

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

D.L., Appellant	)	
	)	
and	)	<b>Docket No. 20-0512</b>
	)	<b>Issued: November 30, 2020</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, West Palm Beach, FL, Employer	) ) )	
	)	

*Appearances:*  
Christina Berrios, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On January 6, 2020 appellant, through his representative, filed a timely appeal from an October 2, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 27, 2018, to the

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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.

filing of this appeal, 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 30, 2013 appellant, then a 61-year-old automation clerk, filed a traumatic injury claim (Form CA-1) alleging that, on June 19, 2013, he noticed a sharp pain in his right knee when pushing a general postal container (GPC) of mail while in the performance of duty. He stopped work on June 21, 2013 and returned to work on June 29, 2013.<sup>4</sup> Appellant stopped work on September 5, 2013 and underwent a right knee arthroscopy. OWCP accepted the claim for right knee medial meniscus tear. Appellant returned to work on November 9, 2013. OWCP paid him intermittent wage-loss compensation on the supplemental rolls as of August 3, 2013.

On June 2, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a May 29, 2017 report, Dr. Graham F. Whitfield, an orthopedic surgeon, provided a permanent impairment rating based on a compilation of appellant's subjective complaints and examination findings from August 16, September 20, and November 10, 2016, and February 23, and April 4, 2017. Multiple measurements of range of motion (ROM) findings of the right knee were recorded and averaged from the different dates of service. Dr. Whitfield opined that appellant reached maximum medical improvement (MMI) on February 23, 2017. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>5</sup> he opined that appellant had 12 percent permanent impairment of the right lower extremity for Class 1 partial tear of the medial and lateral menisci after the assignment of grade modifiers and application of the net adjustment formula.

In a report dated July 29, 2017, Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted deficiencies in Dr. Whitfield's report and indicated that there was not enough information to perform a permanent impairment rating.

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

<sup>3</sup> The Board notes that following the October 2, 2019 decision, OWCP received additional evidence. 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> A July 19, 2013 magnetic resonance imaging (MRI) scan of appellant's right knee revealed tear of posterior horn medial meniscus, bone bruise in medial femoral condyle, small joint effusion and soft tissue edema anteriorly. The lateral meniscus, anterior and posterior cruciate ligaments, collateral ligaments, quadriceps and patellar tendons were intact.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

He recommended that appellant be sent to a second opinion examiner to perform an impairment evaluation and rating.

OWCP forwarded the case record, including Dr. Whitfield's report and an August 9, 2017 statement of accepted facts (SOAF), to Dr. Jon D. Donshik, a Board-certified orthopedic surgeon, for a second opinion impairment evaluation. In a September 1, 2017 report, Dr. Donshik related appellant's history of injury and medical history. He noted that appellant was involved in a nonwork-related motor vehicle accident on September 26, 2016 and sustained, in relevant part, a nondisplaced fracture of the right patella and had been placed in a brace. He also discussed compared magnetic resonance imaging (MRI) scans of the right knee dated June 22, 2015 and May 19, 2016. Dr. Donshik reported the findings of his physical examination, noting that appellant had an antalgic gait, ROM of the right knee was 0 to 120 degrees of knee flexion with no instability. Appellant had medial and lateral joint line tenderness as well as patellar tenderness and crepitus. He noted that Dr. Whitfield rated appellant for tears and meniscectomies of the medial and lateral meniscus; however, the case was accepted only for medial meniscal tear. Dr. Donshik opined that using the lateral meniscus for rating purposes was incorrect. He determined that appellant's date of MMI was August 31, 2017, the date of appellant's examination. Dr. Donshik opined that appellant's final right lower extremity impairment was Class 1, grade C or two percent impairment of the right lower extremity for partial medial meniscectomy under Table 16-3, page 509 of the A.M.A., *Guides*.

In an October 28, 2017 report, the DMA opined that appellant reached MMI on September 1, 2017, the date of Dr. Donshik's examination. He concurred with Dr. Donshik's rating and method of calculation for permanent impairment of appellant's right lower extremity. He noted that, although appellant underwent a partial medial and lateral meniscectomy, the lateral meniscal tear was not an accepted condition and was not included in the calculation. The DMA also noted that Dr. Donshik correctly utilized the diagnosis-based impairment (DBI) rating method. Under Table 16-3, page 509 of the A.M.A., *Guides*, Knee Regional Grid -- Lower Extremity Impairment, he found a class of diagnosis (CDX) of 1, grade C default impairment rating for a partial medial meniscal injury was two percent impairment. He indicated that appellant had a grade modifier for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 1, and that a grade modifier for clinical studies (GMCS) was not applicable. Application of the net adjustment formula resulted in a net adjustment of 0, equaling two percent permanent impairment of the right lower extremity.

