

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

R.C., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
AGENCIES, WASHINGTON HEADQUARTERS)
SERVICES, Alexandria, VA, Employer)

**Docket No. 22-1118
Issued: December 14, 2022**

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 25, 2022 appellant, through counsel, filed a timely appeal from a January 26, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 1, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (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 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. The facts and circumstances as presented in the Board's prior order are incorporated herein by reference.³ The relevant facts are set forth below.

On July 27, 2017 appellant, then a 34-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 2017 he sprained his left ankle when playing basketball while in the performance of duty. He stopped work on that date.⁴ Appellant underwent surgery to repair the rupture of his left Achilles tendon on August 3, 2017. OWCP accepted his claim for strain of the left Achilles tendon, and sprain of an unspecified ligament of the left ankle. It paid wage-loss compensation on the supplemental rolls beginning September 13, 2017.⁵ Appellant returned to light-duty work on October 24, 2017 and full-duty work on January 23, 2018.

In a letter dated October 6, 2017, OWCP noted that appellant had not worked at the employing establishment for a full year prior to his accepted employment injury. It requested that the employing establishment provide his pay rate.

On October 20, 2017 appellant completed a Form EN 1029 and provided his earnings and leave statement from the employing establishment indicating that his base pay was \$43,576.00 and that his adjusted locality pay was \$55,385.00.

In an October 26, 2017 e-mail, the employing establishment indicated that effective July 23, 2017 appellant's hourly base pay was \$20.88, that he worked eight hours a day, and that he did not receive premium pay.

In a November 16, 2017 Form EN 1030, the employing establishment noted actual earnings of another employee with the same kind of appointment in a job with similar duties. It indicated that the selected position of police officer would be 80 hours during the two-week period from September 3 through 16, 2017, and earned gross pay of \$4,246.40 and additional night differential or special pay increments of \$457.64. The employing establishment noted that it would not include Sunday premium or holiday pay.

³ *Order Remanding Case, 21-0845* (issued December 13, 2021).

⁴ The employing establishment reported that appellant's yearly salary was \$43,576.00 when he stopped work on July 23, 2017. It did not include any additional pay types.

⁵ Appellant received continuation of pay from July 24 through September 6, 2017 and used leave from September 7 through 12, 2017.

In a December 18, 2017 memorandum of telephone call (Form CA-110) it was noted that appellant had not worked in the date-of-injury position for 11 months prior to his injury, but that the position would have afforded employment for 11 months, but for the injury.

In two separate December 18, 2017 memoranda to file, OWCP indicated both that appellant's annual salary was \$43,576.00. Beginning on September 24, 2018, it paid him wage-loss compensation based on a weekly pay rate of \$1,065.10.

In a report dated November 30, 2018, Dr. Eric G. Dawson, an orthopedic specialist, determined that appellant had reached maximum medical improvement (MMI) and applied American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁶ to his findings on physical examination. He determined that appellant had 17 percent permanent impairment of the left lower extremity due to Class 2 history of ruptured left Achilles tendon in accordance with Table 16-2, (Foot and Ankle Regional Grid), page 501 of the A.M.A., *Guides*.

On October 16, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award. The employing establishment indicated that his base pay on July 23, 2017, the date of injury, was \$55,385.00.

In a February 26, 2019 development letter, OWCP informed appellant that all permanent impairment determinations must be completed in accordance with the sixth edition of the A.M.A., *Guides* and afforded him 30 days to submit additional medical evidence.

On February 26, 2019 OWCP routed Dr. Dawson's November 30, 2018 report, a statement of accepted facts (SOAF), and the case record to Dr. Ari Kaz, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA), for review and a determination of permanent impairment of the left lower extremity in accordance with the A.M.A., *Guides*.

