

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

M.M., Appellant)	
)	
and)	Docket No. 22-0780
)	Issued: November 16, 2022
DEPARTMENT OF STATE, SOUTH CENTRAL)	
ASIAN AFFAIRS, Washington, DC, Employer)	
)	

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
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 19, 2022 appellant filed a timely appeal from a December 13, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision on this issue, dated July 12, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence to OWCP following the December 13, 2021 decision and to the Board 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.*

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 December 30, 2020 appellant, then a 57-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained injuries as a result of a terrorist attack while in a USG vehicle from residence to place of work. He noted that he first became aware of his condition and realized its relation to his federal employment on March 8, 1995.

On January 15, 2021 OWCP received a December 8, 2020 attending physician's report (Form CA-20) by Dr. Richard Morse, who noted the March 8, 1995 injuries with surgical repair of the left ankle. On examination, Dr. Morse noted weakness and decreased range of motion of the left ankle. He indicated that appellant had permanent sequelae of ambulation and balance limitations.

On January 20, 2021 OWCP accepted appellant's claim for a head laceration, laceration with foreign body of the left lower extremity, puncture wound with foreign body of the left lower extremity, open displaced dome fracture of the left talus, displaced fracture of the anterior process of the left calcaneus, pathological fracture of the left ankle, and pathological fracture of the left foot.

In a May 10, 2021 Form CA-20, Dr. Matthew Waite, an osteopathic physician Board-certified in family practice, noted the March 8, 1995 employment injury. He diagnosed pathological fracture of the left foot and ankle.

In a May 17, 2021 Form CA-20, Dr. Hayden Poulson, a podiatrist, noted appellant's history of a March 8, 1995 gunshot wound to the left ankle with retained shrapnel. On examination, he observed limited range of motion of the left ankle and subtalar joint. Dr. Poulson diagnosed arthritis of the left midfoot, ankle, and subtalar joints with retained foreign body. He opined that these conditions were caused or aggravated by the March 8, 1995 employment injury as the arthritic changes were consistent with bullet damage to the left hindfoot and midfoot. Dr. Poulson answered a question "Yes" indicating that permanent effects were expected as a result of the occupational injury, including restricted mobility and diminished ability to stand.³

On June 7, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

³ On June 1, 2021 OWCP received March 2, 2021 x-ray reports. A March 2, 2021 x-ray report of the left ankle demonstrated cancellus screws within the talus, plantar and posterior calcaneus enthesophytes, and well-corticated ossific density project at the Achilles tendon near the calcaneus insertion. A March 2, 2021 x-ray of the right knee demonstrated metallic densities project anterior to the patella and adjacent to the proximal fibula, minimal degenerative changes of the right patellofemoral compartment, and a superior patellar pole osteophyte. A March 2, 2021 x-ray of the left knee demonstrated metallic densities at the distal thigh, and multiple metallic densities in the left and right lower extremities.

In a June 9, 2021 development letter, OWCP requested that appellant provide a report from his physician with regard to whether his condition had reached a fixed and stable point known as maximum medical improvement (MMI), and an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ It afforded him 30 days to submit additional medical evidence in support of his schedule award claim. No additional evidence was received.

By decision dated July 12, 2021, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.

On August 2, 2021 OWCP received a July 28, 2021 report by Dr. Poulson noting appellant's history of chronic left ankle pain following the March 8, 1995 employment injury and surgical reduction with screw fixation. On examination of the left lower extremity, Dr. Poulson observed limited motion with severe crepitus of the ankle, subtalar joint, first, second, and third metatarsal cuneiform joints, and tenderness to palpation of the Achilles tendon insertion. He measured 12 degrees left ankle dorsiflexion, 20 degrees left ankle plantar flexion, one degree subtalar joint inversion, and zero degrees subtalar joint eversion. Dr. Poulson diagnosed arthritis of the left subtalar joint, left midfoot, and left ankle with retained metal fragments. He directed conservative therapy and medication.

In a Form CA-20 dated October 17, 2021, Dr. H. Ryan Hall, a podiatrist, diagnosed traumatic arthritis with posterior tibial tendon dysfunction causally related to the March 8, 1995 employment injury. He held appellant off work. Dr. Hall answered a question "Yes" to indicate that he anticipated permanent effects of the accepted injuries as appellant would require treatment on a permanent basis.

On November 24, 2021 appellant requested reconsideration. He asserted that Dr. Hall's report established that the March 8, 1995 employment injury had caused permanent impairment.

OWCP received a September 28, 2021 report by Dr. Hall, who noted that appellant had undergone left ankle reconstruction on March 11, 2005. On examination of the left lower extremity, Dr. Hall observed instability of the left ankle, an equinus deformity of the left foot, tenderness to palpation of the fifth metatarsal and anterior ankle joint, and limited range of left ankle motion. He noted that August 17, 2021 left ankle x-rays demonstrated tibiotalar joint degeneration with severe spurring, and significant metallic shrapnel in the left ankle. Dr. Hall diagnosed primary osteoarthritis of the left ankle and foot, tarsal tunnel syndrome, and posterior tibialis tendon dysfunction. He noted that appellant could consider surgical treatment of tarsal tunnel syndrome and posterior tibialis tendon dysfunction.

By decision dated December 13, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

⁴ A.M.A., *Guides* (6th ed., 2009).

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 compensation at any time on his or her own motion or on application.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration.⁹

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).

In his November 24, 2021 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that he is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP.

⁵ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁶ 20 C.F.R. § 10.606(b)(3); *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).

⁷ *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 (September 2020). 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.

⁸ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *Supra* note 6.

In support of his reconsideration request, appellant submitted a July 28, 2021 report by Dr. Poulson and September 28 and October 17, 2021 reports by Dr. Hall. Both physicians diagnosed degenerative conditions, retained foreign bodies, and tendon dysfunction of the left foot and ankle requiring ongoing treatment. However, neither Dr. Poulson nor Dr. Hall opined that appellant had attained MMI, nor did they provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ Thus, appellant is not entitled to a review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

Appellant 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 permanent impairment.

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).

¹¹ *A.M.*, Docket No. 20-1417 (issued July 30, 2021); *E.J.*, Docket No. 19-1509 (issued January 9, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹² *Supra* note 6; *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

¹³ *See D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b)(3), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board