

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

R.S., Appellant)	
)	
and)	Docket No. 22-1141
)	Issued: April 18, 2023
U.S. POSTAL SERVICE, FREDERICK N. WEATHERS POST OFFICE, St. Louis, MO, Employer)	
)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 28, 2022 appellant, through counsel, filed a timely appeal from a July 18, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated January 25, 2022, which became final after 30 days of issuance, and is not subject to further review.² As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

¹ 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.

² 20 C.F.R. § 501.6(d). See *R.H.*, Docket No. 21-1405 (issued July 26, 2022); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

³ 5 U.S.C. § 8101 *et seq.*

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.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 26, 2014 appellant, then a 54-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative joint disease in the left knee due to factors of his federal employment.⁵ OWCP accepted his claim for left knee medial osteoarthritis. It paid appellant wage-loss compensation on the supplemental rolls until September 23, 2014, when he returned to full-time, modified-duty work.

On July 23, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 15, 2016, OWCP granted appellant a schedule award for 20 percent permanent impairment of the left lower extremity (left leg). The schedule award ran for 57.6 weeks from August 12, 2015 through September 18, 2016. The schedule award was based on the February 22, 2016 report of Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), who opined that, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁶ appellant had 20 percent permanent impairment of the left lower extremity based on his diagnosis of left knee osteoarthritis.⁷

On October 31, 2016 appellant underwent left knee unicondylar arthroplasty. The operative report noted a diagnosis of end-stage medial arthritis of the left knee. On February 8, 2017 appellant began to work part-time modified duty.⁸

On May 15, 2017 appellant filed a Form CA-7 claim for an increased schedule award.

Appellant submitted a June 6, 2017 impairment rating report by Dr. Neil Allen, a Board-certified neurologist and internist, who utilized the diagnosis-based impairment method to

⁴ Docket No. 20-0311 (issued July 8, 2020); Docket No. 21-0833 (issued January 25, 2022).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx321. Appellant subsequently filed a traumatic injury (Form CA-1) claim for a left leg and head injury related to an October 3, 2017 employment incident. OWCP assigned that claim OWCP File No. xxxxxx721 and accepted it for left leg contusion and head laceration. It administratively combined appellant's claims, with the present claim serving as the master file.

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ In a February 22, 2016 report, Dr. Berman utilized Table 16-3, *Knee Regional Grid*, page 511, and assigned a class of diagnosis (CDX) of primary knee joint arthritis with a default value of 20 percent.

⁸ OWCP placed appellant on the periodic rolls, effective December 11, 2016.

determine that appellant had 34 percent permanent impairment of the left lower extremity.⁹ He explained that the condition of status post tibial osteotomy most closely resembled a unicondylar arthroplasty.¹⁰

In an April 20, 2018 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the OWCP DMA, reviewed Dr. Allen's June 6, 2017 impairment rating report and concurred that appellant had 34 percent permanent impairment of the left lower extremity.

By decision dated September 18, 2018, OWCP granted appellant a schedule award for 34 percent permanent impairment of the left lower extremity (left leg). The award ran for 97.92 weeks from June 6, 2017 through April 22, 2019.

On April 23, 2019 OWCP requested a supplemental opinion from Dr. Harris, which addressed appellant's prior schedule award of 20 percent permanent impairment of the left lower extremity. In a May 1, 2019 addendum report, Dr. Harris indicated that, because appellant was previously awarded 20 percent permanent impairment for his left lower extremity, he was entitled to an increase of 14 percent permanent impairment for a total of 34 percent permanent impairment of the left lower extremity.

On September 16, 2020 OWCP forwarded appellant's case record back to Dr. Harris, the DMA, for clarification regarding whether the 34 percent left lower extremity permanent impairment duplicated in whole, or in part, the prior impairment rating of 20 percent permanent impairment of the left lower extremity.

In a September 18, 2020 report, Dr. Harris indicated that he had reviewed the case record and opined that the 34 percent permanent impairment duplicated, in part, a portion of appellant's prior award of 20 percent permanent impairment because both awards were for the same accepted condition of left knee osteoarthritis. He explained that, after the initial schedule award, appellant's condition worsened and he underwent surgery, which resulted in a greater impairment. Thus, Dr. Harris concluded that appellant had a total of 34 percent permanent impairment of the left lower extremity.

By decision dated September 21, 2020, OWCP corrected its September 18, 2018 decision to specifically find that appellant was granted a schedule award for an additional 14 percent permanent impairment of the left lower extremity, resulting in a total of 34 percent permanent impairment of the left lower extremity. The award ran for 40.32 weeks from June 6, 2017 through March 15, 2018.

On October 1, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on January 15, 2021.

⁹ Dr. Allen referenced Table 16-3, *Knee Regional Grid*, page 511, of the A.M.A., *Guides*, and noted that a CDX of status post tibial osteotomy with a poor result equated to a Class 3 impairment with a default value of 37 percent permanent impairment. He assigned a grade modifier for functional history (GMFH) of 2 and did not assign a grade modifier for physical examination (GMPE) or a grade modifier for clinical studies (GMCS) because they were used in the class placement. Dr. Allen applied the net adjustment formula $(GMFH - CDX) = (2 - 3) = -1$, which moved the rating to the left and resulted in a final permanent impairment rating of 34 percent permanent impairment of the left lower extremity.

¹⁰ Appellant retired from federal service, effective February 28, 2018.

By decision dated March 24, 2021, OWCP's hearing representative affirmed the September 21, 2020 decision.

Appellant appealed to the Board. By decision dated January 25, 2022, the Board affirmed the March 24, 2021 decision.

On May 18, 2022 appellant, through counsel, requested reconsideration.¹¹

Appellant, through counsel, submitted a printout of FECA Transmittal 22-06 issued on February 14, 2022 regarding Schedule Awards and Permanent Disability claims.

By decision dated July 18, 2022, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 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 compensation at any time on his or her own motion or on application.¹²

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.¹³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁵ If the request is timely, but fails to meet at least one of the

¹¹ Although appellant claimed to be filing a request for reconsideration from the Board's January 25, 2022 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Although the January 25, 2022 Board decision was the last merit decision, the hearing representative's March 24, 2021 decision is the appropriate subject of possible modification by OWCP.

¹² 5 U.S.C. § 8128(a); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹³ 20 C.F.R. § 10.606(b)(3); *see S.K.*, Docket No. 22-0248 (issued June 27, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁴ *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.

¹⁵ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁶

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 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered. He merely submitted a printout of FECA Transmittal 22-06 without any explanation regarding how this evidence established that he was entitled to an increased schedule award. Consequently, appellant was 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).¹⁷

Furthermore, appellant did not submit any new medical evidence with his May 18, 2022 request for reconsideration. Accordingly, he was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁸

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration without reopening the case for review on the merits.¹⁹

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).

¹⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁷ *Supra* note 14; *see K.F.*, Docket No. 19-1846 (issued November 3, 2020).

¹⁸ *Supra* note 14; *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁹ *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *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 July 18, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2023
Washington, DC

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

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

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