

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

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 07-1986
Issued: February 4, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 24, 2007 appellant filed a timely appeal of the May 5, 2007 decision of the Office of Workers' Compensation Programs which denied her request for further merit review of her claim and a January 5, 2007 decision denying her claim for disability. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she was disabled on or after November 7, 2005 causally related to her December 31, 1999 employment injury; and (2) Whether the Office properly denied her request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 4, 2000 appellant, then a 42-year-old mail processor, filed a traumatic injury claim alleging that she was pulling a gate to close a container when it popped open and bruised her left foot on December 31, 1999. She stopped work that day and returned to limited duty on

January 21, 2000. On February 23, 2000 the Office accepted the claim for left foot trauma and fracture of the third metatarsal. The Office also accepted appellant's claim for aggravation of arthritis of the left foot.¹

Appellant came under the treatment of Dr. R. Howard Pike, a Board-certified orthopedic surgeon. In a March 17, 2004 report, Dr. Pike noted that appellant was seen for pain, soreness and swelling in her foot. He indicated that she had continued pain and soreness in the foot with dysesthesia sensations consistent with her previous work injury in the year 2000. Dr. Pike stated that appellant had a prior nonwork-related fracture in the same area of the left foot in 1998. He determined that she had ongoing symptoms in the lateral hind foot, "probably related to her nonwork injury in 1998." Dr. Pike completed a limited-duty report of the same date, with permanent restrictions. On April 11, 2005 he determined that appellant had new symptoms of metatarsalgia which were "unrelated." Dr. Pike completed a status report of the same date and noted that appellant's metatarsalgia was "unrelated."

In a November 7, 2005 report, Dr. Pike diagnosed substantial pes planovalgus and forefoot pronation. He stated that appellant "has been here in the last couple of visits now for things I think are unrelated to her work[ers'] comp[ensation] injury." Dr. Pike advised that appellant was getting "pressure from her substantial pronation and the foot throwing itself into the lateral border of the shoe." He advised that she needed customized inserts which would help her be more comfortable in standing on her feet and working. Dr. Pike opined that "[t]hese issues again I do not believe are related to [appellant's] original work injury. They are a preexisting underlying problem of a congenital nature."

In a June 5, 2006 report, Dr. Pike diagnosed pes planovalgus. He opined that standing on her feet for long periods of time was not compatible with "that kind of a poor foot mechanical disadvantage" and noted that it was not directly related to her workers' compensation injury. Dr. Pike indicated that appellant should consider an "occupational job change or early retirement if she cannot stand on her feet long enough to continue in her current job in an effective manner." Dr. Pike recommended the continued use of orthotics and shoe modifications. He examined appellant again on October 30, 2006 and noted that she was seen for new problems with pain in the area of the second metacarpophalangeal (MTP) joint. Dr. Pike determined that appellant had a "Morton-type foot morphology with a short first ray" and tenderness in the area of the second metatarsal head planetary and in the second MTP joint as well. He opined that "[t]his new symptomatology is not related to her original injury, now seven years out. It is simply metatarsalgia due to her underlying preexisting genetic risk, with the way that her foot has grown, with a short first ray."

In a November 9, 2006 report, Dr. Pike indicated that appellant was "still trying to help me understand the relationship to her work[ers'] comp[ensation] injury and frankly, after reviewing things with her again today and looking back through her six to eight-year history in the chart. I do have to concur that her current symptoms in the mid foot are in the area of her original injury." Dr. Pike noted that it was a "three or four-year period of time where all of our efforts were concentrated on the fourth and fifth tarsal metatarsal (TMT) joints from a previous

¹ The record reflects that appellant reached maximum medical improvement on August 1, 2000 and received a schedule award for an eight percent permanent partial impairment of the left leg.

