

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

S.K., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. CUSTOMS & BORDER PROTECTION,)
U.S. BORDER PATROL, San Ysidro, CA,)
Employer)
_____)

Docket No. 24-0936
Issued: December 12, 2024

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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 24, 2024 appellant filed a timely appeal from an August 9, 2024 nonmerit decision and a September 18, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim for wage-loss compensation for the period February 1 through 28, 2023,

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 18, 2024 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

pursuant to 5 U.S.C. § 8128(a); and (2) whether appellant has met his burden of proof to establish greater than 25 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On February 20, 2007 appellant, then a 37-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on February 18, 2007 he injured his left knee and lower leg when he slipped and his knee buckled while in the performance of duty. On April 6, 2007 OWCP accepted the claim for left knee sprain.³ Appellant underwent arthroscopic surgery to the left knee by Dr. Mark Thomas Selecky, a Board-certified orthopedic surgeon, on June 28, 2007. He returned to work effective August 5, 2007. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls from April 13 through August 5, 2007.

On October 6, 2008 Dr. Leonard A. Simpson, an orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed the medical record and evaluated appellant's permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ He found 14 percent permanent impairment of the left lower extremity due to partial lateral meniscectomy, patellofemoral crepitation, and joint space interval involving the femoral-tibial space. Dr. Simpson opined that appellant had reached maximum medical improvement (MMI) as of May 16, 2008.

By decision dated April 15, 2009, OWCP granted appellant a schedule award for 14 percent permanent impairment of the left lower extremity. The award ran for 40.32 weeks from May 16, 2008 through February 22, 2009.

On February 27, 2020 appellant filed a Form CA-1 claiming a consequential injury to his left Achilles tendon on February 12, 2020 when his left knee buckled while in the performance of duty.⁵ He underwent surgery on February 21, 2020 by Dr. Cuchulain L. Rust, a Board-certified orthopedic surgeon, including left Achilles tendon repair, gastrocnemius recession, and excision of calcaneal spur.

On January 15, 2021 appellant underwent surgery by Dr. Tony C. Lin, a Board-certified orthopedic surgeon and sports medicine specialist, including left knee diagnostic arthroscopy with debridement chondroplasty of the medial femoral condyle and lateral femoral condyle, removal of a loose body, and limited synovectomy. His postoperative diagnoses included chondromalacia of the medial and lateral femoral condyles, trochlea, and patella.

On April 1, 2021 appellant accepted a full-time temporary light-duty assignment as a customs and border protection officer. The physical demands of the position included sitting, computer work, and no weight bearing activity, pushing, pulling, or lifting.

³ OWCP assigned the claim OWCP File No. xxxxxx005.

⁴ A.M.A., *Guides* (5th ed 2001).

⁵ OWCP assigned the February 12, 2020 claim OWCP File No. xxxxxx062.

On May 18, 2021 OWCP administratively combined OWCP File Nos. xxxxxx062 and xxxxxx005, with the latter serving as the master file. It then expanded its acceptance of the claim to include unilateral post-traumatic osteoarthritis of the left knee; rupture of left Achilles tendon; hemarthrosis left lower leg; left knee contusion; tear of medial meniscus of left knee; and chondromalacia patellae, left.

Appellant continued to receive treatment to his left knee, including multiple hyaluronic injections by Dr. Lin.

In a report dated December 20, 2022, Dr. Lin indicated that appellant related pain in the anterior medial aspect of his left knee, cramps in the left calf, and lower leg swelling. He performed a physical examination and diagnosed left knee osteoarthritis. Dr. Lin recommended a partial knee replacement based upon the nature and extent of arthritic findings in appellant's left knee joint.

In a letter dated January 31, 2023, Dr. Lin placed appellant out of work from February 1 through March 1, 2023.

On February 9, 2023 Dr. Lin released appellant to return to work from February 9 through March 27, 2023 "pending surgery date," with restrictions including limited standing and walking and no stairs, bending, stooping, or crawling due to left knee pain.

In a duty status report (Form CA-17) dated February 15, 2023, Dr. Lin noted that appellant was unable to work from February 1 through 9, 2023 and could thereafter return to modified-duty work, pending left knee replacement surgery on March 27, 2023. He did not list any specific restrictions.

On February 17, 2023 appellant filed a claim for compensation (Form CA-7) for disability from work for the period February 1 through 9, 2023 as a result of his accepted employment injury. On February 24, 2023 he filed a CA-7 for disability from work for the period February 12 through 24, 2023.

In a development letter dated February 27, 2023, OWCP informed appellant of the deficiencies of his claims for compensation. It advised him of the type of factual and medical evidence needed to establish his claims and afforded him 30 days to submit the necessary evidence.

