

FACTUAL HISTORY

This is appellant's second appeal before the Board. In a November 14, 2003 decision, the Board found that the Office properly terminated appellant's compensation benefits effective August 10, 2002 on the grounds that she had no further disability causally related to her December 17, 1999 employment injury.² The facts and circumstances of the case are set out in the prior decision and are hereby incorporated by reference.³

On June 7, 2004 appellant requested reconsideration by the Office, contending that her foot continued to swell thereby precluding her from wearing comfortable shoes due to the pressure on her foot.

By decision dated June 15, 2004, the Office denied appellant's request for reconsideration, finding that her letter neither raised substantive legal questions nor included relevant and pertinent new evidence. The Office instructed appellant that any future request for reconsideration must be made within one year from November 14, 2003 and must be accompanied by relevant legal argument or medical evidence.

By letter dated August 10, 2004, appellant requested reconsideration, noted that her compensation had been terminated on July 30, 2002 and argued that the termination was incorrect as her foot swelled and she could not wear comfortable shoes because of the pressure on her foot.

She submitted reports from Dr. James L. Thomas, a podiatrist, who noted that on July 30, 2002 he debrided appellant's affected toe and nail for skin build-up and possible nail recurrence. In an April 1, 2003 report, Dr. Thomas noted that appellant had a new onset of pain through the distal aspect of the metatarsals of the left foot. He noted that x-rays raised the suspicion of a possible stress fracture and he put her in a postoperative shoe. In an April 1, 2003 report, Dr. Thomas reported that appellant had a new onset of pain through the distal aspect of the metatarsals of the left foot. In a July 8, 2003 report, Dr. Thomas noted that appellant was asymptomatic with respect to the fourth metatarsal but had chronic symptoms from a nonunion of her second metatarsal fracture. He opined that this was permanent, would bother her on and off, and would be resolved only by a bone graft and plate. Dr. Thomas recommended that appellant wear comfortable shoes, such as postoperative shoes. On February 5, 2004 he noted that appellant continued with foot pain and swelling secondary to the chronic nonunion.

Appellant also submitted an April 1, 2003 radiology report from Dr. Robert R. Lopez, a Board-certified radiologist, who noted a healing stress fracture at the base of the fourth metatarsal. A May 5, 2003 radiology report from Dr. Lopez noted a hallux valgus abnormality and medial bunion deformity, but no significant interval change since the prior examination.

² Docket No. 03-1903 (issued November 14, 2003). The Office had accepted that on December 17, 1999 appellant sustained a second metatarsal fracture when a container fell on her left foot.

³ Appellant filed a petition for reconsideration with the Board on November 25, 2003. By order dated April 16, 2004, the Board denied the petition on the grounds that no error of fact or law was cited warranting further consideration. Docket No. 03-1903 (issued April 16, 2004).

By decision dated September 14, 2004, the Office denied appellant's request for reconsideration, finding that the evidence was cumulative and repetitious or immaterial. The Office noted that Dr. Thomas indicated that, although she had continued symptoms through the second metatarsal base, follow-up radiographs did not show any abnormalities.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,⁴ the Office's regulations under 20 C.F.R. § 10.606(b), provide that a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. In accordance with 20 C.F.R. § 10.608(b), the implementing regulations provide that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁶

ANALYSIS

In support of her reconsideration requests, appellant submitted letters of request containing the argument that, although her compensation entitlement was terminated on July 30, 2002, such termination was incorrect as her foot still swelled and she could not wear good shoes because of the pressure on her foot caused chronic pain. Appellant also argued that after about two hours she had to slip her foot into a slide or surgery shoe because of swelling, and that she was not going to have surgery because of the risk of a pulmonary embolism. The Board finds that these arguments do not demonstrate an incorrect interpretation or application of a point of law, do not advance a legal argument not previously considered, and do not constitute relevant and pertinent new evidence not previously considered by the Office or by the Board.

Medical evidence submitted to support appellant's case of continuing injury-related disability and impairment included podiatrist's notes from Dr. Thomas, which reported his treatment of appellant's condition in 2002 and discussed the onset of pain through the distal metatarsals in 2003, which he did not causally relate to her originally accepted employment injury or employment factors. On July 8, 2003 Dr. Thomas found appellant to be asymptomatic with respect to the fourth metatarsal, but was symptomatic of her second metatarsal, and on January 13, 2004 he noted appellant's complaints but noted that follow-up radiographs did not show any abnormalities. Dr. Thomas stated that appellant had a possible stress fracture but he did not discuss causal relationship. As Dr. Thomas did not address the threshold issue, the Board finds

⁴ 5 U.S.C. § 8101 *et seq.* Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁵ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

⁶ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

that the Office properly declined to reopen appellant's case on the merits based on the submission of this evidence.

Also submitted were two radiographic reports interpreted by Dr. Lopez, the radiologist, who found on April 1, 2003 that appellant had a healing stress fracture at the base of the fourth metatarsal, and a May 5, 2003 report that found a hallux valgus abnormality and medial bunion deformity, but no significant interval change since the prior examination. The Board notes that the condition accepted by the Office was a left foot second metatarsal fracture. The additional diagnostic report did not find a fracture at this site as addressed by Dr. Thomas. Therefore these reports are insufficient to warrant merit review.

Appellant, therefore, did not submit any evidence as required by 20 C.F.R. § 10.606(b), that showed the Office erroneously applied a point of law, that advanced a relevant legal argument not previously considered by the Office, or that contained relevant and pertinent new evidence not previously considered by the Office, which would require the Office to reopen her case for further consideration of the merits.

Accordingly, with 20 C.F.R. § 10.608(b), when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. The Office, therefore, properly complied with the provisions of 20 C.F.R. § 10.608(b) and denied a reopening of appellant's record for further review on its merits.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review on its merits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 14 and June 15, 2004 are hereby affirmed.

Issued: March 24, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member