

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

_____)
S.E., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE)
COMMISSARY AGENCY, LITTLE CREEK)
COMMISSARY, Norfolk, VA, Employer)**
_____)

**Docket No. 09-1706
Issued: June 1, 2010**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 15, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' August 8, 2008 merit decision, denying her claim for disability and April 6, 2009 nonmerit decision, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant was disabled from June 30, 2004 to April 12, 2008 due to her employment injury; and (2) whether the Office properly denied her request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that she is entitled to wage-loss compensation.

FACTUAL HISTORY

On November 22, 2005 appellant, then a 43-year-old sales store checker, filed a claim for an occupational disease alleging that on March 4, 2004 she became aware of her bilateral heel

spurs. On June 4, 2004 she realized that her condition was caused by standing and walking in her federal employment. By letter dated March 10, 2006, the Office accepted appellant's claim for right plantar fasciitis. Appellant filed claims for wage-loss compensation (Form CA-7) for the period June 30, 2004 to April 12, 2008.

By letters dated June 6, 2006 to April 15, 2008, the Office advised appellant about the deficiencies in her claims. It requested that she provide additional factual and medical evidence to support her disability for the claimed period.

Appellant submitted medical evidence from Dr. Peter R. Grinkewitz, an attending Board-certified orthopedic surgeon. In disability certificates dated October 14, 2004 to October 11, 2007 and a September 2, 2004 note, Dr. Grinkewitz advised that she could return to work on intermittent dates during the period August 22, 2004 through October 22, 2007 with restrictions. On September 2, 2004 he advised that appellant would be out of work for three weeks due to surgery scheduled on September 17, 2004 to treat her plantar fasciitis. In a July 26, 2005 surgical report, Dr. Grinkewitz performed a radical resection of the heel spur and plantar fascial scarring of the right heel. In progress notes, he addressed treatment of appellant's chronic tendinitis, calcaneal spur, traumatic arthritis and radiculopathy of the right heel and foot post surgery. On August 22, 2006 Dr. Grinkewitz released her to return to work. In an April 3, 2007 prescription note, he listed appellant's physical restrictions. In a July 5, 2007 report, he advised that she sustained chronic pain syndrome of the right heel and found that she could work four to six hours a day with restrictions.

In letters dated June 14, 2006 to March 13, 2008, the employing establishment addressed requests for medical documentation and removal of appellant from her employment.¹

A November 6, 2007 prescription note signed by someone on the staff of Dr. A.J. Barot, a Board-certified neurologist, stated that appellant was evaluated on that date. In a January 18, 2008 disability certificate, Dr. Barot advised that she could return to work on January 19, 2008 without restrictions.

A July 6, 2005 x-ray report of Dr. Michael Ho, a Board-certified radiologist, revealed spurring of the calcaneus and flat longitudinal arch with weight bearing of the right foot. In a July 6, 2005 report, Dr. Chan V. Nguyen, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan of appellant's right foot showed an unremarkable Achilles tendon and minimal fluid signal in the retrocalcaneal bursa. Otherwise, there was no surrounding inflammation. Dr. Nguyen stated that the MRI scan also showed a torn anterior talofibular ligament. A July 26, 2005 x-ray report from Dr. Kip K. Park, a Board-certified radiologist, stated that appellant was status post right heel spur removal. Appellant had soft tissue swelling and air within the surgical site that was likely due to immediate postoperative state. In a July 27, 2005 surgical pathological report, Dr. Olubunmi T. Lampejo, a pathologist, stated that there were no significant gross abnormalities in the bone and soft tissue related to her right heel resection.

¹ In a March 13, 2008 decision, the employing establishment terminated appellant's employment effective March 29, 2008 based on her inability to perform the essential duties of her sales store checker position. Appellant also submitted physical therapy reports for chronic bilateral plantar fasciitis.

By decision dated August 8, 2008, the Office denied appellant's claim for compensation for disability from June 30, 2004 to April 12, 2008. The evidence was found to be insufficient to establish that she was totally disabled during this period due to her accepted condition.

On February 2, 2009 appellant requested reconsideration and submitted letters dated February 1 to June 19, 2008 from the Office of Personnel Management (OPM), which addressed her application for a disability retirement.² In a March 20, 2008 letter, she addressed her removal from the employing establishment. On March 28, 2008 the Office addressed the medical evidence appellant needed to submit to establish entitlement to compensation. On September 1 and October 6, 2006 it provided her with a benefits statement. On October 4, 2006 the Office provided appellant with an election of benefits form. In letters dated January 3, 2006 to June 16, 2008, the employing establishment addressed the processing of her compensation claims and her disability retirement application.

