

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

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|---------------------------------------|---|------------------------------|
| _____ )                               |   |                              |
| W.V., Appellant )                     | ) |                              |
| and )                                 | ) |                              |
| DEPARTMENT OF HOMELAND SECURITY, )    | ) | <b>Docket No. 24-0179</b>    |
| U.S. CUSTOMS AND BORDER PROTECTION, ) | ) | <b>Issued: April 2, 2024</b> |
| JOHN F. KENNEDY INTERNATIONAL )       | ) |                              |
| AIRPORT, Jamaica, NY, Employer )      | ) |                              |
| _____ )                               | ) |                              |

*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 December 4, 2023 appellant filed a timely appeal from a November 13, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated March 2, 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 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**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 13, 2007 appellant, then a 45-year-old import specialist, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to his knees, elbows, face, neck, hands, fingers, shoulders, and lower back when he tripped on loose carpet tile and fell while in the performance of duty. OWCP accepted the claim for neck and lumbar sprains, left index finger contusion, right shoulder contusion, bilateral knee contusions, bilateral knee tear of the medial meniscus, left trigger finger, thoracic or lumbosacral neuritis, traumatic bilateral arthropathy of the legs, adhesive capsulitis of the right shoulder, bilateral post-traumatic osteoarthritis of the knee, bilateral traumatic arthropathy of the knees, and other intervertebral lumbar disc displacement. It paid appellant wage-loss compensation on the supplemental rolls for the period July 29 to September 1, 2007, and on the periodic rolls from September 2, 2007 until May 9, 2009. OWCP again paid him on the supplemental rolls as of May 10, 2009, until January 3, 2017.

OWCP received a claim for compensation (Form CA-7) dated December 1, 2016 requesting a schedule award.

Following development of the medical evidence, by decision dated November 1, 2018, OWCP granted appellant a schedule award for nine percent permanent impairment of the right upper extremity, zero percent permanent impairment for the left upper extremity, and zero percent permanent impairment of the bilateral lower extremities.

On January 14, 2019 appellant requested reconsideration of the November 1, 2018 decision, specifically regarding the denial of a schedule award for his bilateral lower extremities. In support of his request, he submitted a November 27, 2018 impairment rating and report by Dr. Craig Levitz, a Board-certified orthopedic surgeon.

Dr. Levitz determined that appellant had seven percent right lower extremity permanent impairment and seven percent left lower extremity permanent impairment based on a diagnosis of bilateral knee osteoarthritis.

In a March 12, 2019 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, OWCP's District Medical Adviser (DMA), reviewed Dr. Levitz' report and impairment rating and found no significant additional information had been provided which would change the impairment rating of zero percent permanent impairment of the bilateral lower extremities.

By decision dated March 20, 2019, OWCP denied modification finding the evidence insufficient to establish more than zero percent permanent impairment each of the left and right lower extremities.

On May 21, 2019 appellant appealed the March 29, 2019 decision to the Board. By decision dated March 15, 2021, the Board set aside OWCP's March 29, 2019 decision and

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<sup>2</sup> Docket No. 19-1276 (issued March 15, 2021).

remanded the case for further development, to be followed by a *de novo* decision. The Board found that the DMA's opinion lacked rationale and required clarification.

In a report dated April 27, 2021, Dr. Harris related that appellant's diagnosed conditions did not meet the criteria to be calculated by the range of motion (ROM) method. He concluded that, utilizing the diagnosis-based impairment (DBI) methodology under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> the class of diagnosis (CDX) for arthroscopic partial medial and lateral meniscectomy resulted in a Class 1, grade C impairment, for 10 percent permanent impairment of the right lower extremity, per Table 16-3, page 509. Dr. Harris also related that under the DBI methodology, the CDX for left knee strain resulted in a Class 1, grade C impairment for two percent permanent impairment of the left lower extremity, per Table 16-3, page 509.

By decision dated May 20, 2021, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity (right leg) and 2 percent permanent impairment of the left lower extremity (left leg).

In a letter dated May 11, 2022, OWCP referred appellant along with a SOAF and the medical record to Dr. Teresa Habacker, a Board-certified orthopedic surgeon, for a second opinion regarding permanent impairment. The letter noted that the claim had been initially accepted for neck and lumbar sprains, right shoulder contusion, bilateral knee contusion. OWCP further noted that the acceptance of the claim had subsequently been expanded to include bilateral knee medical meniscus tear, left trigger finger, thoracic or lumbosacral neuritis or radiculitis, bilateral lower leg traumatic arthropathy, right shoulder adhesive capsulitis, and bilateral knee post-traumatic osteoarthritis.

In a report dated May 26, 2022, Dr. Habacker, based upon a review of the SOAF, and medical evidence, provided permanent impairment ratings under the sixth edition of the A.M.A., *Guides*, of 10 percent permanent impairment of the left knee and 10 percent permanent impairment of the right knee, based on a diagnosis of patellofemoral arthritis.

