United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 10-186**
	)	**Issued: February 19, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 26, 2009 appellant timely appealed the May 21, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. The last merit decision is dated October 10, 2008. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board does not have jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether the Office properly denied appellant's April 7, 2009 request for reconsideration under 5 U.S.C. § 8128(a).

[1] The Board notes that appellant requested oral argument. Appellant indicated that oral argument was necessary, in part, because the Office had not properly reviewed new evidence she submitted with her latest request for reconsideration. As discussed *infra*, the Board agrees with her argument regarding the Office's consideration of her newly submitted evidence. Appellant's brief was sufficiently persuasive such that oral argument is unnecessary in this instance. Consequently, the Board, in its discretion, denies her request for oral argument. *See* 20 C.F.R. § 501.5(a), (b)(2009).

FACTUAL HISTORY

Appellant, a 55-year-old distribution window clerk, has an accepted claim for right toe contusion, which occurred on September 11, 2007.[2] On January 7, 2008 Dr. Kenneth E. Cookus, a Board-certified podiatric surgeon, sought authorization to fuse the interphalangeal (IP) joint of appellant's right big toe. The Office referred the authorization request to its district medical adviser (DMA), Dr. Lawrence A. Manning, who disagreed with the proposed surgery. It then declared a conflict in medical opinion and referred the case to an impartial medical examiner (IME) to determine whether the proposed surgery was appropriate.[3] In a report dated March 11, 2008, the IME, Dr. William K. Fleming, found that a toe fusion was not indicated because of appellant's minimal level of arthritis.[4] Based on the opinions of the IME and the DMA, the Office denied the requested surgery by decision dated July 9, 2008. Appellant requested reconsideration and received merit review, however, the Office denied modification in a decision dated October 10, 2008.

In October 2008, appellant's podiatrist referred her to Dr. Fleming, the previous IME, for treatment of her right foot injury. Dr. Fleming examined appellant on October 21, 2008 and provided a differential diagnosis of diabetic vascular neuropathy of the right great toe. He recommended additional studies, including a magnetic resonance imaging (MRI) scan, which appellant obtained on October 29, 2008. Dr. Fleming also recommended part-time, limited-duty work.[5] He conducted a follow-up examination on November 5, 2008. At that time Dr. Fleming noted that appellant's vascular testing (arterial Doppler) was negative or normal and her MRI scan simply showed some arthritis at the sesamoid. He believed appellant might have a pain syndrome, previously known as reflex sympathetic dystrophy. Dr. Fleming referred appellant for rehabilitation and pain management and kept her on part-time, limited-duty work. According to him, appellant was not a surgical candidate and there was nothing further he could offer her.

Appellant obtained additional diagnostic studies on November 20 and 26, 2008. She eventually underwent a right great toe fusion on December 2, 2008. Appellant provided the Office with copies of her presurgery history and physical examination report as well as Dr. Cookus' December 2, 2008 operative report.

Appellant filed another request for reconsideration on April 7, 2009. Her request referenced the recent treatment she received from Dr. Fleming as well as her December 2, 2008

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[2] The injury occurred when the bottom door of a cage opened and fell on appellant's right foot. Appellant initially described her injury as a bruised and swollen big toe and second toe.

[3] The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a)(2006); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The regulations and Board precedent both recognize that a conflict may be created by an Office medical adviser or consultant, as in the instant case. 20 C.F.R. § 10.321(b); *see Elaine Sneed*, 56 ECAB 373, 379 (2005).

[4] Dr. Fleming is a Board-certified orthopedic surgeon.

[5] Appellant had previously been working full-time, limited duty as a modified clerk.

right big toe surgery. Appellant also argued that the Office should have referred her for a second opinion examination before denying her request for surgery.

By decision dated May 21, 2009, the Office denied appellant's request for reconsideration. It did not review the case on the merits. The Office found that appellant's legal argument regarding the need for a second opinion examination was not valid. It also found that the evidence appellant provided with her request for reconsideration "was not new competent evidence" relevant to the issue upon which the case was denied. Consequently, the Office determined that merit review was unwarranted.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.[6] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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 Office.[7] When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8] A timely request for reconsideration that meets at least one of the standards under section 10.606(b)(2) will be reopened for merit review in accordance with the requirements of 20 C.F.R. § 10.609.[9] The Office's decision shall contain findings of fact and a statement of reasons.[10]

ANALYSIS

The Board finds that the case is not in posture for decision. Appellant submitted new evidence from Dr. Fleming who previously had served as an IME. She also provided a copy of the surgical notes from her December 2, 2008 IP fusion of the first right toe. When Dr. Fleming last saw appellant on November 5, 2008, he reiterated that appellant was not a surgical candidate. Although this latest report may not directly support appellant's position, Dr. Fleming's latest diagnoses and findings appear to be relevant to the issue of whether the proposed right great toe fusion was appropriate medical treatment for appellant's accepted condition. Similarly, Dr. Cookus' December 2, 2008 operative notes appear to be relevant to the issue of whether surgery was warranted. Although the Office itemized the various medical evidence submitted on reconsideration, the May 21, 2009 decision does not reflect a thorough review of the evidence. Moreover, pursuant to 20 C.F.R. § 10.126, it does not explain why this evidence is not relevant.

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2).

[8] *Id.* at § 10.608(b).

[9] *Id*.

[10] 20 C.F.R. § 10.126.

The senior claims examiner made no mention of the content of the various reports and did not even acknowledge that appellant had undergone surgery in December 2008 or that the IME treated appellant in October and November 2008. The Office simply concluded without explanation that the evidence provided was not "new competent medical evidence," and was, therefore, insufficient to warrant a merit review. The Board finds that the Office improperly denied further merit review of appellant's request for authorization of surgery. Accordingly, the case will be remanded for an appropriate decision which with an explanation of the reasons for such decision.

CONCLUSION

The Office's decision will be set aside and the case will be remanded for a decision in accordance with the requirements of 20 C.F.R. § 10.608(a).

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2009 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 19, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board