

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kearny, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-151
Issued: June 4, 2012**

Appearances:

*Thomas R. Uliase, 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 October 31, 2011 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) July 28, 2011 nonmerit decision denying his request for merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. The last merit decision of OWCP was issued on April 12, 2010. The Board lacks jurisdiction to review the merits of this claim.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

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

On appeal, counsel argues that the medical evidence is sufficient to establish appellant's occupational disease claim or, in the alternative, to require further development of the medical evidence.

FACTUAL HISTORY

On December 19, 2001 appellant, then a 34-year-old mail handler, filed an occupational disease claim (File No. xxxxxx719) alleging a left foot condition due to factors of his federal employment. In a decision dated April 15, 2002, OWCP denied his claim. By decision dated September 30, 2003, the Board affirmed OWCP's April 15, 2002 decision.³

This appeal involves appellant's October 11, 2002 occupational disease claim (File No. xxxxxx150) in which he alleged that he developed bilateral fourth metatarsal fractures and bilateral heel spurs causally related to lifting thousands of pounds of mail on hard flooring. In a decision dated July 21, 2008, OWCP denied the claim. On February 13, 2009 an OWCP hearing representative affirmed the denial of his claim due to insufficient medical evidence to establish a causal relationship between his claimed foot condition and the work factors. In an order dated December 23, 2009, the Board set aside July 21, 2008 and February 13, 2009 decisions and remanded the case for consolidation with File No. xxxxxx719.⁴ On remand, the cases were consolidated, with File No. xxxxxx150 serving as the master file.

In a December 5, 2008 report, Dr. John Moglia, appellant's treating podiatrist, stated that he originally saw the claimant on July 12, 2002 for two fractures of the right foot and three fractures of the left foot. He stated that the stress fracture of the left fourth metatarsal was of seven years' duration. Dr. Moglia opined that "this was an injury sustained in the course of [appellant's] job as a mail handler due to the requirements of long hours standing, repetitive bending, carrying heavy loads, and having to push heavy containers with his feet."

In a December 8, 2008 report, Dr. Joseph Corona, a Board-certified orthopedic surgeon, indicated that the claimant "developed a stress fracture of the left fourth metatarsal due to the repetitive bending, standing and walking nature of his job in the postal service. He opined that the stress fracture was "due to the very nature of this gentleman's work with the postal service over the years."

By decision dated April 12, 2010, OWCP again denied appellant's claim on the grounds that he had failed to provide medical evidence sufficient to establish the required causal relationship between his claimed foot condition and established factors of employment.

On April 19, 2010 appellant, through his representative, requested an oral hearing. Appellant submitted a July 21, 2010 work history describing his employment duties from 1987 through 2002.

³ Docket No. 03-1810 (issued September 30, 2003).

⁴ Docket No. 09-1382 (issued December 23, 2009).

At the July 20, 2010 hearing, appellant testified that he developed bilateral foot conditions as a result of 20 years of employment activities. He stated that OWCP had accepted a prior claim for a fifth metatarsal fracture in 1987 or 1988.⁵ Appellant described the job duties that placed stress on his feet.

In a letter dated August 19, 2010, appellant's representative indicated that she was enclosing an August 16, 2010 report from Dr. Corona and a July 27, 2010 report from Dr. Moglia.⁶

In a July 27, 2010 report, Dr. Moglia stated that appellant had injured his right foot while working as a mail handler in 2002. He provided examination findings and diagnosed nonhealing fourth metatarsal fracture and plantar fasciitis with bone spurs, bilateral heels. Noting that metatarsal fractures are conditions that occur in those people who work on their feet bending, lifting and carrying heavy loads, Dr. Moglia opined that appellant's condition was directly related to his job working as a mail handler.

By decision dated October 4, 2010, an OWCP hearing representative affirmed the April 12, 2010 decision finding that appellant had not provided factual or medical evidence sufficient to establish fact of injury. He stated that appellant had failed to submit medical evidence that establishes the existence of the claimed conditions of bilateral metatarsal fractures and bilateral heel spurs or that included a medical explanation of how and why the claimed bilateral foot problems were related to the claimed work factors rather than off-the-job injuries.

On July 5, 2011 appellant, through his representative, requested reconsideration. Counsel noted that OWCP's hearing representative had apparently not reviewed Dr. Corona's August 16, 2010 report, which he was resubmitting in support of the reconsideration request.

Appellant submitted an August 16, 2010 report from Dr. Corona, who stated that appellant had been under his care for more than a decade. Dr. Corona diagnosed symptomatic left plantar heel spur syndrome, stress fractures of the right fourth and fifth metatarsals and a stress fracture of the left fourth metatarsal, which had regrettably gone on to nonunion despite prolonged care including the use of an electrical bone growth stimulator. He described appellant's duties as a mail handler since 1987, stating that his work responsibilities involved spending one day a week driving a stand-up Jeep and several days a week standing and culling mail onto a belt. Dr. Corona understood that the surface upon which appellant stood was a hard, asphalt planked floor with worn-out anti-fatigue mats. The problem was aggravated between December 2001 and 2002, at which time this gentleman had the opportunity to sit down one day a week, but for administrative reasons, this opportunity was denied him.

