

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

S.M., Appellant	)	
	)	
and	)	<b>Docket No. 22-0723</b>
	)	<b>Issued: October 12, 2022</b>
DEPARTMENT OF THE NAVY, NORFOLK	)	
NAVAL SHIPYARD, Portsmouth, VA, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., 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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On April 11, 2022 appellant, through counsel, filed a timely appeal from a March 16, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 12, 2015, to the 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>

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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 an 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> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the March 16, 2022 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.*

## 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 and order are incorporated herein by reference. The relevant facts are as follows.

On September 21, 2012 appellant, then a 41-year-old marine electrician, filed a traumatic injury claim (Form CA-1) alleging that on that date a one-half inch steel plate fell from a fence onto his right leg causing a right lower leg contusion. OWCP accepted the claim, assigned OWCP File No. xxxxxx449, for a contusion of the right leg. Appellant stopped work on September 22, 2012 and returned to work on January 8, 2013.<sup>5</sup>

OWCP previously accepted that appellant sustained a right lateral collateral ligament sprain and a right medial meniscus tear on July 26, 2008, assigned OWCP File No. xxxxxx817.

On August 27, 2015 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability from employment for the period November 21, 2013 to January 24, 2014.

By decision dated November 12, 2015, OWCP denied appellant's claim for wage-loss compensation from November 21, 2013 to January 24, 2014 due to disability causally related to his September 21, 2012 employment injury.

Appellant appealed to the Board. By decision dated March 15, 2017, the Board affirmed OWCP's November 12, 2015 decision.<sup>6</sup>

On December 8, 2021 appellant, through counsel, requested that his claim be expanded to include additional conditions. In a December 15, 2021 development letter, OWCP requested additional factual and medical evidence supporting that he sustained additional employment-related conditions.

Counsel submitted an excerpt from a report by Dr. John Shutack, a Board-certified neurosurgeon, who reviewed the findings from magnetic resonance imaging (MRI) scans. Dr. Shutack recommended possible surgery and noted that, if it did not "relieve the right lower leg pain associated with the trauma," appellant might need a referral to a peripheral nerve specialist.

Appellant submitted the results of electrodiagnostic testing of the right lower extremity performed on July 15, 2014 which yielded normal findings, and an x-ray of his right knee dated

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<sup>4</sup> Docket No. 16-1142 (issued March 15, 2017); *Order Dismissing Petition for Reconsideration*, Docket No. 16-1142 (issued December 4, 2017).

<sup>5</sup> Appellant retired effective January 12, 2016.

<sup>6</sup> *Supra* note 4.

August 16, 2019. Electrodiagnostic testing of the right lower extremity obtained on July 27, 2021 revealed right sural neuropathy.

On August 3, 2021 Dr. Beth M. Winke, a Board-certified physiatrist, indicated that electrodiagnostic testing showed worsening right sural neuropathy. She noted that appellant had a history of medial cruciate ligament tears of the right knee as shown by a 2020 MRI scan and a history of lumbar surgery due to a disc herniation and radiculopathy. Dr. Winke related that these diagnoses had caused right lower extremity pain, numbness, and weakness that were causing “ongoing disability with decreased activity tolerance, especially limited walking, standing, bending, and lifting.”

An MRI scan of the lumbar spine, obtained on September 10, 2021 demonstrated grade 1 anterolisthesis of L4 with respect to L5 and multilevel grade 1 retrolisthesis.

In a report dated September 15, 2021, Dr. Shutack diagnosed chronic low back pain, degeneration of a lumbar intervertebral disc, a history of lumbar surgery, lumbar radiculopathy, lumbar spondylosis, lumbar stenosis, lumbar instability, lumbar spondylolisthesis, postlaminectomy syndrome, cervical spondylosis, neck pain, cervical stenosis, and a lumbar synovial cyst.

In reports dated January through November 15, 2021, Dr. Surya M. Challa, a Board-certified surgeon, diagnosed chronic pain syndrome, radiculopathy due to lumbar intervertebral disc disorder, and varicose veins of the lower extremity.

