

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

M.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Hartford, CT, Employer**

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**Docket No. 12-489
Issued: June 20, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2012 appellant, through her attorney, filed a timely appeal from a December 13, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As the most recent merit decision of OWCP was issued on January 11, 2011, more than 180 days from the date of appeal, the Board has no jurisdiction over the merits of the claim¹ pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

On appeal, counsel asserts that OWCP's December 13, 2011 decision is contrary to fact and law.

FACTUAL HISTORY

On August 28, 2010 appellant, then a 43-year-old letter carrier, filed a notice of traumatic injury (Form CA-1) claiming that she sustained a right great toe injury on August 13, 2010. She "bent [her] right foot back between the curb and street" while delivering mail. Appellant had intermittent work absences through November 2010.

In August 28, 2010 reports, Dr. Deborah Keightley, an attending Board-certified internist, diagnosed plantar fasciitis due to the August 13, 2010 incident.

In reports from September 17 to October 27, 2010, Dr. Samuel Berkowitz, an attending podiatrist, diagnosed a possible intra-articular fracture of the sesamoid apparatus beneath the right first metatarsophalangeal joint of the right foot. After September 17, 2010 x-rays were negative for fracture, he diagnosed symptomatic osteoarthritis secondary to the injury. Dr. Berkowitz prescribed a walker and orthotics.

In a November 23, 2010 letter, OWCP advised appellant of the evidence needed to establish her claim, including a physician's explanation of how the August 13, 2010 incident caused the claimed right foot injury. In response, appellant submitted copies of medical reports previously of record.

By decision dated January 11, 2011, OWCP denied appellant's claim on the grounds that fact of injury was not established. It accepted that the August 13, 2010 incident occurred at the time, place and in the manner alleged. OWCP found that the medical evidence was insufficiently rationalized to establish a causal relationship between the August 13, 2010 incident and the diagnosed intra-articular fracture of the sesamoid apparatus, osteoarthritis or plantar fasciitis of the right foot.

In a February 14, 2011 letter, appellant requested reconsideration, asserting that the August 13, 2010 incident was competent to cause the diagnosed right foot conditions. In a February 7, 2011 report, Dr. Berkowitz noted persistent pain in the "lateral sesamoid bone beneath the right first metatarsophalangeal joint," consistent with the August 13, 2010 injury. He stated that, while the diagnosis of intra-articular fracture was not confirmed by x-ray, "osteoarthritis can be caused by traumatic injury." Dr. Berkowitz also noted that a May 19, 2010 lower extremity bone scan was normal.

By decision dated May 18, 2011, OWCP denied reconsideration finding the additional evidence insufficient to warrant further merit review as it was cumulative or irrelevant.

In a November 30, 2011 letter, counsel requested reconsideration. He submitted November 29 and December 13, 2011 reports from Dr. Berkowitz reiterating the diagnosis of osteoarthritis of the right foot.

In a December 6, 2011 letter, counsel requested that OWCP accept the conditions diagnosed by Dr. Berkowitz.

By decision dated December 13, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative or irrelevant to her claim. It found that Dr. Berkowitz's November 29 and December 13, 2011 reports were cumulative and repetitious of those previously of record.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ 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), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁶ The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP 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.⁸

ANALYSIS

Appellant claimed that catching her right foot between the curb and the street on August 13, 2010 caused several right foot injuries and conditions. Dr. Keightley, a Board-certified internist, diagnosed plantar fasciitis. Dr. Berkowitz, an attending podiatrist, diagnosed an intra-articular fracture of the sesamoid apparatus beneath the right first metatarsophalangeal joint and osteoarthritis. OWCP issued a January 11, 2011 decision denying appellant's claim on the grounds that causal relationship was not established.

Appellant requested reconsideration on February 14, 2011 and submitted a February 7, 2011 report from Dr. Berkowitz who again diagnosed osteoarthritis of the right foot. OWCP denied reconsideration by May 18, 2011 decision, finding that the evidence submitted was cumulative or irrelevant.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

Counsel requested reconsideration on November 30, 2011. He submitted November 29 and December 13, 2011 reports from Dr. Berkowitz, reiterating his diagnosis of osteoarthritis of the right foot. Counsel also requested on December 6, 2011 that OWCP “upgrade the allowance of the case.”

Dr. Berkowitz diagnosed osteoarthritis of the right foot. His opinion is cumulative of those reports previously of record. This evidence is insufficient to warrant a merit review of the prior decision.⁹ Accordingly, the Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly issued its December 13, 2011 decision denying merit review.

On appeal, counsel contends that OWCP’s December 13, 2011 decision was contrary to fact and law. As noted, OWCP properly denied appellant’s request for reconsideration as the evidence submitted in support thereof was either cumulative or irrelevant.

CONCLUSION

The Board finds that OWCP properly denied appellant’s request for reconsideration.

⁹ A.R., Docket No. 11-1358 (issued January 3, 2012). See *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 13, 2011 is affirmed.

Issued: June 20, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board