustained a diagnosed condition as a result of the alleged employment incident. OWCP afforded appellant 30 days to submit the necessary evidence. A similar letter was sent to the employing establishment.

In an August 22, 2017 letter, Dr. Rice described that on June 27, 2017 appellant was playing basketball at the employing establishment's gym during his "work-provided recreational time" when he injured his left ankle. He indicated that appellant was treated in his office on June 28, 2017 and was placed in a fracture boot. Dr. Rice related that a magnetic resonance imaging (MRI) scan showed a severe partial to complete tear of appellant's left Achilles tendon. He reported that on June 30, 2017 appellant underwent surgery to repair the Achilles tendon.

On August 28, 2017 OWCP received appellant's response to its development letter. He related that, on June 27, 2017, he was playing basketball during "approved gym time" at the employing establishment when he injured his left Achilles tendon. Appellant reported that he informed J.G., his supervisor, who escorted him to occupational medical services. He explained that he was not required to participate in the physical fitness time, but it was an opportunity provided by his employer. Appellant noted that his approved physical fitness time occurred during regular work hours.

OWCP received a statement from J.G. who confirmed that, on June 27, 2017, appellant informed him that he sustained a left ankle injury while on approved gym time. It also received a statement from M.F., an employee, who related that on June 27, 2017 appellant was participating in a basketball game and chasing down a ball when he suddenly fell over.

In a September 11, 2017 note, Mr. Pulley related that appellant was progressing well with physical therapy. He opined that appellant could continue to work without restrictions.

On September 13, 2017 appellant returned to full-time regular-duty work.

By decision dated September 18, 2017, OWCP denied appellant's claim finding that he was not in the performance of duty when injured on June 27, 2017. It noted that according to the employing establishment, appellant's participation in the basketball game was not related to his employment as a mechanic, nor was he required to participate in the activity.

Following the September 18, 2017 decision, OWCP received several physical therapy notes dated September 18 to October 4, 2017.

On October 16, 2017 appellant requested reconsideration.

Appellant submitted physical therapy reports dated October 16 to 30, 2017.

By decision dated January 8, 2018, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that his reconsideration request neither raised substantive legal questions, nor included new and relevant evidence sufficient to warrant further merit review of his claim.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>5</sup> 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>6</sup>

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.<sup>7</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</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>10</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 did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>11</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> 20 C.F.R. § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

Along with his reconsideration request, appellant submitted a series of physical therapy notes dated September 18 to October 30, 2017. The Board finds that these notes failed to address the underlying issue of whether appellant sustained a traumatic injury while in the performance of duty on June 27, 2017, as alleged. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup> Thus, appellant was also not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>13</sup>

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review. On appeal, counsel argues that OWCP acted erroneously in denying appellant's claim, and related that OWCP had previously accepted appellant's claim for a right leg injury under similar circumstances. As noted above, however, the Board lacks jurisdiction over the merits of this claim.

### **CONCLUSION**

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>12</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>13</sup> *J.W.*, Docket No. 17-1943 (issued January 28, 2019); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2019  
Washington, DC

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

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

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