By decision dated November 14, 2017, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. The period of the award, equivalent to 5.76 weeks of compensation, ran for the period September 1 through October 11, 2017.

On December 1, 2017 appellant, through his representative, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on May 16, 2018. Appellant's representative alleged that appellant had sustained both medial and lateral meniscus right knee tears due to the accepted employment injury. Evidence received included an April 25, 2018 statement from appellant regarding the sufficiency of Dr. Donshik's examination.

In a January 30, 2018 report, Dr. Whitfield acknowledged that appellant's post-injury MRI scan did not show lateral meniscal tear, but it was present during the September 5, 2013 arthroscopic procedure. He opined that it was appropriate to include both the lateral meniscal tear and the medial meniscal tear in the impairment rating as it was within reasonable medical probability that both tears were sustained at the time of appellant's June 19, 2013 employment injury. Dr. Whitfield explained that findings made during an arthroscopic procedure were a more accurate way to precisely delineate the nature and extent of a patient's injuries/pathology in the knee as compared to a preoperative MRI scan.

By decision dated June 27, 2018, OWCP's hearing representative affirmed the November 14, 2017 schedule award decision. The hearing representative found that "while Dr. Whitfield argues that [the impairment rating] was incorrect because a lateral meniscal tear should be included, this inclusion was not supported by reports from appellant's initial treating surgeon, Dr. Reno Amro, a Board-certified orthopedic surgeon.

On June 27, 2019 appellant's representative requested reconsideration, arguing that the schedule award should include the lateral meniscal tear as it was present during the September 5, 2013 right knee arthroscopy. She also argued that OWCP's procedures emphasized that a schedule award should include permanent impairment resulting from conditions accepted by OWCP as job-related as well as any nonindustrial permanent impairment present in the same schedule member at the time of the rating examination. Appellant's representative further contended that OWCP failed to request clarification from Dr. Whitfield regarding his methodology in obtaining the date of MMI and his reasoning for using different examination dates for an impairment rating and that it had therefore improperly declined to determine whether a conflict existed between Dr. Whitfield and OWCP's second opinion physician.

By decision dated October 2, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim.

### **LEGAL PRECEDENT**

The Board has held that a claimant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.<sup>6</sup> When a claimant has requested reconsideration, and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.<sup>7</sup> Alternatively, the reconsideration request will be determined under Section 8128(a) of FECA, which vests OWCP with discretionary authority to

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<sup>6</sup> *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>7</sup> See *C.W.*, Docket No. 18-1110 (issued December 28, 2018); *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994); see also *B.K.*, 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate an application for reconsideration).

determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>8</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>9</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>10</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>11</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>12</sup>

### ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Initially, the Board finds that OWCP properly considered appellant's representative's correspondence as a request for reconsideration and not as a claim for an increased schedule award.<sup>13</sup> The underlying issue on reconsideration is whether the medical evidence demonstrates a greater permanent impairment. Thus, the Board must determine whether appellant presented sufficient evidence or argument regarding the extent of permanent impairment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).<sup>14</sup>

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<sup>8</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>9</sup> 20 C.F.R. § 10.606(b)(3); *J.K.*, Docket No. 19-1420 & 19-1422 (issued August 12, 2020); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>10</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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>11</sup> *Id.* at § 10.608(a); *M.S.*, Docket No. 19-1090 & 20-0408 (issued April 20, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>12</sup> *Id.* at § 10.608(b); *J.D.*, Docket No. 19-1757 (issued April 15, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>13</sup> *See K.W.*, Docket No. 19-0553 (issued November 8, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

<sup>14</sup> *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

The Board finds that appellant's representative raised a relevant legal argument in her request for reconsideration, which was not previously considered.

Under Table 16-3 of the A.M.A., *Guides*, a permanent impairment rating for both partial and medial meniscectomy would result in greater impairment than that previously awarded for impairment based solely on a partial medial meniscectomy. Counsel correctly noted that OWCP's procedures provide in relevant part that: "*Rated impairment should reflect the total loss as evaluated for the scheduled member (i.e., arm, leg, etc.) at the time of the rating examination.*"<sup>15</sup> There are no provisions for apportionment under FECA. As such, schedule awards include permanent impairment resulting from conditions accepted by OWCP as job related as well as and any nonindustrial permanent impairment present in the same scheduled member at the time of the rating examination."<sup>16</sup> The Board finds that appellant's request for reconsideration therefore raised a relevant legal argument not previously considered or addressed by OWCP sufficient to warrant reopening the claim for further merit review.

Pursuant to 20 C.F.R. § 10.606(b)(3), appellant is entitled to a merit review of the claim. The case will be remanded to OWCP for an appropriate merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly 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>15</sup> See *Raymond E. Gwynn*, 35 ECAB 247, 253 (1983).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(d) (March 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 2, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: November 30, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board