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| YOLANDA V. HENDERSON, Appellant |) | |
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| and |) | Docket No. 03-970 |
| |) | Issued: February 9, 2004 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Pittsburgh, PA, Employer |) | |
| |) | |

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

On July 3, 2000 the Office received a notice of occupational disease and claim for compensation (Form CA-2) from appellant, then a 43-year-old letter carrier, who alleged that her right foot conditions and heel spurs resulted from her employment. She advised that she was

first aware of her conditions on September 10, 1999 and realized that the conditions were caused or aggravated by her employment on November 22, 1999. She further advised that she had been working limited duty since November 22, 1999. Appellant stopped work on April 20, 2000.

On September 12, 2000 the Office accepted appellant's claim for a right heel spur. The Office, however, did not authorize the April 21, 2000 surgery for a partial resection of the calcaneal heel and a plantar fasciotomy.

On September 3, 2002 appellant filed a claim for compensation on account of traumatic injury (Form CA-7) for a schedule award. In an August 26, 2002 medical report, Dr. Jaimie Yun, a podiatrist, noted that appellant was a former patient of a Dr. Raissi and had been seen for bilateral plantar fasciitis and tarsal tunnel of the right foot. Dr. Yun noted the history of injury and indicated that the April 2000 plantar fascia release with calcaneal spur resection of the right heel did not heal well and that appellant continued to suffer from bilateral heel pain, with the right side worse than the left. She further indicated that appellant continued to work four hours a day and has been doing so for the past two years. Pain on palpation along the plantar medial aspect of the heel bilaterally, right side worse than the left, was noted along with positive tarsal tunnel symptoms with paresthesia over the posterior tibial nerve around the medial malleolus into the plantar foot. Problems with workers' compensation paying for physical therapy were noted, and Dr. Yun requested that appellant continue her stretching exercises at home and continue wearing a night split and orthotics.

By letter dated October 16, 2002, the Office noted that there was no medical evidence of record which indicated that maximum medical improvement had been reached in appellant's claim. The Office noted that appellant was still undergoing medical treatment for her right foot, including physical therapy which had been authorized several months previously. Appellant was informed that, in order to be eligible for a schedule award, medical evidence must establish that maximum medical improvement had been reached. The Office provided appellant with the information required to determine a schedule award to present to her doctor and advised that the medical report must be received by November 22, 2002 or her claim for a schedule award would be formally denied.

In an October 21, 2002 report, Dr. Yun again noted appellant's complaints regarding both feet, with the right side being worse than the left. The possibility of orthotics and further physical therapy to treat appellant's plantar fasciitis, heel spur and tarsal tunnel were discussed. The report further provided that appellant was working four-hour days. In a December 2, 2002 report, Dr. Yun provided the results of her examination and indicated that appellant had not reached maximum medical improvement. She stated that, although appellant underwent surgical plantar fascial release in April 2000, over time the condition had returned and appellant continued to suffer with the problem. She further stated that, although appellant had been using a night splint, additional therapies with physical therapy were needed. A new pair of orthotics and additional testing, such as an electromyogram (EMG) with nerve condition velocity studies, were requested. Dr. Yun continued to restrict appellant to working a full weight-bearing

status no more than four hours a day. In a December 5, 2002 report, Dr. Yun indicated that appellant had been referred to Dr. James Rutherford for an impairment rating.¹

By decision dated December 9, 2002, the Office denied appellant's claim for a schedule award as the medical evidence on file failed to establish that maximum medical improvement had been reached. On January 8, 2003 the Office received appellant's undated request for reconsideration. Appellant stated that her condition was job related and noted that her physician was Dr. Yun. By decision dated January 13, 2003, the Office denied appellant's reconsideration request, finding that appellant's letter neither raised substantive legal questions nor included new and relevant evidence.²

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act³ and section 10.404 of the implementing federal regulations,⁴ schedule awards are payable for permanent impairment of specified body members, functions or organs. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the injury.⁵ Thus, an employee is not eligible to receive a schedule award until she has reached maximum medical improvement. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.⁶ The question of when maximum medical improvement has been reached is a factual one depending upon the medical findings in the record.⁷

ANALYSIS -- ISSUE 1

In this case, the weight of the medical evidence shows that appellant has not reached maximum medical improvement. Dr. Yun's reports prior and subsequent to appellant's claim for a schedule award demonstrate that appellant was still undergoing medical treatment for her right foot, including physical therapy. Although Dr. Yun's reports do not distinguish between the accepted condition of right heel spur and the unauthorized April 21, 2000 surgery from which

¹ In a letter dated December 6, 2002, the Office noted Dr. Yun's request for orthotics and a referral for an impairment rating and advised that it would not authorize further medical treatment, consultations and orthotics until medical evidence was provided which indicated a work-related causal relationship. The Office further noted that the only accepted condition was that of a right heel spur for the period beginning September 10, 1998.

² The Board notes that, following the Office's January 13, 2003 decision, additional evidence was received into the record. This included a subsequent acceptance by the Office of the additional diagnoses of right foot plantar fasciitis and tarsal tunnel. The Office further authorized one set of orthotics and a sound wave procedure of the right foot.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *James E. Earle*, 51 ECAB 567 (2000).

⁶ *Id.*

⁷ *James E. Earle*, *supra* note 5.

appellant is having residual effects, the reports clearly establish that appellant was continuing to experience problems with her right foot and additional medical treatment was indicated. In fact, in her October 21, 2002 report, Dr. Yun clearly stated that appellant had not reached maximum medical improvement. As appellant's right foot condition was clearly changing following the unauthorized April 21, 2000 surgery, she has not, by definition, reached maximum medical improvement based on the medical evidence available to the Office at the time of its December 9, 2003 decision. Accordingly, the Board finds appellant's request for a schedule award was premature.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.⁸ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration, which the Office received January 8, 2003, neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. In her request for reconsideration, appellant merely stated that her conditions were job related and noted who her physician was. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any additional evidence with her request for reconsideration. Accordingly, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to

⁸ 20 C.F.R. § 10.606(b)(2) (1999).

⁹ 20 C.F.R. § 10.608(b) (1999).

¹⁰ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award as she had not reached maximum medical improvement at the time of the Office's December 9, 2002 decision. The Board further finds that the Office properly denied merit review of her claim on January 13, 2003.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2003 and December 9, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.¹¹

Issued: February 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ The Board notes that appellant submitted additional evidence in her appeal to the Board. However, the Board's review is limited to evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).