

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

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**VERNETHIA J. COLEY-SMITH, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Detroit, MI, Employer**

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**Docket No. 04-192  
Issued: February 6, 2004**

*Appearances:*  
*Vernethia J. Coley-Smith, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On October 27, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 2, 2003 denying her request for reconsideration under 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office's September 2, 2003 decision. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> Therefore, the Board has no jurisdiction to consider the Office's September 19, 2002 decision terminating appellant's compensation and medical benefits.<sup>2</sup>

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> See *Algimantas Bumelis*, 48 ECAB 679 (1997); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

## **ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On June 7, 1999 appellant, then a 38-year-old mail processor, filed a traumatic injury claim alleging that on June 6, 1999 she injured her right foot when a steel mail container she was pulling cut the back of her foot. The Office accepted her claim for a right foot laceration. Appellant returned to full-time limited duty on June 18, 1999 but decreased her workday to four hours in June 2000.

On July 14, 2000 appellant filed a traumatic injury claim alleging that on that date she injured her right foot and leg while pulling a mail cart. The Office accepted her claim for a strain of the right foot and heel.<sup>3</sup> She stopped work and began receiving compensation for lost wages.

On August 8, 2002 the Office advised appellant that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence established that her work-related right foot laceration and right foot and heel strain had resolved. The Office's letter was sent to appellant's correct address of record.<sup>4</sup>

By decision dated September 19, 2002, the Office terminated appellant's compensation and medical benefits on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Jerry Matlen, a Board-certified orthopedic surgeon and an Office referral physician, established that appellant had no residuals from her accepted right foot laceration and right foot and heel strain.

Appellant requested reconsideration and submitted additional medical evidence. She asserted that Dr. Matlen did not conduct a physical examination on July 17, 2000 and did not consider her July 14, 2000 foot injury in his opinion regarding her condition, only her June 6, 1999 injury.<sup>5</sup> She asserted that the Office did not consider the April 10, 2002 report from Dr. Sarah McDade and that the Office incorrectly stated that Dr. Robert H. Leland and

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<sup>3</sup> The files for the 1999 and 2000 injuries were later consolidated by the Office.

<sup>4</sup> The Office sent the notice of proposed termination to the address provided by appellant on her July 14, 2000 claim form and on other correspondence, including letters to the Office dated March 26 and April 10, 2002. On September 11, 2002 subsequent to the Office's August 8, 2002 notice of proposed termination she sent a change of address.

<sup>5</sup> Appellant alleged that she told Dr. Matlen that she could not discuss her July 14, 2000 injury with him until she had spoken to the Office and he asked her to leave without examining her.

Dr. Ronald E. Little, both attending Board-certified orthopedic surgeons, told her she could return to work without restrictions.<sup>6</sup>

Dr. Kevin E. Till, an attending podiatrist, stated in November 25, 2002 notes that appellant had experienced right heel pain since her June 6, 1999 employment injury. He provided findings on examination and diagnosed Achilles tendinitis and hallux abductovalgus of the right foot.

In a disability certificate dated August 7, 2003, Dr. J. McCollough, an orthopedic surgeon, indicated that appellant was under treatment for a right foot and ankle injury that occurred on June 6, 1999. He diagnosed a right heel laceration and tendinitis of the right foot.

By decision dated September 2, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to warrant further merit review.<sup>7</sup>

### **LEGAL PRECEDENT**

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.<sup>8</sup> When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>9</sup>

### **ANALYSIS**

The medical evidence submitted in support of appellant's request for reconsideration does not constitute relevant and pertinent evidence not previously considered by the Office. The November 25, 2002 notes of Dr. Till, an attending podiatrist, did not mention appellant's July 14, 2000 injury or address the issue of whether appellant had any residuals due to her accepted employment-related right foot injuries. Therefore, his notes do not constitute relevant and pertinent evidence not previously considered by the Office. The disability certificate from Dr. McCollough, an attending Board-certified orthopedic surgeon, merely provided diagnoses of a right heel laceration and tendinitis of the Achilles tendon. Although Dr. McCollough

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<sup>6</sup> Dr. Matlen's July 19, 2000, June 19 and July 25, 2002 reports are at pages 196-99, 388-89 and 397 of the record. Dr. McDade's April 10, 2002 report is at pages 375-76. Dr. Leland's August 7, 2000 and January 8, 2001 reports are at pages 290, 306. Dr. Little's May 1, 2001 report is at pages 302-03.