On March 1, 2023 appellant accepted a full-time temporary light-duty assignment as customs and border protection officer. The physical demands of the position included sitting, computer work, and no weight bearing activity, pushing, pulling, or lifting.

On March 6, 2023 appellant filed a CA-7 for disability from work for the period February 26 through 28, 2023.

In a March 13, 2023 medical report, Dr. Brad Lorber, a Board-certified physiatrist, noted that appellant related complaints of left knee pain, which he attributed to the February 18, 2007 employment injury. He indicated that he was working modified duty, largely doing paperwork. Dr. Lorber documented physical examination findings and diagnosed chronic left knee pain with a history of multiple surgeries.

On March 27, 2023 appellant underwent a left unicondylar knee arthroplasty and osteoplasty of the patella by Dr. Lin.

By decision dated May 2, 2023, OWCP denied appellant's claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish disability from work for the period February 1 through 28, 2023 causally related to the accepted February 18, 2007 employment injury.

OWCP thereafter received a follow-up report by Dr. Lorber dated April 28, 2023 and physical therapy notes.

On May 23, 2023 appellant requested reconsideration of OWCP's May 2, 2023 decision. In support of his request, he submitted a statement dated May 23, 2023 which indicated that on January 31, 2023 he reagravated his left knee when it buckled while he was working. On February 1, 2023 appellant's knee was swollen, and it was difficult to stand and walk, so Dr. Lin provided him with a note taking him out of work from February 1 through March 1, 2023. He indicated that on February 9, 2023 Dr. Lin released him to return to limited-duty work, and he was provided an offer of limited light duty on or about February 28, 2023. Appellant related that he returned to work in that capacity on March 1, 2023, until he underwent surgery on March 27, 2023.

In a follow-up report dated May 1, 2023, Dr. Lin noted that appellant was recovering well from the March 27, 2023 knee surgery and anticipated that he would be able to return to light-duty work in approximately two months.

By decision dated May 30, 2023, OWCP denied modification of its May 2, 2023 decision.

OWCP thereafter received a February 3, 2023 record of telephone call from appellant to Dr. Lin, who indicated that he needed a referral to an occupational medicine specialist.

In a report dated June 27, 2023, Dr. Lorber noted that appellant was approaching a medically stationary status and released him to return to sedentary to light level work.

On July 3, 2023 appellant accepted an offer of temporary light-duty as a customs and border protection officer at an airport inspection station. The physical demands of the position included sitting and use of a computer, with no weight bearing, pushing, pulling, or lifting.

In a physical therapy discharge summary dated August 11, 2023, Amy Danielson, an occupational therapist, noted that appellant had completed a four-week, comprehensive work-conditioning program and had demonstrated the capacity to perform heavy work.

On August 31, 2023 appellant requested reconsideration of OWCP's May 30, 2023 decision.

OWCP thereafter received an August 24, 2023 report by Dr. Lorber, who evaluated appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ For the left knee, using the diagnosis-based impairment (DBI) rating method, he referenced Table 16-3 (Knee Regional

⁶ A.M.A., *Guides* (6th ed. 2009).

Grid -- Lower Extremity Impairments), and identified the class of diagnosis (CDX) as knee replacement with a good surgical result of 2, which resulted in a default Grade C or 25 percent permanent impairment of the left lower extremity. Dr. Lorber applied a grade modifier for functional history (GMFH) of 1 for a mild problem with positional issues, a grade modifier for physical examination (GMPE) of 1 due to mild sensory loss and calf atrophy, and a grade modifier for clinical studies (GMCS) of 2 due to the presence of the surgical implant. He found that application of the net adjustment formula resulted in an overall impairment of 21 percent of the left lower extremity. Dr. Lorber noted that appellant's range of motion (ROM) was good and, therefore, would not qualify for permanent impairment under the ROM rating method. Regarding the left ankle, he referenced Table 16-2 (Foot and Ankle Regional Grid) and identified a CDX of 1 for mild-to-moderate motion deficits due to the Achilles tendon rupture. Dr. Lorber applied a GMFH of 1 for loss of ankle motion impacting ground level activities, a GMPE of 1 due to mild loss of motion and calf atrophy, and no GMCS due to a lack of clinical studies. He found five percent permanent impairment of the left lower extremity due to the left ankle.

By decision dated November 14, 2023, OWCP denied modification of its May 30, 2023 decision.

OWCP subsequently received physical therapy reports, an electrocardiogram order dated March 22, 2023, and a record of anesthesia dated March 27, 2023.

On May 16, 2024 appellant filed a Form CA-7 for an increased schedule award.

