

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

V.W., Appellant	)	
	)	
and	)	Docket No. 24-0750
	)	Issued: September 11, 2024
DEPARTMENT OF AGRICULTURE,	)	
U.S. FOREST SERVICE, MASTHEAD ANNEX,	)	
Albuquerque, NM, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 July 8, 2024 appellant, through counsel, filed a timely appeal from a June 20, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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.

<sup>2</sup> The Board notes that counsel did not appeal OWCP's merit decision dated May 9, 2024. Therefore, this decision is not presently before the Board. *See* 20 C.F.R. § 501.3.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>4</sup>

### **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**

On September 2, 2021 appellant, then a 50-year-old forestry technician,<sup>5</sup> filed a traumatic injury claim (Form CA-1) alleging that on August 24, 2021 he sustained a right lower extremity injury when he stepped into a hole with his right foot and fell forward, thereby hyperextending his right knee while in the performance of duty. He stopped work but returned to full-time modified work on August 30, 2021. OWCP accepted the claim for lateral meniscus tear, right knee. Appellant again stopped work on December 5, 2021.

On May 31, 2022 appellant underwent right knee arthroscopy with lateral meniscectomy. OWCP paid him wage-loss compensation on the supplemental rolls for the period May 31 through July 14, 2022.

Appellant returned to modified-duty work on July 15, 2022.

On December 8, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work during the period December 5, 2021 through May 21, 2022.

In a December 12, 2022 development letter, OWCP noted that appellant had alleged a recurrence of disability commencing December 5, 2021 due to a worsening of the accepted August 24, 2021 employment injury while on light duty. It requested that he provide additional factual and medical evidence in support of his recurrence claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a completed development questionnaire signed on December 19, 2022. He asserted that he sustained a recurrence of disability commencing December 5, 2021 based on a withdrawal of a light-duty position made specifically to accommodate his condition. Appellant explained that his entire work unit of seasonal employees had also been terminated on December 5, 2021. He asserted that "[t]here was no new disability."

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the June 20, 2024 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.*

<sup>5</sup> Appellant's date-of-injury position was a temporary, seasonal appointment.

Thereafter, OWCP received a series of work capacity evaluation (Form OWCP-5c) reports and form reports dated December 6, 2022 through January 6, 2023 by Dr. Jeffrey N. Mercer, a Board-certified orthopedic surgeon, wherein he noted work restrictions.<sup>6</sup>

By decision dated January 12, 2023, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a recurrence of disability for the period December 5, 2021 through May 21, 2022 due to a worsening of the accepted employment conditions or a withdrawal of his light-duty position.

Thereafter, OWCP received a series of reports by Dr. Mercer dated December 5, 2022 through May 5, 2023 finding appellant had attained maximum medical improvement (MMI). Dr. Mercer diagnosed chronic arthritis of the right knee, exacerbated by the accepted employment injury. He advised that appellant was able to perform full-time work with restrictions.<sup>7</sup>

On May 23, 2023 appellant requested reconsideration.

Thereafter, OWCP received a June 5, 2023 report by Dr. Mercer.

By decision dated August 10, 2023, OWCP denied modification of the prior decision.<sup>8</sup>

On May 22, 2024 OWCP expanded the acceptance of appellant's claim to include unilateral primary arthritis of the right knee.

On June 13, 2024 appellant, through counsel, requested reconsideration of OWCP's August 10, 2023 decision regarding appellant's claimed recurrence of disability. He submitted an incomplete copy of OWCP's May 22, 2024 decision.

By decision dated June 20, 2024, 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>9</sup>

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<sup>6</sup> OWCP also received physical therapy treatment notes dated November 18 and December 30, 2022.

<sup>7</sup> OWCP also received physical therapy treatment notes dated November 18, 2022 through May 22, 2023.

<sup>8</sup> By decision dated May 9, 2024, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity (right leg). The period of the award ran for 5.76 weeks from April 6 through May 16, 2024.

<sup>9</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

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>10</sup>

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>11</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>12</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>13</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record,<sup>14</sup> or does not address the particular issue involved, does not constitute a basis for reopening a case.<sup>15</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).

On June 13, 2024 appellant, through counsel, filed a timely request for reconsideration of OWCP's August 10, 2023 decision, regarding his denied claim for recurrence of disability.<sup>16</sup> The Board finds, however, that he neither established that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

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<sup>10</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>11</sup> 20 C.F.R. § 10.607(a). According to OWCP's procedures, 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). The right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. *Id.* at Chapter 2.1602.4a (September 2020).

<sup>12</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>13</sup> *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>14</sup> *J.N.*, Docket No. 23-0974 (issued May 14, 2024); *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>15</sup> *T.E.*, Docket No. 24-0575 (issued July 31, 2024); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>16</sup> *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

On reconsideration, appellant submitted an incomplete copy of OWCP's May 22, 2024 decision. However, the underlying issue of the case is whether appellant established a recurrence of disability for the period December 5, 2021 through May 21, 2022, causally related to August 24, 2021 employment injury. As this issue is medical in nature, it can only be resolved through the submission of probative medical evidence.<sup>17</sup> The incomplete copy of the May 22, 2024 OWCP decision does not address the particular issue involved. 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.<sup>18</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>19</sup>

The Board, accordingly, 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.

### **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).

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<sup>17</sup> See *W.M.*, Docket No. 18-0565 (issued August 14, 2018); *S.J.*, Docket No. 17-1214 (issued April 16, 2018); *George C. Vernon*, 54 ECAB 319 (2003).

<sup>18</sup> *Supra* note 14.

<sup>19</sup> *J.N.*, *supra* note 14; see *R.S.*, Docket No. 22-1141 (issued April 18, 2023); *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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 20, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 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