

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Omaha, NE, Employer**

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**Docket No. 11-515
Issued: September 13, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2010 appellant filed a timely appeal of a September 23, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying further merit review. Because over 180 days elapsed between the most recent merit decision of March 10, 2010 to the filing of this appeal the Board lacks jurisdiction to review the merits of appellant's case, pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 12, 2007 appellant, then a 37-year-old city letter carrier, filed an occupational disease claim alleging that he developed bilateral pes planus and ankle instability and traumatic

¹ 5 U.S.C. § 8101 *et seq.*

arthritis due to factors of his federal employment. On July 18, 2007 Dr. Gary Kilian, an osteopath, diagnosed pes planus and stated that appellant was at risk for a permanent increase in pain due to overuse in his federal employment. OWCP accepted appellant's claim for bilateral temporary aggravation of flat feet and temporary aggravation of articular cartilage disorder of the right ankle and foot on August 9, 2007. In a report dated October 9, 2007, Dr. Kilian reported that appellant had bilateral pain in both feet as his left foot was subjected to ongoing overuse as a result of his right foot condition. On January 24, 2008 OWCP denied appellant's claim to include an additional left foot condition.

Appellant filed a claim for a left ankle injury on July 10, 2008 alleging that on July 3, 2008 he twisted his ankle while delivering mail. On January 26, 2009 OWCP accepted this claim for left ankle sprain.

Appellant filed a claim for a schedule award on June 9, 2008. In a report dated June 3, 2009, Dr. Scott A. Swanson, Board-certified in orthopedic surgeon, reported appellant's right lower extremity findings and diagnosed right ankle mild arthritis, talonavicular mild arthritis and adult acquired flatfoot deformity. He opined that appellant should reach maximum medical improvement within one month. On November 15, 2009 appellant requested a schedule award noting his accepted conditions including left ankle sprain. In a report dated November 9, 2009, Dr. Swanson opined that appellant had reached maximum medical improvement regarding his right ankle and foot. He found a minimally antalgic gait and pes planovalgus posture on the right with 25 percent restriction in hindfoot motion and tenderness with palpation of the talonavicular joint with swelling about the foot and ankle. On x-ray Dr. Swanson identified some arthritic changes at the naviculocuneiform joint with slight increase in the talar first metatarsal angle consistent with adult acquired flatfoot deformity. OWCP requested additional medical evidence in support of appellant's claim for permanent impairment of his right foot on November 27, 2009.

In a letter dated November 27, 2009, OWCP requested additional information in support of his claim for a schedule award due to his left ankle sprain. Dr. Swanson completed a report on January 4, 2010 and stated that appellant reached maximum medical improvement on November 9, 2009 for his left ankle sprain. He reviewed the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² and found that an osteochondral lesion of the lateral talar dome and ankles sprain were classified within class 1 mild problem with severity grade C. Dr. Swanson opined that appellant had two percent lower extremity impairment.

In a separate report dated January 4, 2010, Dr. Swanson addressed appellant's right foot and opined that appellant reached maximum medical improvement on November 9, 2009. He noted appellant's x-ray findings and stated, "The temporary aggravation of the above has result in arthritic change in the talonavicular joint which has clearly resulted in permanent impairment." Dr. Swanson reviewed the sixth edition of the A.M.A., *Guides* and opined that

² For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

appellant had a class 1 mild problem with grade C severity and accorded his one percent impairment of the right lower extremity.

In a letter dated February 18, 2010, OWCP noted that appellant was currently receiving benefits from the Department of Veterans Affairs and requested authorization to obtain additional information. On February 18, 2010 Dr. Daniel D. Zimmerman, district medical adviser, found that appellant had two percent impairment of his left lower extremity. He stated that OWCP accepted temporary conditions affecting the right lower extremity and that no permanent impairment for the right lower extremity was appropriate.

By decision dated March 10, 2010, OWCP granted appellant a schedule award for two percent impairment of the left lower extremity.

By decision dated March 10, 2010, OWCP denied appellant's claim for a schedule award on the grounds that no impairment rating was applicable from the accepted conditions of temporary aggravation of bilateral flat feet, and temporary aggravation of articular cartilage disorder of the right ankle and foot.

On September 13, 2010 appellant requested reconsideration of the March 10, 2010 decision denying his claim for a schedule award. He argued that his temporary right foot and ankle conditions had become permanent. Appellant resubmitted medical evidence including reports from Dr. Swanson which he believed established a permanent changed to his right foot and ankle. He submitted Dr. Swanson's reports dated January 4, 2010, November 9, June 3, 2009 as well as the July 18, 2007 and the October 9, 2007 reports from Dr. Kilian.

By decision dated September 23, 2010, OWCP declined to reopen appellant's claim for consideration of the merits. It found that the evidence appellant submitted was repetitious and that he failed to submit new argument in support of his reconsideration request.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at anytime on its own motion or on application by the claimant.³ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁵

³ 5 U.S.C. §§ 8101-8193, 8128(a).

⁴ 20 C.F.R. § 10.606.

⁵ *Id.* at § 10.608.

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁶

ANALYSIS

OWCP denied appellant's claim for a schedule award for his right lower extremity on the grounds that his claim was accepted for only temporary aggravation of his underlying ankle and foot conditions. Appellant requested reconsideration and resubmitted medical evidence already included in the record in support of his argument that he was entitled to a schedule award as temporary aggravations had become permanent.

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits. Appellant did not submit relevant new evidence or argument in support of his reconsideration request. Instead he resubmitted several medical reports already included in the record at the time of OWCP's March 10, 2010 merit decision. As noted above, these repetitive medical reports do not constitute new evidence and are not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.⁷ Appellant also argued that based on the medical reports submitted his employment-related conditions, which were only accepted for a temporary aggravation, had become permanent. The Board finds that this is not a new argument. The essence of appellant's claim for a schedule award is that he has a permanent impairment of a scheduled member as a result of his accepted employment injury. As this was the underlying scenario forming the basis for appellant's claim for compensation requesting a schedule award, his allegations that his accepted conditions resulted in a permanent impairment cannot be considered a new argument sufficient to require OWCP to reopen his claim for consideration of the merits.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits as his request for reconsideration did not contain relevant and pertinent new evidence or argument; nor did it point out that legal precedent was incorrectly interpreted.

⁶ *M.E.*, 58 ECAB 694 (2007).

⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2010 decision of Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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