

Appellant returned to work on March 29, 2003 and on March 30, 2003 his temporary position ended.

Appellant came under the treatment of Dr. Herbert V. Rachelson, a Board-certified orthopedist, who treated him on April 11, 2003 for a sprained right ankle and recommended a fracture walker. In a physician assistant's note of the same date signed by Dr. Rachelson, who reported that appellant injured his right ankle when he fell on debris while searching for parts of the space shuttle Columbia. He noted that x-rays of the right ankle revealed no fractures. On May 13, 2003 Dr. Rachelson diagnosed pain of the right foot. Appellant was treated in follow-up and was determined to be totally disabled from work. Dr. Rachelson indicated that he would be out of work for approximately six weeks. Thereafter, appellant was treated in the emergency room on June 3, 2003 for right foot pain.

On December 29, 2003 appellant filed a CA-7, claim for compensation for the period March 23 to December 29, 2003.

On January 13, 2004 Isabel Gonzalez, appellant's supervisor, advised that the most recent report from Dr. Rachelson dated May 13, 2003 determined him to be totally disabled. The notes indicated that he would be out of work for approximately six weeks.

By letter dated January 29, 2004, the Office asked appellant to submit additional information, including a comprehensive medical report from his treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed right ankle injury and any resulting disability. No additional evidence was received.

In a decision dated April 13, 2004, the Office granted compensation for the period March 30 to June 24, 2003; however, it denied compensation thereafter on the grounds that the evidence was not sufficient to establish that he continued to have disability due to the accepted work injury. The Office noted that Dr. Rachelson's report of May 13, 2003 advised that appellant would be off work for approximately six additional weeks or until June 24, 2003.

On April 13, 2004 appellant filed a CA-7, claim for compensation for the period March 23, 2003 to April 13, 2004.¹

On August 12, 2004 appellant requested reconsideration and submitted additional medical evidence. Report's from Dr. Rachelson dated February 13 and 27, 2004 noted his complaints of persistent pain in the right ankle and foot and diagnosed chronic medial ankle pain, possible tendinitis and possible tarsal tunnel syndrome. He indicated that because of the severity of appellant's symptoms, he suspected malingering and released him to work. On July 23, 2004 the physician noted that appellant had right foot tendinitis and decreased movement of the toes.

¹ The record reflects that the Office has not issued a final decision on appellant's request for compensation for the period March 23, 2003 to April 13, 2004; therefore, the Board does not have jurisdiction over the matter. See 20 C.F.R. § 501.2(c).

Also submitted was a magnetic resonance imaging (MRI) scan dated May 13, 2004 which revealed flexor halucis longus tendinitis with fluid noted around the tendon.

In a decision dated August 20, 2004, the Office denied appellant's reconsideration request on the grounds that his letter neither raised a substantive legal question, nor included new and relevant evidence and was, therefore, insufficient to warrant merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.² Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.³ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right ankle sprains, for which he was totally disabled from work for the period March 30 to June 24, 2003 as established by Dr. Rachelson. In a report dated May 13, 2003, the physician reviewed treatment of his work-related injury and indicated total disability compensation for a six-week period. The Board notes that the record supports that appellant was totally disabled due to the accepted injury during this period and that he received appropriate compensation.

The medical evidence submitted in support of the wage-loss compensation claim for disability for the period beginning June 25 to December 29, 2003 is insufficient to establish that the claimed period of disability was caused or aggravated by the accepted employment injury.

Accompanying appellant's claim was a report dated April 11, 2003 from Dr. Rachelson, who advised that he sustained a sprained right ankle when he fell on debris while searching for parts of the space shuttle Columbia and that he was totally disabled. In his report dated May 13, 2003, Dr. Rachelson, noted that appellant was treated for follow-up and diagnosed with sprain of the right ankle and right foot pain and advised that he was totally disabled from work for approximately six weeks. These reports of the physician are not relevant to appellant's claim of total disability for the period on or after June 25 to December 29, 2003. He was requested by the Office to submit medical evidence to support his claim of total disability after June 24, 2003 but he failed to do so within the time allotted. Therefore, these reports are insufficient to meet appellant's burden of proof and the Office properly denied his claim for wage-loss compensation.

² See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

³ *Id.*

⁴ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

The remainder of the medical evidence, specifically emergency room records from June 3, 2003 failed to provide a specific opinion on the issue of disability. Consequently, the medical evidence does not establish that disability on or after June 24, 2003 was due to appellant's employment injury of March 23, 2003.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁶ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(1) shows that [the Office] erroneously applied or interpreted a specific point of law; or
- (2) advances a relevant legal argument not previously considered by the [Office]; or
- (3) constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁷

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration advised that his injury was disabling and he sought additional wage-loss compensation. His August 12, 2004 request for reconsideration 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. Consequently, he is not entitled to a review of the merits of his 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 submitted treatment notes from Dr. Rachelson dated February 13 to July 23, 2004 and an MRI scan dated May 13, 2004. In the reports dated February 13, 2004 to July 23, 2004, Dr. Rachelson indicated that appellant experienced persistent pain in the right ankle and foot and diagnosed chronic medial ankle pain, possible tendinitis and possible tarsal tunnel syndrome. However, these reports are not relevant to the

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b).

⁷ 20 C.F.R. § 10.608(b).

issue in the case as Dr. Rachelson did not address disability on or after June 24, 2003. The physician did not support further disability, rather he suspected malingering because of the severity of his symptoms. The other medical reports submitted with the reconsideration request are not relevant because they do not specifically address the issue of whether the claimed period of disability after June 25, 2003 was caused by the accepted employment injury.

Appellant neither “showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.”⁸ Therefore, he did not submit relevant evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his August 12, 2004 request for reconsideration.⁹

CONCLUSION

The Board finds that appellant has failed to establish that his condition during the claimed period of disability is causally related to the accepted employment injury of March 23, 2003 and that the Office properly denied appellant’s request for reconsideration without conducting a merit review.

⁸ 20 C.F.R. § 10.606(b).

⁹ With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 20 and April 13, 2004 are affirmed.

Issued: May 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member