On December 16, 2021 appellant, through counsel, requested reconsideration of OWCP’s November 12, 2015 decision.<sup>7</sup> Counsel asserted that OWCP should rescind its prior decision as it had indicated that the injury was to appellant’s left rather than right leg and relied upon medical evidence relevant to another claimant.

Appellant resubmitted progress reports from Dr. David Goss and Dr. Michael Romash, Board-certified orthopedic surgeons, dated 2012 to 2014. He further resubmitted a February 7, 2014 report from Dr. Richard Ginard, an osteopath, regarding appellant’s lumbar steroid injection.

In a progress report dated December 16, 2016, Dr. Goss diagnosed chronic neck pain and radiculitis, cervical spinal stenosis, and cervical disc degeneration.

By decision dated March 16, 2022, OWCP denied appellant’s request for reconsideration as he had not submitted evidence or raised an argument sufficient to warrant reopening his claim for merit review under 5 U.S.C. § 8128(a).

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<sup>7</sup> The Board notes that counsel captioned his motion as a motion for rescission. Counsel’s mere characterization of the request as a motion for rescission, rather than a request for reconsideration under 5 U.S.C. § 8128(a), is found by the Board to be without significance as it cannot circumvent OWCP’s discretionary authority to impose a one-year timeframe for requesting reconsideration pursuant to 5 U.S.C. § 8128(a). *See A.B.*, Docket No. 19-1539 (issued January 27, 2020).

## 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.<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 properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's November 12, 2015 merit decision. The Board considered that evidence in its March 15, 2017 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>13</sup> The Board, therefore, will not review the evidence or arguments addressed in its prior appeal.

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered by OWCP. Counsel asserted that OWCP, in its November 12, 2015 decision, indicated that appellant had injured his

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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); *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 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.

<sup>11</sup> *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>12</sup> *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>13</sup> *K.K.*, Docket No. 20-1394 (issued July 26, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

left rather than right leg and considered medical evidence pertinent to another claimant. However, in its November 12, 2015 decision, OWCP noted that an October 14, 2014 report addressed appellant's left knee condition rather than the accepted right contusion. There is no evidence that it reviewed reports that were not relevant to appellant. Additionally, as noted, the Board previously affirmed the November 12, 2015 decision, and thus the issue is *res judicata* pending further review.<sup>14</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>15</sup>

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. Appellant submitted a December 16, 2016 progress report from Dr. Goss regarding appellant's cervical condition, reports from Dr. Challa dated January through November 15, 2021, and the results of diagnostic testing. He further submitted reports from Dr. Shutack and Dr. Winke pertinent to his current condition. None of this evidence addressed the relevant issue of whether appellant was disabled from employment for the period November 21, 2013 to January 24, 2014 causally related to his accepted September 21, 2012 employment injury. The Board has held the submission of evidence or argument which does not address the issue involved does not constitute a basis for reopening a case.<sup>16</sup>

Appellant further resubmitted progress reports dated 2012 through 2016 from Dr. Goss and Dr. Romash and a February 7, 2014 report from Dr. Ginard. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case for merit review.<sup>17</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>18</sup>

On appeal counsel contends that OWCP should have ruled on motion for rescission. As previously noted, however, the motion for rescission constituted a request for reconsideration.<sup>19</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>14</sup> *Id.*; *see also R.G.*, Docket No. 21-1098 (issued March 28, 2022).

<sup>15</sup> 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also B.W.*, Docket No. 21-0709 (issued December 29, 2021); *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

<sup>16</sup> *See P.G.*, Docket No. 20-1419 (issued September 16, 2021); *C.C.*, Docket No. 20-0950 (issued October 29, 2020); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>17</sup> *See T.T.*, Docket No. 19-0559 (issued July 19, 2019); *D.K.*, 59 ECAB 141 (2007).

<sup>18</sup> *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

<sup>19</sup> *See supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 16, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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