

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

O.A., Appellant	)	
	)	
and	)	<b>Docket No. 22-1350</b>
	)	<b>Issued: May 24, 2023</b>
<b>DEPARTMENT OF HEALTH &amp; HUMAN</b>	)	
<b>SERVICES, PHOENIX INDIAN MEDICAL</b>	)	
<b>CENTER, Phoenix, AZ, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 24, 2022 appellant filed a timely appeal from a September 15, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision on this issue, dated March 21, 2022, 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 to review 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 June 11, 2020 appellant, then a 62-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on May 3, 2020 he was exposed to a patient that tested positive for COVID-19 while in the performance of duty and subsequently developed a fever and tested positive for COVID-19 on May 4, 2020. On the reverse side of the claim form, his supervisor acknowledged that he was injured in the performance of duty. Appellant stopped work on May 8, 2020. OWCP accepted his claim for COVID-19. It paid appellant wage-loss compensation on the supplemental rolls, effective June 18, 2020.

Appellant submitted a polymerase chain reaction test result, collected on September 8, 2020, which revealed that he tested negative for COVID-19.

In a September 18, 2020 work excuse note, Dr. Harvey Hsu, a Board-certified internist, indicated that appellant was recovering from COVID-19 and required admission and treatment. He held appellant off work until October 5, 2020. In a November 17, 2020 letter, Dr. Hsu related that appellant was admitted with a severe case of COVID-19 pneumonia from May 13 through June 6, 2020. He reported that appellant had severe symptoms requiring oxygen, was hypercoagulable, had acute renal failure in the hospital from which appellant recovered, and had cardiac symptoms including bradycardia and right bundle branch block with grade 2 diastolic dysfunction. Dr. Hsu noted baseline asthma and hypertension as risk factors. He further explained that appellant had continued brain fogging, reduced concentration, and difficulty with activity. Dr. Hsu indicated that appellant was “a COVID[-19] long hauler with residual symptoms,” but noted that appellant had improved and was eventually released back to work on October 5, 2020.

In a January 24, 2022 development letter, OWCP requested that appellant provide a report from his physician with regard to whether his condition had reached a fixed and stable point known as maximum medical improvement (MMI), and an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> It afforded him 30 days to submit additional medical evidence in support of his schedule award claim.

Appellant subsequently submitted a February 3, 2022 report from Dr. Hsu relating that appellant’s memory was still limited and appellant had poor concentration, but that he was able to work in medical records. Dr. Hsu also noted that appellant’s walking was fine and that his hypertension, asthma, and fatigue had improved. He diagnosed hypertension, secondary hypothyroidism, post-COVID-19 syndrome, sleep apnea, secondary male hypogonadism, asthma, and cognitive dysfunction. In an accompanying visit summary of even date, Dr. Hsu opined that appellant had a permanent impairment caused by COVID-19 acquired at work. He noted that appellant underwent neuropsychological testing on May 5, 2021 and was found to have significant problems with information processing speed, complex attention, and memory, both verbal and visual, suggesting dysfunction in frontal-subcortical networks with multifactorial etiology. The neuropsychologist recommended that appellant avoid complex instructions, which prevented him from returning to work as a nurse as he would endanger patients with errors. Dr. Hsu opined that

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed., 2009).

appellant had reached MMI by May 2021, noting that the COVID-19 infection and hypoxia led to permanent damage of the brain and appellant had no preexisting condition for this. He explained that appellant's impairment was mainly cognitive and that appellant could do most simple tasks, but could not learn complex concepts, could not multitask, and had reduced memory.

By decision dated March 21, 2022, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.

Appellant subsequently submitted a May 5, 2021 report from Dr. Maryellen Romero, Ph.D., a neuropsychologist, who detailed appellant's history of injury, including cognitive changes since his COVID-19 infection and hospitalization in the summer of 2020 and resection of pituitary adenoma in September 2020. Dr. Romero performed a neuropsychological evaluation, which revealed significant issues with information processing speed, complex attention, and memory, both verbal and visual. She noted that this pattern implicated dysfunction in frontal-subcortical networks and the etiology was likely multifactorial. Dr. Romero diagnosed benign neoplasm of pituitary, pneumonia due to COVID-19, chronic hypertension, major neurocognitive disorder due to multiple etiologies, without behavioral disturbance, and adjustment disorder with mixed anxiety and depressed mood. In a June 8, 2022 report, she noted that, while some improvement or stability was seen in isolated aspects of functioning such as attention and concentration, there was no significant overall improvement in appellant's cognition relative to his previous evaluation. Dr. Romero also noted that, though the current understanding of the impacts of COVID-19 on the central nervous system remained incomplete, his history of severe COVID-19 resulting in extended hospitalization and ventilation could not be overlooked as potential contributors to his current functioning.

On August 29, 2022 appellant requested reconsideration. He asserted his loss of cognitive abilities was a direct and proximate result of contracting COVID-19 and that Dr. Romero's second report established that he had no overall improvement in his cognition.

Appellant also submitted a September 7, 2022 report from Dr. Hsu, relating that appellant continued to have brain fog, memory issues, trouble finding words, fatigue, and leg swelling. Dr. Hsu noted that appellant still had trouble with complex tasks since appellant's COVID-19 infection and asserted that appellant could not return to work as a nurse due to patient safety concerns. He opined that, after two years, this was a permanent deficit. Dr. Hsu diagnosed chronic renal impairment, stage 3a; hypertension; elevated mean corpuscular volume; elevated D-dimer; swelling of lower leg; long COVID-19, asthma, and cognitive dysfunction.

By decision dated September 15, 2022, 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>3</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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>4</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>5</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</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>7</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).

In his August 29, 2022 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that he is not entitled to a review of the merits 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 not previously considered by OWCP. The underlying issue in this case is whether he has

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<sup>3</sup> 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>4</sup> 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).

<sup>5</sup> *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.

<sup>6</sup> *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> *Supra* note 5.

established permanent impairment of a scheduled member or function of the body. In support of his reconsideration request, appellant submitted May 5, 2021 and June 8, 2022 reports by Dr. Romero and a September 7, 2022 report by Dr. Hsu. Both physicians diagnosed post-COVID-19 conditions and cognitive conditions. Dr. Romero indicated that appellant had no significant overall improvement in his cognition between her two evaluations, and Dr. Hsu opined that appellant's cognitive deficits were permanent. However, neither Dr. Romero nor Dr. Hsu provided an impairment rating of a scheduled member or function of the body in accordance with the sixth edition of the A.M.A., *Guides*. 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>9</sup> Thus, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>10</sup>

The Board accordingly finds that OWCP properly determined that appellant has not met any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>11</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).

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<sup>9</sup> *A.M.*, Docket No. 20-1417 (issued July 30, 2021); *E.J.*, Docket No. 19-1509 (issued January 9, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>10</sup> *Supra* note 5; *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

<sup>11</sup> *See D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b)(3), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 15, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 2023  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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