On June 24, 2022 OWCP referred the case record, along with a SOAF and Dr. Habacker's April 26, 2022 report to Dr. Harris, the DMA. In a report dated July 1, 2022, Dr. Harris reviewed Dr. Habacker's May 26, 2022 report and advised that he was unable to verify Dr. Habacker's impairment calculation. He explained that neither the case record nor Dr. Habacker's report contained documentation of retained knee joint space based on diagnostic studies.

On August 9, 2022 OWCP requested clarification from Dr. Habacker. In an addendum dated September 15, 2022, Dr. Habacker indicated that it was reasonable to find that appellant had a mild problem due to patellofemoral arthritis under Table 16-3 of the A.M.A., *Guides*. She further related that while a one-millimeter cartilage interval or no cartilage interval would indicate a moderate problem, a Class 2 impairment, there was no documentation indicating loss of cartilage to this extent. Dr. Habacker concluded that the only way to definitively determine whether appellant had a mild or moderate problem would be to review an MRI scan that was calibrated.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

She again concluded that appellant had 10 percent right knee permanent impairment and 10 percent left knee permanent impairment.

On October 13, 2022 OWCP requested clarification from Dr. Harris, the DMA. In an addendum dated October 18, 2022, Dr. Harris reviewed additional medical records and disagreed with Dr. Habacker's finding of 10 percent left knee permanent impairment. He explained that the case record contained no diagnostic study documenting any retained joint space of the knee. Dr. Harris concluded that the medical evidence of record did not support an increased schedule award for appellant's right upper extremity permanent impairment, or his bilateral lower extremity impairments.

On December 1, 2022 OWCP requested clarification from Dr. Habacker as to the retained joint space in appellant's left knee. It also requested her to explain how she arrived at 10 percent left lower extremity permanent impairment.

By decision dated March 2, 2023, OWCP denied appellant's claim for an increased schedule award.

Subsequently, OWCP received a report dated March 8, 2023, from Dr. Habacker, who reiterated her opinion that appellant had 10 percent permanent impairment of both knees. Dr. Habacker again noted that based on Table 16-3, of the A.M.A., *Guides*, for patellofemoral arthritis, a classification of mild problem was reasonable.

On November 6, 2023 appellant requested reconsideration. He indicated that his physician, Dr. Habacker, did not provide a proper rating of his left knee permanent impairment as she did not consider that his left knee popped and gave out when he walked. No medical evidence was received with the request for reconsideration.

By decision dated November 13, 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 the review of an OWCP decision as a matter of right.<sup>4</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>5</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>6</sup>

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (1) shows that OWCP erroneously applied or

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</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'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.

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>7</sup> When a timely request 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>8</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).

Preliminarily, the Board finds that OWCP did not receive evidence of additional permanent impairment with appellant's request for reconsideration received on November 6, 2023. The Board will, therefore, consider this a reconsideration request as opposed to a claim for an additional schedule award.<sup>9</sup>

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. 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).<sup>10</sup>

Furthermore, OWCP did not receive any relevant and pertinent new medical evidence. Following the March 2, 2023 merit decision it received Dr. Habacker's clarification report dated March 8, 2023. However, in this report she merely reiterated her opinion that appellant had 10 percent permanent impairment of both knees, without providing the diagnostic basis for her opinion. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the record does not constitute a basis for reopening a claim.<sup>11</sup> In his November 6, 2023 request for reconsideration, appellant argued that Dr. Habacker did not properly rate his left lower extremity permanent impairment. However, his own opinion regarding the degree of his permanent impairment is not relevant to the underlying issue in this case, *i.e.*, whether the medical evidence established that he has more than 10 percent permanent impairment of the right lower extremity (right leg) and/or two percent permanent impairment of the left lower extremity (left leg), for which he previously received schedule award compensation. This is a medical issue which must be addressed by relevant medical evidence.<sup>12</sup> As the Board has

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<sup>7</sup> *Id.* at § 10.606(b)(3); *see R.M.*, Docket No. 23-0748 (issued October 30, 2023); *L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>8</sup> *Id.* at § 10.608.

<sup>9</sup> *See L.W.*, Docket No. 21-0942 (issued May 11, 2022); *C.S.*, Docket No. 19-0851 (issued November 18, 2019); *P.D.*, Docket No. 18-0962 (issued September 18, 2019).

<sup>10</sup> *R.M.*, Docket No. 23-0748 (issued October 30, 2023); *L.W.*, *id.*; *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>11</sup> *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>12</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

held, the submission of argument/evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</sup> Accordingly, appellant was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>14</sup>

The Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration without reopening the case for review on the merits.<sup>15</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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2024  
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>13</sup> *Id.*; see also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979)

<sup>14</sup> *R.S.*, Docket No. 22-1141 (issued April 18, 2023); *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>15</sup> See *R.S., id.*; *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).