United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 10-1419**
	)	**Issued: March 7, 2011**
U.S. POSTAL SERVICE, FDR POST OFFICE, LENOX HILL STATION, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 28, 2010 appellant, through counsel, filed a timely appeal of a November 6, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than one year elapsed between the most recent merit decision dated October 28, 2008 to the filing of the appeal, the Board lacks jurisdiction to review the merits of her claim 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 reconsideration of her claim pursuant to 5 U.S.C. § 8128(a).

[1] For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

On appeal, counsel contends that the Office should have treated appellant's recurrence of disability claim as a new occupational disease claim, assigned a new file number and found the claim compensable.

FACTUAL HISTORY

The Office accepted that on December 6, 2006 appellant, then a 44-year-old mail carrier, sustained bilateral enthesopathy of the ankles and tarsus as a result of walking on cement floors while working at the employing establishment. Appellant stopped work on the date of injury.[2]

On August 15, 2007 appellant filed a claim alleging that she sustained a recurrence of disability commencing that date.[3] When she returned to full-duty work on August 6, 2007 she experienced pain in her feet after she stood on a hard cement floor without a mat. Appellant submitted an August 15, 2007 emergency room record from New York Hospital Queens, which indicated that she was treated for a foot condition. She did not have an infection or gout. An x-ray did not demonstrate a fracture, but a radiologist would review the test results to determine the presence of any abnormality. In an August 16, 2007 medical report, Dr. Aaron J. Gutman, an attending podiatrist, advised that appellant could not stand for more than eight hours or stretch to stand. Appellant had to be seated in a chair and not a stool without having to stand. She could only walk to take restroom and lunch breaks and "step-offs" and travel to and from work until further notice. In an August 15, 2007 prescription, Dr. Anthony L. Berger, Board-certified in emergency medicine, ordered Vicodin.

In a November 27, 2007 decision, the Office found that appellant did not sustain a recurrence of disability commencing August 15, 2007 causally related to the December 6, 2006 injuries.

On December 20, 2007 appellant requested a review of the written record by an Office hearing representative.

In a March 25, 2008 decision, an Office hearing representative affirmed the denial of appellant's recurrence claim. He found that the evidence submitted established that she was claiming an intervening injury for which she could file an occupational disease claim.

By letter dated August 1, 2008, appellant requested reconsideration.

In an October 28, 2008 decision, the Office denied modification of the March 25, 2008 decision. The medical evidence of record failed to establish that appellant sustained a recurrence of disability commencing August 15, 2007 causally related to her accepted injuries.

[2] On December 6, 2006 appellant filed both traumatic injury and occupational disease claims alleging that she sustained a bilateral foot injury due to her federal employment.

[3] In a March 13, 2007 decision, the Office accepted that appellant sustained a recurrence of disability on February 26, 2007 causally related to her December 6, 2006 employment injuries.

In a December 6, 2006 report, Dr. Gutman provided his findings on physical, neurological and dermatological examination. He diagnosed bursitis in the metatarsal phalangeal (MP) joints bilaterally, high arch foot creating trauma to the MP joints and tendon Achilles irritation with possible plantar fasciitis. In an August 15, 2007 disability certificate, Dr. Gutman advised that appellant was partially disabled. Appellant could not work on her feet. Dr. Gutman recommended that she sit as much as possible. In treatment notes dated January 2 through March 8, 2007, he addressed appellant's foot problems, treatment and physical restrictions. Appellant underwent bilateral foot surgery on March 6, 2007 to treat her multiple hammertoes and small bunion protrusion. In a February 24, 2008 treatment note, Dr. Gutman stated that she had chronic bilateral MP joint bursitis, bilateral foot tendinitis and ankle neuropathy. He addressed appellant's medical treatment and physical restrictions. Appellant underwent bilateral foot surgery on March 6, 2007 to treat her multiple hammertoes and small bunion protrusion. Dr. Gutman opined that her discomfort was related to her employment which required standing on a rigid floor with no soft mats. He stated that appellant could only return to work with specific restrictions such as, padded mats under her shoes and possibly sitting while working that would relieve pressure from her feet. Dr. Gutman advised that her condition would return from time to time. He concluded that appellant had reached maximum medical improvement. In a January 13, 2009 report, Dr. Gutman reiterated the findings in his August 16, 2007 report.[4]

By letter dated October 16, 2009, appellant, through counsel, requested reconsideration. Counsel contended that her claim should be treated as an occupational disease claim and not a recurrence claim. He requested that the Office assign a new file number to the claim and find it compensable based on the medical evidence of record. An Office form letter dated November 9, 2001 stated that a claim for a recurrence of disability commencing May 8, 2001 due to an April 5, 2001 injury would be processed as a new claim and assigned a new file number.

