

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

L.V., Appellant)
and) Docket No. 10-1808
U.S. POSTAL SERVICE, POST OFFICE,) Issued: March 3, 2011
Pittsburgh, PA, Employer)

)

Appearances:

Douglas Sughrue, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2010 appellant, through counsel, filed a timely appeal of a March 16, 2010 decision of the Office of Workers' Compensation Programs denying reconsideration of his claim. He filed his appeal more than 180 days after the last merit decision of November 2, 2009 denying his claim for an employment-related foot condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without further merit review under 5 U.S.C. § 8128(a).

On appeal, counsel argues that appellant submitted relevant new medical evidence with his request for reconsideration.

FACTUAL HISTORY

On February 2, 2009 appellant, then a 41-year-old mail carrier, filed an occupational disease claim alleging a torn Achilles tendon in his left foot from walking involved in his federal

employment. By decision dated March 11, 2009, the Office denied his claim finding that the medical evidence was insufficient to establish that specific work factors caused his left foot condition. It noted that there was no medical evidence that provided a diagnosis that could be connected to the duties of his federal employment.

On March 30, 2009 appellant stated that prior to his employment, he had no pain in either of his Achilles tendons. His condition started about one-year prior and became more frequent. On appellant's last day of work on September 24, 2008 the pain was unbearable. He discussed his medical treatment and physical therapy sessions. Appellant noted that his route required walking on uneven concrete and across grass and weeds and on steps that were in disrepair. He was on his feet between seven and a half to nine hours a day.

In a May 5, 2009 report, Dr. Kathleen M. O'Connell, a treating Board-certified internist and podiatrist, discussed appellant's duties as a mail carrier. She noted that radiographs taken on September 30, 2008 showed an infracalcaneal heel spur, calcifications along the insertion of the Achilles tendon on the right foot and signs of traction and pulling of his Achilles tendon. Dr. O'Connell opined that such biomechanical deformities could have been caused by walking up and down stairs and delivering mail and from wearing nonsupportive shoes and carrying a mailbag. She noted that appellant's Achilles tendinitis caused him to have an improper biomechanical gait giving him a decrease in heel strike adding to his gastroc soleus equinus.

By decision dated November 2, 2009, the Office denied modification of the March 11, 2009 decision.

On March 11, 2010 counsel requested reconsideration. He addressed appellant's job duties and medical history. Counsel argued that Dr. O'Connell clearly and unequivocally opined that appellant's Achilles tendon was stressed by his job duties resulting in an intratendinous tear requiring surgery once conservative treatments were exhausted.

In a February 2, 2010 report, Dr. O'Connell noted that appellant had an initial complaint of right Achilles tendinitis which was surgically corrected in November 2008. It was decided in January 2009 that appellant had healed from his right Achilles tendon procedure and he then had the left Achilles surgically repaired. This consisted of a retrocalcaneal exostectomy, a gastroenemius recession and debridement along with repair of the Achilles tendon. Dr. O'Connell opined that appellant's delivering mail and walking up and down stairs while carrying a mailbag increased the pain he suffered. As of appellant's January 20, 2009 visit, he stated that his right Achilles tendon was feeling well but he had swelling in his left leg with difficulty ambulating. She diagnosed a left equinus deformity that also caused an increase in his Achilles tendinitis and the longitudinal rupture of the Achilles tendon needed to be addressed surgically. Appellant had a prominent bony exostosis and chronic enthesopathy that was formed at the proximal aspect of the calcaneus. She opined that appellant's biomechanical deformity consisted of an equinus deformity and was exacerbated by walking in delivering mail and carrying a mailbag.

By decision dated March 16, 2010, the Office denied appellant's request for reconsideration without conducting a merit review. It found that appellant did not raise any substantive legal arguments or provide new and relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that the evidence or argument submitted by 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.² 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.³ 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 on the merits.⁴

The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after conducting such investigation as the Office considers necessary with respect to the claim. Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is critical that the Office review all newly received evidence relevant to that subject matter prior to the time of issuance of its final decision.⁵

ANALYSIS

The Board finds that this case is not in posture for decision. The Office denied appellant's claim for compensation on the grounds that appellant did not establish that his bilateral Achilles tendon condition was caused by his duties as a letter carrier. Appellant requested reconsideration of this decision and submitted a February 2, 2010 medical report from his treating podiatrist, Dr. O'Connell. By decision dated March 16, 2010, the Office denied reconsideration without conducting a merit review. The Board notes that Dr. O'Connell clearly discussed appellant's employment activities and stated that appellant's equinus deformity was exacerbated by delivering mail and carrying a mailbag. She noted that the left equinus deformity had caused an increase in his Achilles tendinitis and a longitudinal rupture of the Achilles tendon that was surgically treated. Dr. O'Connell discussed the issues of causation and disability, the issues on which appellant's claim was denied. The Office, in denying appellant's reconsideration request, did not review this evidence. The Board has held that it is crucial that

¹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[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.” 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b).

⁵ *William A. Couch*, 41 ECAB 548 (1990).

all evidence relevant to the subject matter in the record prior to the time of issuance of the final decision be considered by the Office.⁶ The Board will remand the case for a proper review of the evidence and an appropriate final decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with this opinion.

Issued: March 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

⁶ *Id.*