



Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>4</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 October 9, 2020 appellant, then a 49-year-old work unit supervisor, filed a traumatic injury claim (Form CA-1) alleging that on October 2, 2020 he felt a popping/tearing/burning in his right knee when he stood up to move his chair while in the performance of duty. He stopped work on October 3, 2020 and returned to work shortly thereafter. Appellant stopped work again on November 17, 2020. He returned to work on February 1, 2021 and worked intermittently thereafter. On April 21, 2021 OWCP accepted appellant's claim for right knee sprain, other tear of right knee medial meniscus, and loose body in right knee. Appellant was paid wage-loss compensation on the supplemental rolls from November 17, 2020 to February 1, 2021.

Appellant submitted a claim for compensation (Form CA-7) claiming intermittent disability from work commencing on February 16, 2021.

By decision dated December 17, 2021, OWCP denied appellant's claim for compensation, finding that the medical evidence of record was insufficient to establish disability from work commencing on February 2, 2021.

On December 28, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on April 13, 2022.

By decision dated June 28, 2022, OWCP's hearing representative affirmed OWCP's December 17, 2021 decision.

On July 13, 2022 appellant, through counsel, requested reconsideration of OWCP's June 28, 2022 decision. In an accompanying statement, appellant argued that Dr. Hythem P. Shadid, a Board-certified orthopedic surgeon, had not performed a complete examination in his role as a second opinion physician relative to his schedule award claim. Counsel also submitted a copy of Dr. Shadid's February 9, 2022 second opinion report.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that following the July 15, 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.*

By nonmerit decision dated July 15, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **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 own motion or on application.<sup>5</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>6</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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</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>9</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).

In support of his request for reconsideration, appellant argued that Dr. Shadid had not performed a complete examination in his role as a second opinion physician. However, this argument is not relevant to the underlying issue in this case of whether appellant has met his burden of proof to establish intermittent disability from work commencing on February 2, 2021 causally related to the accepted October 2, 2020 employment injury. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not

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<sup>5</sup> 5 U.S.C. § 8128(a); *see K.V.*, Docket No. 21-0628 (issued August 8, 2022); *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>6</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>7</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 the merit 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>8</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *K.V., supra* note 5; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

constitute a basis for reopening a case.<sup>10</sup> The Board therefore finds that appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>11</sup>

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. In support of his reconsideration request, appellant resubmitted a copy of Dr. Shadid's February 9, 2022 second opinion impairment report with several annotations. However, this evidence is not relevant to the underlying issue in this case of whether appellant has met his burden of proof to establish intermittent disability from work commencing on February 2, 2021 causally related to the accepted October 2, 2020 employment injury. As previously noted, the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup> Consequently, as appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review 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 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>14</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>10</sup> *T.D.*, Docket No. 21-1381 (issued June 21, 2022); *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>11</sup> *Supra* note 6.

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *Supra* note 6.

<sup>14</sup> *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 15, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2023  
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