

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

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S.R., Appellant )

and )

DEPARTMENT OF THE NAVY, PRODUCTION )  
RESOURCES DEPARTMENT, ELECTRICAL )  
SHOP, PORTSMOUTH NAVAL SHIPYARD, NH, )  
Employer )

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**Docket No. 23-1095  
Issued: January 8, 2024**

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 14, 2023 appellant filed a timely appeal from a February 15, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated January 4, 2023, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</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>2</sup>

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant requested an appeal from a January 4, 2023 merit decision. However, Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. The 180<sup>th</sup> day following OWCP's January 4, 2023 decision was July 3, 2023. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(e)-(f). As this appeal was received on August 14, 2023, the Board lacks jurisdiction to review the January 4, 2023 merit decision. *S.N.*, Docket No. 22-1048 (issued April 3, 2023); *see P.H.*, Docket No. 19-1354 (issued March 13, 2020); *E.H.*, Docket No. 19-0859 (issued December 10, 2019).

## **FACTUAL HISTORY**

On November 16, 2021 appellant, then a 62-year-old electronic mechanic, filed a traumatic injury claim (Form CA-1) alleging that on November 4, 2021 he injured his left knee while in the performance of duty. He indicated that he was “kneeling” on his left knee in order to retrieve materials from a toolbox at the time of injury, and the pain worsened over several days. On the reverse side of the claim form, appellant’s supervisor acknowledged that appellant was injured in the performance of duty. The form indicated that appellant stopped work on November 10, 2021.

Appellant was initially seen on November 10, 2021 by Dr. Mark M. Grossman, a Board-certified orthopedic surgeon, who diagnosed a left knee sprain. On November 12, 2021 appellant was seen by Jade A. O’Donovan, a nurse practitioner, for left knee pain.

In a development letter dated December 28, 2021, OWCP informed appellant of the deficiencies in his claim. It advised appellant of the type of additional factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP received November 12, 2021 and January 11, 2022 reports from Dr. Thomas N. Decker, a Board-certified internist, which indicated that appellant was seen for left knee pain.

By decision dated February 2, 2022, OWCP found that the November 4, 2021 incident occurred as alleged; however, it denied appellant’s traumatic injury claim, finding that the evidence of record was insufficient to establish a diagnosed medical condition in connection with the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

An x-ray report of the left knee dated January 11, 2022 and signed by Dr. Shawn M. Reyder, a Board-certified diagnostic radiologist, showed a “radiographically” normal left knee.

On March 7, 2022 appellant requested reconsideration.

In support of his reconsideration request, appellant submitted a treatment note from Nathan P. Vassill, a physician assistant, dated January 18, 2022. He related left knee pain that began on November 4, 2021 after standing up from kneeling at work. Appellant further noted the pain increased thereafter. Mr. Vassill reviewed x-rays and a radiology report and believed the very mild medial joint space narrowing “may” be consistent with mild osteoarthritis. He diagnosed acute left knee pain and placed appellant on restricted duty.

Appellant further resubmitted the x-ray report of his left knee dated January 11, 2022.

OWCP also received a March 4, 2022 note from Ms. O’Donovan, now co-signed by Dr. Randall Zielinski, a Board-certified internist, which noted a diagnosis of left knee pain.

By decision dated June 1, 2022, OWCP denied modification of its February 2, 2022 decision.

Appellant thereafter resubmitted his treatment note from Mr. Vassill, dated January 18, 2022, now co-signed by Dr. David C. Thut, a Board-certified orthopedic surgeon, as well as the left knee x-ray report dated January 11, 2022.

On December 14, 2022 appellant requested reconsideration.

In support thereof, appellant submitted an after-visit summary dated November 7, 2022, wherein Dr. Webb diagnosed acute medial meniscus tear of the left knee and opined that appellant's medical history and physical examination were consistent with a meniscal tear. Appellant also submitted a state form report of even date, wherein Dr. Webb reiterated his diagnosis and placed appellant on restricted duty.

By decision dated January 4, 2023, OWCP modified its June 1, 2022 decision to find that appellant had established a diagnosed knee condition in connection with the accepted employment incident. The claim remained denied, however, as the medical evidence of record was insufficient to establish causal relationship between the diagnosed condition and the accepted employment incident.

By decision dated February 15, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>5</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

### **ANALYSIS**

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

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<sup>3</sup> This section provides in pertinent part: [t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP 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.

<sup>6</sup> *Id.* at § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.608(a), (b).

OWCP did not receive any further argument following the January 4, 2023 merit decision. The Board therefore finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Appellant also did not submit any relevant and pertinent new evidence following January 4, 2023. Therefore, he is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board further finds that OWCP properly denied reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 15, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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