

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

C.P., Appellant

and

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

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**Docket No. 08-2535
Issued: July 13, 2009**

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, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 29, 2008 appellant, through her attorney, filed a timely appeal from a December 27, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. As there is no merit decision within one year of the filing date of this appeal, the Board lacks jurisdiction to review the merits of this case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly denied appellant's request for further merit review of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

This case is before the Board for the second time. On December 7, 2007 the Board affirmed September 18, 2006 and May 9, 2007 decisions modifying appellant's loss of wage-

¹ See 20 C.F.R. §§ 501.2(c), 501.3.

earning capacity to zero and terminating her medical benefits.² The Board found that she had no continuing disability after September 19, 2006 due to her January 20, 1993 employment injury, accepted by the Office for left ankle sprain. The Board determined that the reports from Dr. Tara Long Scott, an attending podiatrist, did not address the relevant issue of whether appellant had any further employment-related disability. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On December 14, 2007 appellant, through her attorney, requested reconsideration. In a report dated September 7, 2007, Dr. Scott described her treatment of appellant for “chronic ankle pain associated with a torn anterior tibiofibular ligament on the left ankle. The injury was sustained while appellant was carrying mail at work that was over 40 pounds. The ligament was surgically repaired 13 years ago; however, her symptoms were never alleviated and she continues to experience pain and swelling.” Dr. Scott stated:

“Due to the chronic nature of this pathology, there may be occasions in which [appellant] may have to decrease activity intermittently to manage her symptoms. She will never be able to have a job that requires constant standing, and walking, and will not be able to participate in her previous duties as an [employing establishment] worker.”

By decision dated December 27, 2007, the Office denied appellant’s request for reconsideration on the grounds that she did not submit evidence or argument sufficient to warrant reopening her case for further review of the merits under section 8128. It determined that Dr. Scott’s report contained no new information.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,³ the Office’s regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to

² Docket No. 07-1653 (issued December 7, 2007). The Office accepted that appellant sustained a left ankle sprain on January 20, 1993 when she slipped on ice. Appellant returned to work for four hours per day on January 25, 1993 and worked until October 14, 1993, when her temporary appointment ended. She received compensation for total disability beginning January 12, 1994, when she underwent an excision of a thickened distal tibiofibular ligament of the left ankle. In a decision dated March 27, 1997, the Office reduced appellant’s compensation based on its finding that she had the capacity to earn wages as a medical assistant.

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that “[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.”

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁶

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁷ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁸ If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁹

ANALYSIS

The Board affirmed Office decisions dated September 18, 2006 and May 9, 2007 modifying appellant's loss of wage-earning capacity to zero and terminating her authorization for medical treatment. The Board further affirmed the determination that appellant had no work-related disability after September 19, 2006, finding that Dr. Scott failed to address the relevant issue of whether appellant had any continuing disability for employment.

With her request for reconsideration, appellant submitted a new medical report from Dr. Scott, who diagnosed chronic ankle pain due to a torn left anterior tibiofibular ligament from an employment injury 13 years earlier. Dr. Scott noted that the tear had been surgically repaired but found that appellant continued to experience symptoms. She opined that due to the "chronic nature" of appellant's condition, she was unable to perform her previous work duties. In its December 27, 2007 decision, the Office found that Dr. Scott's report contained no new evidence sufficient to warrant reopening appellant's case for further merit review of her claim. Her opinion that appellant was unable to perform her date-of-injury position, however, pertained directly to the issue of whether she had continuing employment-related disability.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.¹⁰ As the September 7, 2007 report from Dr. Scott constituted new and relevant medical evidence, the Board finds that the Office improperly denied her request for review of the merits of the claim. The case will be remanded to the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

⁶ *Id.* at § 10.608(b).

⁷ *Billy B. Scoles*, 57 ECAB 258 (2005); *Donald T. Pippin*, 53 ECAB 631 (2003).

⁸ *Id.*

⁹ *See Annette Louise*, 53 ECAB 783 (2003).

¹⁰ *See Billy B. Scoles* and *Donald T. Pippin*, *supra* note 7.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of her claim pursuant to section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 27, 2007 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 13, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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