

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

_____)		
D.C., Appellant))	
))	
and))	Docket No. 23-0728
))	Issued: October 4, 2023
U.S. POSTAL SERVICE, POST OFFICE,))	
Cincinnati, OH, Employer))	
_____))	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
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 April 25, 2023 appellant, through counsel, filed a timely appeal from an April 20, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated October 11, 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 issued within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation

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 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.

² 20 C.F.R. § 501.6(d). *See M.D.*, Docket No. 22-0542 (issued August 17, 2022); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 8, 2012 appellant, then a 50-year-old window clerk, filed an occupational disease claim (Form CA-2) alleging that she developed neuropathy and blisters on her feet from years of standing on concrete floors for 98 to 100 percent of her workday. She noted that she first became aware of her condition on October 1, 2006, and realized its relation to her federal employment on April 18, 2012. On the reverse side of the claim form, the employing establishment noted that appellant stopped work on February 9, 2012. OWCP assigned the present claim OWCP File No. xxxxxx621 and accepted it for bilateral hallux valgus. It subsequently expanded the acceptance of the claim to include open wound of right lesser toe; complete traumatic amputation of one right toe; closed fracture of left foot metatarsal bone; left foot stress fracture; other complications due to other internal orthopedic device, implant, and graft, left; chronic osteomyelitis of the left ankle and foot; and open wound of the left foot, unspecified toe(s).⁶

On December 15, 2014 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated October 4, 2016, OWCP granted appellant a schedule award for 25 percent permanent impairment of the left lower extremity.⁷

Appellant requested an additional left lower extremity schedule award.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Appellant has a prior claim under OWCP File No. xxxxxx324 alleging that on August 21, 2012 she fell on both knees while in the performance of duty. She also has an occupational disease claim under OWCP File No. xxxxxx105 alleging arthritis from prolonged standing and walking. OWCP has administratively combined these claims with the present claim, with the present claim, OWCP File No. xxxxxx621, serving as the master file.

⁵ Docket No. 21-0954 (issued October 11, 2022).

⁶ Appellant has a prior claim under OWCP File No. xxxxxx324 alleging that on August 21, 2012 she fell on both knees while in the performance of duty. She also has an occupational disease claim under OWCP File No. xxxxxx105 alleging arthritis from prolonged standing and walking. OWCP has administratively combined OWCP File Nos. xxxxxx324, xxxxxx105, and xxxxxx621, with the latter serving as the master file.

⁷ Regarding the right lower extremity, OWCP explained that appellant had an amputation of the second long toe of the right foot on November 6, 2015; therefore, it was unknown if she had reached maximum medical improvement.

By decision dated October 11, 2019, OWCP denied appellant's claim for an additional left lower extremity schedule award. It found that the final impairment rating for the left lower extremity was 17 percent permanent. OWCP explained that, as appellant had previously received a schedule award 25 percent permanent impairment of the left lower extremity, no additional impairment award was due for permanent impairment of the left lower extremity.

By decision dated October 17, 2019, OWCP granted appellant a schedule award for four percent permanent impairment of the right lower extremity.

On October 23, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated November 27, 2019, OWCP's hearing representative set aside the October 11, 2019 decision and remanded the case for further development. The hearing representative requested that the district medical adviser (DMA) review FECA Bulletin No. 17-06 and determine whether the range of motion (ROM) methodology could be used as an alternative rating method.

By decision dated January 29, 2020, OWCP denied an additional schedule award for permanent impairment of the left lower extremity, but granted an additional three percent permanent impairment of the right lower extremity (for a total award of seven percent permanent impairment of the right lower extremity).

On February 4, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 5, 2020.

On August 7, 2020 an OWCP hearing representative set aside the January 29, 2020 decision and remanded the case to obtain an explanation from Dr. Ralph Rohner, a Board-certified orthopedic surgeon serving as the second opinion physician, of any disagreement he had with Dr. Ari Katz, a Board-certified orthopedic surgeon serving as the DMA, regarding appellant's permanent impairment rating.

By decision dated December 1, 2020, OWCP denied appellant's claim for an additional schedule award. It explained that both the second opinion physician, Dr. Rohner, and the DMA, Dr. Katz, concurred as to the final rating of 16 percent permanent impairment of the left lower extremity and 7 percent permanent impairment of the right lower extremity.

On December 11, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review of the December 1, 2020 decision.

By decision dated December 31, 2020, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the right lower extremity, for a final impairment rating of seven percent. It also found that he was only entitled to 16 percent permanent impairment for the left lower extremity and advised that it would declare an overpayment based on the additional 9 percent permanent impairment of the left lower extremity previously awarded.

On January 25, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review of the December 31, 2020 decision. A

hearing was held on March 10, 2021. By decision dated May 7, 2021, the OWCP hearing representative affirmed the December 1 and 31, 2020 decisions.

On June 8, 2021 appellant, through counsel, appealed the May 7, 2021 merit decision to the Board.

By decision dated October 11, 2022, the Board affirmed the May 7, 2021 decision of OWCP.

On March 28, 2023 appellant, through counsel, requested reconsideration of the May 7, 2021 decision. Counsel alleged that the May 7, 2021 decision should be overturned based on FECA Transmittal No. 22-06 (issued February 14, 2022), regarding the appeals procedures if the initial schedule award decision must be set aside. He attached a copy of the FECA Transmittal.

By decision dated April 20, 2023, OWCP denied appellant's request for reconsideration of the merits of her 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.⁸

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.⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration.¹²

⁸ 5 U.S.C. § 8128(a); *see L.J.*, Docket No. 22-0348 (issued April 28, 2023); *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).

⁹ 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *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).

¹⁰ *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.

¹¹ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

¹² *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).

ANALYSIS

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

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹³ It is, therefore, unnecessary for the Board to consider the evidence submitted prior to the issuance of OWCP's May 7, 2021 decision as the Board considered that evidence in its October 11, 2022 decision.¹⁴

On reconsideration, counsel alleged that the May 7, 2021 decision should be overturned based on FECA Transmittal No. 22-06. While this is a new legal argument not previously considered by OWCP, it is irrelevant as the February 14, 2022 transmittal was not in effect when OWCP issued its May 7, 2021 decision. 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.¹⁵ Consequently, appellant is not entitled to a review of the merits of her claim based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁶

Appellant did not submit any relevant and pertinent new evidence with her request for reconsideration. Therefore, she was not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹⁷

The Board, accordingly, finds that appellant has not met any of the requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁸

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 her claim.

¹³ A.A., Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁴ See *R.B.*, Docket No. 22-0954 (issued December 29, 2022); *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

¹⁵ *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).

¹⁶ See *D.B.*, Docket No. 22-1241 (issued April 27, 2023); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁷ See *supra* note 11 at § 10.606(b)(3)(iii).

¹⁸ See *D.M.*, Docket No. 21-1224 (issued March 15, 2023); *J.C.*, Docket No. 21-0453 (issued December 8, 2021); *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 20 C.F.R. § 10.606(b), OWCP will deny the request without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed, pursuant to 5 U.S.C. § 8128(a).

Issued: October 4, 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