In a March 6, 2019 report, Dr. Kaz reviewed the SOAF and the medical record, including the November 30, 2018 report from Dr. Dawson. He found that Dr. Dawson improperly applied the A.M.A., *Guides* to his findings on physical examination in calculating appellant's left lower extremity permanent impairment rating of 17 percent. The DMA applied the A.M.A., *Guides* to Dr. Dawson's findings and determined that utilizing the diagnosis-based impairment (DBI) method, based on the diagnosis of Achilles tendon tear resulted Class 1 diagnosis with mild motion deficits or five percent impairment of the left lower extremity in accordance with Table 16-2 page 501. He then applied the range of motion (ROM) method, Table 16-20 (Hindfoot Motion Impairments), page 549 of the A.M.A., *Guides* and determined that appellant had four percent permanent impairment of the left lower extremity due to two percent impairment of eversion and two percent impairment of inversion. As the DBI method yielded the greater impairment, Dr. Kaz arrived at a five percent permanent impairment rating of the left lower extremity as of November 30, 2018, the date of Dr. Dawson's rating.

By decision dated April 12, 2019, OWCP granted appellant a schedule award for five percent permanent impairment of the left lower extremity. The period of the award ran for 14.4

⁶ A.M.A., *Guides* (6th ed. 2009).

weeks from November 30 through March 10, 2018. The weekly pay rate used to calculate the schedule award was \$1,065.10.

On May 10, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 9, 2019. By decision dated November 1, 2019, OWCP's hearing representative affirmed the April 12, 2019 schedule award decision.

On November 1, 2020 appellant, through counsel, requested reconsideration. Counsel generally contended that the schedule award was based on an incorrect impairment rating, and that appellant was paid at an incorrect pay rate. He did not submit any evidence in support of this request.

By decision dated November 16, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). It found that the request did not raise substantive legal questions nor include new and relevant evidence.

On May 15, 2021 appellant, through counsel, filed an appeal with the Board. By order December 13, 2021, the Board set aside OWCP's November 16, 2020 decision.⁷ The Board found that OWCP had summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.⁸ The Board remanded the case for findings of fact and a statement of reasons regarding the arguments made by counsel, to be followed by an appropriate decision on appellant's reconsideration request.

By decision dated January 26, 2022, OWCP listed counsel's contentions and again denied appellant's November 1, 2020 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 own motion or on application.⁹

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

⁷ *Order Remanding Case*, Docket No. 21-0845 (issued December 13, 2021).

⁸ *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

⁹ 5 U.S.C. § 8128(a); *see L.M.*, Docket No. 22-0902 (issued September 19, 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).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹² 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.¹³

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).

Appellant has not submitted evidence in support of his reconsideration request. Consequently, he is not entitled to a review of the merits of the claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁴

In his timely request for reconsideration, appellant, through counsel, disagreed with DMA Dr. Kaz' opinion that he had five percent permanent impairment of the left lower extremity. This general contention does not show a legal error by OWCP as it a vague allegation with no substantiation.¹⁵ Furthermore this argument was previously addressed by OWCP and does not advance a new and relevant legal argument.¹⁶

¹⁰ 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).

¹¹ *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.

¹² *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹³ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁴ *See L.M.*, *supra* note 9; *W.C.*, Docket No. 20-0691 (issued July 19, 2022); *M.K.*, Docket No. 21-1399 (issued July 14, 2022); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁵ *See S.E.*, Docket No. 17-0222 (issued December 21, 2018).

¹⁶ The submission of evidence or argument that repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case. *L.M.*, *supra* note 9; *R.R.*, Docket No. 20-0378 (issued March 9, 2021); *S.E.*, *supra* note 15; *T.H.*, Docket Nos. 17-1578 & 17-1651 (issued April 26, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

Counsel made a general blanket assertion that appellant's schedule award was based on an incorrect pay rate, but he offered no explanation of the alleged error in the pay rate.¹⁷ This assertion alone is insufficient to reopen the case on the merits. Consequently, 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).

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

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 January 26, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁷ See *R.R., id.* (finding that counsel's argument must include explanation of the basis of the contention).

¹⁸ *D.G.*, Docket No. 19-1348 (issued December 2, 2019); *S.H.*, Docket No. 19-1115 (issued November 12, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).