

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

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<b>K.S., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 25-0339</b>
	)	<b>Issued: April 10, 2025</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. IMMIGRATION AND CUSTOMS</b>	)	
<b>ENFORCEMENT, Miami, FL, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 28, 2025 appellant filed a timely appeal from a February 19, 2025 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decisions, dated April 24, 2024, 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 over the merits of this case.

**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).

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

## **FACTUAL HISTORY**

On February 22, 2021 appellant, then a 38-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2021 he broke his right toe when he was arresting “a violent subject” while in the performance of duty. He did not stop work.

On February 12, 2021 Dr. Robert Abello, Board-certified emergency medicine, treated appellant for a right foot injury. He noted that an x-ray of the right foot revealed no evidence of acute fracture. Dr. Abello diagnosed fracture of the toe of right foot.

In a March 15, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP received additional evidence. On March 3 and 29, 2021 Dr. Yohandy Fuentes, a Board-certified podiatrist, treated appellant for a right toe injury. Appellant reported that he was in a fight at work and hit his big toe on a hard object. X-rays of the right foot revealed radiolucency across the base of the distal phalanx consistent with a fracture. Dr. Fuentes diagnosed localized edema, nondisplaced fracture of the distal phalanx of the right toe, and pain in the right foot. He noted restrictions of light-duty work, with limited standing, and walking less than 10 minutes at a time. In form reports dated March 3 and 29, 2021, Dr. Fuentes provided similar diagnosis and recommended custom-made orthotics. He continued appellant’s work restrictions.

By decision dated April 12, 2021, OWCP accepted appellant’s claim for nondisplaced fracture of the distal phalanx of the right great toe and localized edema.

OWCP received additional evidence. On April 26, 2021 Dr. Fuentes noted appellant presented with significant improvement in symptoms. He diagnosed localized edema, nondisplaced fracture of the distal phalanx of the right great toe, fracture with routine healing, and right foot pain. Dr. Fuentes opined that appellant’s symptoms had resolved and he reached maximum medical improvement (MMI).

On October 20, 2023 Diana Hernandez, a counselor, noted treating appellant weekly with psychotherapy and counseling.

On October 27, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a January 29, 2024 letter, OWCP, through its medical scheduling service, QTC Medical Services, Inc., notified appellant that it had scheduled a March 1, 2024 second opinion examination with Dr. Clinton Bush, III, a Board-certified orthopedic surgeon, to determine whether he was entitled to a schedule award. The letter informed appellant of his obligations to attend and cooperate with the examination and explained that his compensation benefits would be suspended for failure to report to or for obstruction of, the examination, pursuant to 5 U.S.C. § 8123(d). The letter also contained the date, time and location of his appointment, and was mailed to his last known address of record.

On March 1, 2024 QTC informed OWCP that appellant did not attend the scheduled appointment.

In a letter dated March 28, 2024, OWCP proposed to suspend his wage-loss compensation and medical benefits because he failed to attend the February 28, 2024 appointment with Dr. Bush. It advised that if good cause was not established, his compensation benefits would be suspended, pursuant to 5 U.S.C. § 8123(d), until he attended and fully cooperated with the examination. OWCP further indicated that, if appellant intended to report to, and fully cooperate with, any rescheduled examination with Dr. Bush, he should contact OWCP immediately in order to reschedule the examination. It afforded him 14 days to respond. No response was received.

By decision dated April 24, 2024, OWCP denied appellant's schedule award claim finding that he had not met his burden of proof to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.

By separate decision also dated April 24, 2024, OWCP suspended appellant's wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), effective the date, finding that he failed to attend the scheduled medical examination, and had not provided written evidence justifying his failure to attend.

On January 27, 2025 appellant requested reconsideration. He indicated that he filed a claim in 2024 when he was going through a difficult time in his life and was not living at home. Appellant indicated that OWCP had been sending his correspondence to his home address including letters about attending medical appointments; however, he did not receive these notices because he was not residing in his home. He further indicated that he did not check the Employees' Compensation Operations & Management Portal (ECOMP) because he was "not in the right state of mind."

By decision dated February 19, 2025, 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 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>2</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>3</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</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>6</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).

With his request for reconsideration, appellant provided a statement disagreeing with the April 24, 2024 decisions. He indicated that when he filed his claim in 2024 he was going through a difficult time in his life and he was not living at home. Appellant indicated that he did not receive any correspondence from OWCP during this period and did not check ECOMP. However, his argument does not advance a new legal argument not previously considered, nor show that OWCP erroneously applied or interpreted a specific point of law. Rather, appellant's argument is insufficient to warrant reopening the claim for merit review. Additionally, under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>7</sup> The record supports that OWCP's referral letter dated January 29, 2024 was sent to appellant at the address of record and does not indicate that it was returned as undeliverable. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>8</sup>

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his January 27, 2025 reconsideration requests under 20 C.F.R. § 10.606(b)(3). The underlying issues in this case are whether he has established entitlement to a schedule award and whether OWCP properly suspended his wage-loss compensation and medical benefits effective April 24, 2024, pursuant to 5 U.S.C. § 8123(d), due to his failure to attend the February 28, 2024 appointment with Dr. Bush. The schedule award issue is medical in nature,<sup>9</sup> and appellant has not submitted pertinent new and relevant medical evidence in connection with his reconsideration

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<sup>4</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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>5</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>7</sup> *Kenneth E. Harris*, 54 ECAB 502, 505 (2003); *A.C. Clyburn*, 47 ECAB 153 (1995).

<sup>8</sup> *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>9</sup> *See D.M.*, Docket No. 21-1224 (issued March 15, 2023).

request.<sup>10</sup> Additionally, the suspension decision involves a factual issue that must be addressed by relevant factual evidence; however, his explanation is insufficient to justify his failure to attend the scheduled second opinion examination.<sup>11</sup> Thus, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>12</sup>

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.

### **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).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 19, 2025 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2025  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> *C.C.*, Docket No. 21-0900 (issued April 6, 2022).

<sup>11</sup> 20 C.F.R. § 10.606(b)(3); *see C.C.*, Docket No. 19-1622 (issued May 28, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008); *see also D.B.*, Docket No. 19-1963 (issued July 1, 2020); *M.C.*, Docket No. 18-0841 (issued September 13, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>12</sup> *Supra* note 3.