On June 18, 2024 OWCP referred the record, including the August 24, 2023 report of Dr. Lorber and a statement of accepted facts (SOAF), to Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as DMA, and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. The June 18, 2024 SOAF listed the accepted conditions under the present claim as left leg and knee sprain, hemarthrosis of the left lower leg, left knee contusion, medial meniscus tear of the left knee, chondromalacia patella of the left leg, and unilateral post-traumatic osteoarthritis of the left knee. It also noted that the claim was expanded to include a rupture of the left Achilles tendon as a consequential condition that occurred on February 12, 2020.

In a report dated June 20, 2024, Dr. Harris applied the DBI rating method and referenced Table 16-3 (Knee Regional Grid -- Lower Extremity Impairments), on page 510 of the A.M.A., *Guides*, and identified a CDX of 2 for a good result following medial unicompartmental arthroplasty of the left knee with a default rating of 25 percent permanent impairment of the left lower extremity due to the left knee. He opined that appellant had reached MMI on August 24, 2023, the date of Dr. Lorber's examination, and concurred that Table 16-3 did not provide ROM as an alternative rating method for the diagnosed impairing condition. Dr. Harris referenced the prior schedule award for 14 percent permanent impairment of appellant's left lower extremity and opined that the net additional award was therefore 11 percent of the left lower extremity.

In an appeal request form dated August 5, 2024, appellant requested reconsideration of OWCP's November 14, 2023 decision.

By decision dated August 9, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim for wage loss compensation from February 1 through 28, 2023, pursuant to 5 U.S.C. § 8128(a).

By decision dated September 18, 2024, OWCP granted appellant a schedule award for an additional 11 percent permanent impairment of the left lower extremity. The date of MMI was found to be August 24, 2023. The award covered a period of 31.68 weeks and ran for the period from August 24, 2023 through April 1, 2024. OWCP noted that the weight of the medical evidence rested with Dr. Harris as the DMA, who applied the A.M.A., *Guides* to Dr. Lorber's findings.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ 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.⁹

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 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

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

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).¹²

Subsequent to the last merit decision on the disability issue dated November 14, 2023, OWCP received physical therapy reports, an electrocardiogram order, anesthesia reports, and

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607.

⁹ *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.

¹⁰ *Id.* at § 10.606(b)(3); *see L.E.*, Docket No. 22-0004 (issued April 14, 2023); *L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

¹¹ *Id.* at § 10.608.

¹² *L.E.*, *supra* note 10; *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

evidence relevant to appellant's schedule award claim. However, this evidence does not address the underlying issue of whether OWCP properly denied his claim for wage-loss compensation for disability from work from February 1 through 28, 2023 due to his accepted employment injuries. 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.¹³ Thus, appellant is not entitled to further review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

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

LEGAL PRECEDENT -- ISSUE 2

The schedule award provisions of FECA¹⁵ and its implementing regulations¹⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁷

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.¹⁸ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by a GMFH, a GMPE, and/or a GMCS.¹⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).²⁰ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.²¹

¹³ *K.F.*, Docket No. 24-0052 (issued March 26, 2024); *R.H.*, Docket No. 23-0033 (issued September 20, 2023); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁴ *See W.B.*, Docket No. 22-0985 (issued March 27, 2023); *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁵ *Supra* note 1.

¹⁶ 20 C.F.R. § 10.404.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁸ A.M.A., *Guides* 3, section 1.3.

¹⁹ *Id.* at 493-556.

²⁰ *Id.* at 521.

²¹ *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

Benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.²²

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.²³

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.

On June 18, 2024 OWCP referred the record, including the August 24, 2023 report of Dr. Lorber and SOAF to Dr. Harris, serving as DMA, and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Harris provided a rating of 25 percent permanent impairment of the left lower extremity. However, it is unclear whether this rating was solely for the knee or also included the Achilles tendon rupture.

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.²⁴ Once OWCP undertook development of the evidence, it had an obligation to do a complete job and obtain a proper evaluation and a report that would resolve the issue in this case.²⁵

The Board will therefore set aside OWCP's September 24, 2024 decision and remand the case to Dr. Harris for a supplemental opinion and an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. Following this and any other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his wage-loss claim pursuant to 5 U.S.C. § 8128(a). The Board further finds this case not in posture for a decision regarding his claim for a schedule award.

²² 20 C.F.R. § 10.404(d). See *D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

²³ See *supra* note 17 at Chapter 2.808.6f (March 2017).

²⁴ See *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²⁵ See 5 U.S.C. § 8101(19); *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2024 decision of the Office of Workers' Compensation Programs is affirmed. The September 18, 2024 decision is set aside and remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: December 12, 2024
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