In a November 6, 2009 decision, the Office denied appellant's request for reconsideration. It noted that the issue in the case was whether she sustained a recurrence of disability commencing August 15, 2007 and not whether her recurrence claim should have been adjudicated as a new occupational disease claim. The Office found that the evidence submitted was duplicative in nature and not relevant and, thus, insufficient to warrant further merit review of appellant's claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[5] 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) constitute relevant and pertinent new evidence not previously considered by the Office.[6] To be entitled to a merit review of an

[4] Appellant resubmitted a copy of the August 15, 2007 record from New York Hospital Queens and Dr. Berger's prescription.

[5] 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).

[6] 20 C.F.R. § 10.606(b)(1)-(2).

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.[7] 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

In an October 16, 2009 letter, appellant disagreed with the Office's October 28, 2008 decision, which found that she did not sustain a recurrence of disability commencing August 15, 2007 due to her December 6, 2006 employment injuries. The relevant issue in the case, whether she sustained a recurrence of disability causally related to her accepted December 6, 2006 employment injuries, is medical in nature.

On reconsideration, appellant contended that the Office erred in failing to treat her recurrence claim as a new occupational disease claim. She further contended that it should have assigned a new file number to her claim. Appellant also contended that the Office should have found her claim compensable under the Act. On appeal, she reiterated her contention.

In support of her reconsideration request, appellant submitted the Office's November 9, 2001 form letter which stated that a claim for a recurrence of disability commencing May 8, 2001 due to an April 5, 2001 injury would be processed as a new claim and assigned a new file number. Neither her contention nor the Office's correspondence constitute relevant and pertinent evidence not previously considered by the Office because this case involves her claim for a recurrence of disability and its causal relation to the December 6, 2006 employment injuries. Appellant did not attribute her total disability commencing August 15, 2007 to new work factors. She claimed that her recurrence of disability was caused by standing on cement floors while working at the employing establishment which was accepted as a factor of her employment by the Office. The Board finds that appellant's contention and the Office's November 9, 2001 letter are insufficient to reopen her claim for further merit review.

Appellant did not submit relevant and pertinent new evidence not previously considered by the Office. She resubmitted the August 15, 2007 emergency room record and Dr. Berger's prescription. The submission of this evidence does not require reopening of appellant's claim for merit review because it was previously considered by the Office. The Board has held that evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.[8]

Dr. Gutman's December 6, 2006 report found that appellant had bursitis in the MP joints bilaterally, high arch foot creating trauma to the MP joints and tendon Achilles irritation with possible plantar fasciitis. In treatment notes dated January 2 through March 8, 2007, he addressed her foot problems and medical treatment. This evidence predates the alleged recurrence of disability commencing August 15, 2007 and is not relevant to the issue of whether appellant's total disability as of that date was due to the accepted employment injuries of

[7] *Id.* at § 10.607(a).

[8] *See L.H.*, 59 ECAB 253 (2007); *James E. Norris*, 52 ECAB 93 (2000).

December 6, 2006. Dr. Gutman's August 15, 2007 disability certificate stated that she was partially disabled but did not address whether her disability was causally related to the accepted employment injuries. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9] Dr. Gutman's February 24, 2008 treatment note reiterated that appellant had chronic bilateral MP joint bursitis, bilateral foot and ankle tendinitis and neuropathy, bilateral hammertoes and small bunion protrusion for which she received medical treatment. While he opined that her discomfort was related to standing on a rigid floor with no soft mats at work and that she could only return to work with restrictions, he did not address the issue of whether she sustained a recurrence of disability commencing August 15, 2007 due to the December 6, 2006 employment injuries. Dr. Gutman's January 13, 2009 report reiterated his August 16, 2007 findings.[10] The Board finds that his reports and treatment notes do not warrant reopening the case on the merits.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her October 16, 2009 request for reconsideration.[11]

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[9] *See Arlesa Gibbs*, 53 ECAB 204 (2001); *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[10] *Id.*

[11] *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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