injury and aggravation of some degenerative joint disease symptoms there which had me confused. Looking back to [appellant's] very earliest work[ers'] comp[ensation] injuries, it was a direct blow to the dorsum of the foot." Dr. Pike opined that "we would have to consider [appellant's] ongoing current symptoms possibly due to her work[ers'] comp[ensation] injury." He conducted an examination and noted that a bone scan of both feet was surprisingly symmetric. Dr. Pike opined that appellant's previous bony injuries and her previous fractures from 1998 and the degenerative changes in her lateral two TMT joints were at a baseline equivalent to her contralateral foot; despite her having no symptoms in the other foot. Dr. Pike added that the "bone scan is an objective confirmation that [appellant's] bones and joints see similar stresses and strains in both feet." He ordered a magnetic resonance imaging (MRI) scan and noted that, "if that is indeed normal, [appellant] is at maximal medical improvement with zero [disability] with regards to her baseline risk for degenerative changes, as she has now been found to have such stresses and strains on the contralateral foot and therefore could only be rated based on subjective sense of pain in the left foot."

A November 30, 2006 MRI scan of the left foot, read by Dr. S. Boyd Eaton, a Board-certified diagnostic radiologist, was reported as normal.

On December 3, 2006 appellant submitted a CA-7 claim requesting wage-loss compensation for disability for the period October 30 to November 30, 2006.

By decision dated January 5, 2007, the Office denied the claim for compensation on and after November 7, 2005. The Office found that, based on Dr. Pike's reports, appellant's current bilateral foot condition was due to a degenerative congenital condition, congenital pes planovalgus and not causally related to the December 31, 1999 work injury to her left foot. The Office determined that appellant's fracture of the left third metatarsal had healed.

In a December 18, 2006 report, Dr. Pike noted that the MRI scan revealed the absence of soft tissue abnormalities and a bone scan which showed symmetric uptake in both feet and degenerative changes. He opined that it was inevitable with appellant's flat feet that she would develop degenerative changes in both feet and that her injury on the left would have brought on symptoms earlier that would have otherwise happened. Dr. Pike opined that appellant was at maximum medical improvement and no further medical intervention was warranted.

On January 12, 2007 the Office received an undated statement from appellant in which she indicated that she was sent home as there was no work for her from December 19 to 23, 2006. It also received a copy of Dr. Pike's November 9, 2006 report, a CA-7 claiming compensation for the period December 19 to 23, 2006 and a December 19, 2006 e-mail from the employing establishment advising that her services were no longer needed.

On March 22, 2007 appellant requested reconsideration, noting continued pain and swelling in her left foot which she believed was related to her accepted injury.

By decision dated May 4, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,² the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.³ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.⁴ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁵ The medical evidence of record must directly address the particular period of disability for which compensation is sought; to do otherwise would essentially allow employee's to self-certify their disability and entitlement to compensation.⁶

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability for the period on or after November 7, 2005.⁷ The Board has held that the mere belief that a condition was caused or aggravated by employment factors or incidents is insufficient to establish a causal relationship between the two.⁸ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for left foot trauma, fracture of the third metatarsal and aggravation of arthritis of the left foot. Appellant filed a claim for wage-loss compensation for a period after November 7, 2005. It is her burden of proof to establish that her claimed disability is due to her accepted December 31, 1999 employment injury. The Board finds that

² 5 U.S.C. §§ 8181-8193.

³ See *Robert A. Flint*, 57 ECAB ____ (Docket No. 05-1106, issued February 7, 2006); *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁵ See *Carol A. Lyles*, 57 ECAB ____ (Docket No. 05-1492, issued December 13, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁶ *Amelia S. Jefferson*, 57 ECAB ____ (Docket No. 04-568, issued October 26, 2005); see also *William A. Archer*, 55 ECAB 674 (2004).

⁷ *Sandra D. Pruitt*, 57 ECAB ____ (Docket No. 05-739, issued October 12, 2005); *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁸ *Alfredo Rodriguez*, *supra* note 7.

⁹ *Fereidoon Kharabi* *supra* note 5.

appellant did not submit sufficient medical evidence to establish employment-related disability for the period claimed due to her accepted injury.