By decision dated April 6, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to warrant further merit review of her claim.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.³ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁴ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁵ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁶ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify her disability and entitlement to compensation.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained right plantar fasciitis in the performance of duty. Appellant claimed compensation for total disability from June 30, 2004 to April 12, 2008,

² In a June 10, 2008 letter, OPM approved appellant's application for disability retirement.

³ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *Manuel Garcia*, 37 ECAB 767 (1986).

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

due to the accepted condition. On August 8, 2008 the Office found that she was not disabled for work during the claimed period. Appellant has the burden to establish by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability and the accepted condition.⁸

Dr. Grinkewitz stated that appellant could return to work on intermittent dates from August 22, 2004 to October 22, 2007 with restrictions. Although he indicated that she was disabled for work, he did not address how her disability was due to the accepted plantar fasciitis condition. Dr. Grinkewitz did not explain the basis for appellant's disability commencing June 30, 2004. As noted, it is appellant's burden to establish her disability by the submission of probative medical evidence. Dr. Grinkewitz' progress notes only generally addressed the treatment of her calcaneal spur, plantar fasciitis with scarring, chronic tendinitis, traumatic arthritis and radiculopathy of the right heel and foot. An April 3, 2007 prescription note provided appellant's physical restrictions. As noted evidence does not address how her disability for the claimed period was caused by her accepted condition. The Board finds that Dr. Grinkewitz did not submit sufficient medical opinion to establish that appellant's disability for the claimed period was due to her accepted condition.

The reports from appellant's physical therapists are of no probative medial value in establishing her claim. A physical therapist is not a physician as defined under the Act.⁹ These reports, therefore, do not constitute competent medical opinion evidence.

The November 6, 2007 prescription note from Dr. Barot's office stated that appellant was evaluated on that date. This evidence did not address whether she was totally disabled during the claimed period due to the accepted employment injury. The Board finds it is insufficient to establish appellant's claim. On January 18, 2008 disability Dr. Barot stated that appellant could return to work as of January 19, 2008 with no restrictions; however, he did not address whether her disability was causally related to the accepted employment injury. The Board finds that the evidence from Dr. Barot is insufficient to establish her claim. Similarly, the diagnostic test reports of Dr. Ho, Dr. Nguyen, Dr. Park and Dr. Lampejo do not address the issue. The Board finds that these reports are insufficient to establish her claim.

The Board finds that there is insufficient medical opinion to establish that appellant was disabled from June 30, 2004 to April 12, 2008 due to residuals of her accepted right plantar fasciitis. Appellant did not meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹⁰ 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

⁸ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁹ *See* 5 U.S.C. § 8101(2); A.C., 60 ECAB ____ (Docket No. 08-1453, issued November 18, 2008).

¹⁰ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹¹ 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.¹² When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

On February 2, 2009 appellant disagreed with the Office's August 8, 2008 decision, which found the evidence of record insufficient to establish that she was totally disabled from June 30, 2004 to April 12, 2008 due to her employment-related right plantar fasciitis. The relevant issue is whether her disability during the claimed period was causally related to the accepted employment injury. The Board notes that this issue is medical in nature.

Appellant submitted correspondence from OPM, the Office and the employing establishment regarding her disability retirement and her claims for compensation. This evidence is not relevant to the issue in this case, which is medical in nature. It does not address whether appellant was disabled from June 30, 2004 to April 12, 2008 due to her employment-related right plantar fasciitis. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening the claim.¹³ The resubmission of correspondence with the employing establishment and the Office does not require reopening her claim for further merit review as it was previously considered by the Office. The Board has held that evidence that repeats or duplicates that already of record has no evidentiary value and does not constitute a basis for further merit review.¹⁴

The Board finds that appellant did not submit arguments or evidence showing that the Office erroneously applied or interpreted a specific point of law; advancing a relevant legal argument not previously considered; or constituting relevant and pertinent new evidence not previously considered by the Office. Appellant did not meet any of the necessary regulatory requirements and the Office properly declined to reopen her claim for further merit review.¹⁵

CONCLUSION

The Board finds that appellant has failed to establish that she was totally disabled from June 30, 2004 to April 12, 2008 due to her employment injury. The Board further finds that the

¹¹ 20 C.F.R. § 10.606(b)(1)-(2).

¹² *Id.* at § 10.607(a).

¹³ *D. Wayne Avila*, 57 ECAB 642 (2006).

¹⁴ See *L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

¹⁵ *M.E.*, 58 ECAB 694 (2007) (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).

Office properly denied her request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2009 and August 8, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 1, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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