<sup>7</sup> The record contains evidence submitted subsequent to the Office's September 2, 2003 decision. However, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

<sup>8</sup> 20 C.F.R. § 10.606(b)(2).

<sup>9</sup> 20 C.F.R. § 10.608(b).

mentioned the June 6, 1999 injury, he did not address the issue of whether appellant's foot problems represented ongoing residuals from her June 6, 1999 and July 14, 2000 employment injuries. Therefore, the disability certificate from Dr. McCollough does not constitute relevant and pertinent evidence not previously considered by the Office.

In her request for reconsideration, appellant asserted that Dr. Matlen, the Board-certified orthopedic surgeon who served as an Office referral physician, did not conduct a physical examination on July 17, 2000 and did not consider her July 14, 2000 foot injury in his opinion regarding her condition. However, a review of Dr. Matlen's report shows that he provided detailed physical findings on examination from his July 17, 2000 examination and, at the request of the Office, he provided a supplemental report on July 25, 2002 addressing appellant's right foot and heel strain sustained on July 14, 2000. Appellant also asserted that the Office did not consider the April 10, 2002 report from Dr. McDade, an attending Board-certified orthopedic surgeon. However, the Office considered Dr. McDade's report in its August 8, 2002 notice of proposed termination. Appellant asserted that the Office incorrectly stated that Dr. Leland and Dr. Little, both attending Board-certified orthopedic surgeons, told her she could return to work without restrictions. She is apparently referring to the Office's statement in its August 8, 2002 notice of proposed termination that, "Dr. Matlen noted upon review of the medical evidence in your file that both Dr. Little and Dr. Leland<sup>10</sup> indicated [that] you could work without restrictions." Dr. Matlen noted in his June 19, 2002 report that notes from Dr. Little "reveal that he finds no reason for her not to be able to work."<sup>11</sup> He also stated that Dr. Lederman had indicated that if an MRI scan was unremarkable there would be no reason for appellant to have work restrictions or further treatment and Dr. Matlen noted that the MRI scan was essentially unremarkable. Thus, the Office's statement is correct with exception of a minor error, in substituting Dr. Leland's name for that of Dr. Lederman, which does not affect the issue in this case. For all these reasons, appellant's allegations do not constitute relevant and pertinent evidence not previously considered by the Office.

On appeal, appellant argues that she is still disabled due to her right foot injuries. However, as noted above, the issue of whether appellant has any residual disability due to her accepted right foot injuries is not within the Board's jurisdiction. She also asserts that the Office did not send her a notice of proposed termination prior to its September 19, 2002 termination decision. The record does not support appellant's assertion. As noted above, the Office's August 8, 2002 notice of proposed termination was sent to appellant's current address of record. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual.<sup>12</sup> This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>13</sup> The

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<sup>10</sup> Dr. Matlen actually mentioned Dr. Lederman, a Board-certified orthopedic surgeon to whom the employing establishment referred appellant, rather than Dr. Leland.

<sup>11</sup> This is apparently a reference to Dr. Little's May 1, 2001 report in which he stated, "I can find no reason why she should not be working" and noted a "completely normal" examination on March 28, 2001 and a normal magnetic resonance imaging (MRI) scan.

<sup>12</sup> *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

<sup>13</sup> *Michelle Lagana*, 52 ECAB 187 (2000).

appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.<sup>14</sup> Appellant's assertion that the Office did not send her a notice of proposed termination prior to its September 19, 2002 termination decision is not supported by the evidence of record and she did not submit evidence in support of her assertion.

### **CONCLUSION**

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied her request for further merit review of her claim under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 2, 2003 is affirmed.

Issued: February 6, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>14</sup> See *Larry L. Hill*, 42 ECAB 596 (1991).