Appellant's treating physician, Dr. Pike, submitted several reports in which he opined that appellant's left foot condition was no longer work related. On November 7, 2005 he diagnosed pes planovalgus and forefoot pronation and opined that he did not believe this was related to her work injury. Dr. Pike advised that the condition represented a preexisting underlying problem of a congenital nature. On June 5, 2006 he advised that standing on her feet for long periods of time was not compatible with "that kind of a poor foot mechanical disadvantage" and that appellant's condition was not related to her workers' compensation injury. Dr. Pike examined appellant on October 30, 2006 and opined that "[t]his new symptomatology is not related to [her] original injury, now seven years out. It is simply metatarsalgia due to her underlying preexisting genetic risk, with the way that her foot has grown, with a short first ray."

The only report providing some support for appellant's claim is Dr. Pike's November 9, 2006 report. He noted that appellant was trying to help him understand the relationship of her condition to her workers' compensation injury. Dr. Pike reviewed appellant's chart and opined that he would have "to concur that her current symptoms in the mid foot are in the area of her original injury." He explained that there was a "three or four-year period of time where all of our efforts were concentrated on the fourth and fifth TMT joints from a previous injury and aggravation of some degenerative joint disease symptoms there which had me confused. Looking back to appellant's very earliest work[ers'] comp[ensation] injuries, it was a direct blow to the dorsum of the foot." Dr. Pike opined that "we would have to consider [appellant's] ongoing current symptoms possibly due to her work[ers'] comp[ensation] injury." The Board notes that this opinion is speculative.¹⁰ In the same report, Dr. Pike again indicated that appellant symptoms were due to subjective complaints based on a preexisting condition. He stated that he ordered an MRI scan which, if normal, would indicate that appellant was at maximum improvement with no disability. The November 30, 2006 MRI scan was normal. Dr. Pike's November 9, 2006 report does not support that appellant has any employment-related disability for the claimed period. Rather, her ongoing complaints are related to her preexisting conditions.

No other medical reports attribute appellant's disability for work commencing on or after November 7, 2005 to her accepted employment injuries.

Although appellant alleged that her disability commencing after November 7, 2005 was due to her accepted employment injury, the medical evidence of record does not establish that her claimed disability during the timeframe was related to her accepted employment injuries.¹¹ The Board finds that she has failed to submit rationalized medical evidence establishing that her

¹⁰ *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

¹¹ Appellant has also supported his position by noting that he was found disabled by the Social Security Administration. However, the Board has held that a finding of disability under another federal statute does not establish disability under the Act. *John E. Cannon*, 55 ECAB 585 (2004).

disability on or after November 7, 2005 was causally related to her accepted employment injury and thus, she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹² the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, set forth arguments and contains evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the Office; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”¹³

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.¹⁴

ANALYSIS -- ISSUE 2

Appellant disagreed with the Office’s January 5, 2007 decision which denied her request for disability on or after November 7, 2005. The underlying issue on reconsideration was whether she met her burden of proof in establishing that she was disabled on or after November 7, 2005 due to her accepted employment injury. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether she was disabled on or after November 7, 2005 due to her accepted employment injury.

In her October 6, 2005 request for reconsideration, appellant submitted additional evidence. She submitted a December 18, 2006 report in which Dr. Pike noted that appellant was at maximum medical improvement, discussed findings in an MRI scan and opined that it was inevitable that appellant would develop degenerative changes in both feet, as she was flat footed and that her injury on the left would have brought on symptoms earlier that would have otherwise happened. The Board finds that this report is not relevant and pertinent new evidence, as Dr. Pike had previously discussed her preexisting conditions and his report does not otherwise support any work-related disability for the claimed period. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing the claim and

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.606(b).

¹⁴ 20 C.F.R. § 10.608(b).

does not constitute a basis for reopening a case for further merit review.¹⁵ The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she was disabled on or after November 7, 2005 causally related to her December 31, 1999 employment injury. The Board also finds that the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ *Betty A. Butler*, 56 ECAB ____ (Docket No. 04-2044, issued May 16, 2005); *Daniel M. Dupor*, 51 ECAB 482 (2000).

¹⁶ *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 5 and January 5, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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