⁵ Appellant's representative provided a November 28, 1987 date of injury for File No. xxxxxx062, which reportedly was accepted for right fifth metatarsal fracture. IFECs, however, has no record of the claim.

⁶ The record did not reflect receipt of an August 16, 2010 report from Dr. Corona prior to OWCP's October 5, 2010 decision.

Dr. Corona opined to a reasonable degree of medical certainty that appellant's stress fractures and heel spur were causally related to the described work activities. He explained that stress fractures were induced by repetitive micro-bending and straightening of the bone that would come about with walking, standing and running. Dr. Corona noted that appellant's work exposure with respect to his feet "certainly vastly exceeded that which would be expected on a normal day-to-day basis." He reported that bone density studies were performed, which reflected that appellant's skeleton had normal mineralization.

On October 11, 2010 Dr. Corona diagnosed un-united stress fracture; left fourth metatarsal shaft; bilateral carpal tunnel syndrome; and right ulnar nerve neuritis at the elbow. He stated that the diagnosed conditions had been corroborated with radiographic and electrophysiologic studies and opined that they were causally related to appellant's work as a postal employee. Dr. Corona indicated that these stress overuse conditions were chronic in nature. He noted that appellant had been treated nonoperatively for the left foot fracture nonunion with casts and an electrical bone growth stimulator.

By decision dated July 28, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant merit review. The claims examiner stated that appellant did not present any arguments or demonstrate that OWCP acted erroneously in applying or interpreting a point of law or advance any point of law or fact that was not previously considered, nor did appellant submit any new, relevant medical evidence with his request. Specifically, the claims examiner found that the medical evidence received did not provide a history of work factors and off the job factors and injuries or a medical explanation of how and why the claimed bilateral foot problems were related to the claimed work factors.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁸ To be entitled to a merit review of OWCP's 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.⁹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁰

⁷ Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁸ 20 C.F.R. § 10.606(b)(2). See *Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

⁹ *Id.* at § 10.607(a). See *Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

¹⁰ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

ANALYSIS

The only decision before the Board is the July 28, 2011 nonmerit decision denying appellant's request for reconsideration of OWCP's October 5, 2011 merit decision denying his occupational disease claim. The underlying issue is whether he provided sufficient medical evidence to establish a causal relationship between his claimed foot condition and factors of his employment. The Board finds that appellant did not allege or show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant new argument not previously considered. Consequently, appellant was not entitled to a review of the merits based on the first and second above noted requirements under 20 C.F.R. § 10.606(b)(2). He did, however, submit new and relevant medical evidence. The Board finds, therefore, that appellant's request for reconsideration satisfies the third standard for obtaining a merit review of his claim.¹¹

In support of his reconsideration request, appellant submitted reports dated August 16 and October 11, 2010 from Dr. Corona, both of which bore directly on the issue at hand. In his August 16, 2010 narrative report, Dr. Corona diagnosed symptomatic left plantar heel spur syndrome, stress fractures of the right fourth and fifth metatarsals and a stress fracture of the left fourth metatarsal and opined to a reasonable degree of medical certainty that appellant's conditions were causally related to his work activities. He described appellant's duties as a mail handler since 1987, stating that his work responsibilities involved spending one day a week driving a stand-up Jeep and several days a week standing and culling mail onto a belt. Dr. Corona understood that the surface upon which appellant stood was a hard, asphalt planked floor with worn-out anti-fatigue mats. He explained that stress fractures were induced by repetitive micro-bending and straightening of the bone that would come about with walking, standing and running. Dr. Corona noted that appellant's work exposure with respect to his feet "certainly vastly exceeded that which would be expected on a normal day-to-day basis." He reported that bone density studies were performed, which reflected that appellant's skeleton had normal mineralization. On October 11, 2010 Dr. Corona stated that the diagnosed conditions had been corroborated with radiographic and electrophysiologic studies and opined that they were causally related to appellant's work as a postal employee. He indicated that these stress overuse conditions were chronic in nature and noted that appellant had been treated nonoperatively for the left foot fracture nonunion with casts and an electrical bone growth stimulator.

Because this medical evidence is new and relevant to the underlying issue, the Board finds that appellant's request for reconsideration satisfies the third standard for obtaining a merit review of his claim.¹² OWCP found that Dr. Corona's reports were insufficient to warrant a merit review because he did not provide a history of work factors and off-the-job factors and injuries or a medical explanation of how or why the claimed bilateral foot problems were related to the claimed work factors. The Board finds, however, that Dr. Corona's reports are new and relevant regarding appellant's work duties with an explanation regarding the causal relationship between those activities and the diagnosed conditions. It is not necessary or appropriate for

¹¹ *V.B.*, 58 ECAB 725 (2007).

¹² *Id.*

OWCP to weigh the probative value of medical evidence when deciding whether the evidence submitted in support of a reconsideration request is sufficient to warrant further merit review. To require a merit review, the evidence need only be new and relevant.¹³ If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁴ The Board will set aside OWCP's decision denying reconsideration and remand the case for an appropriate final decision on the merits.

On appeal, appellant set forth arguments regarding the merits of his claim. As noted, the Board does not have jurisdiction over the merits of this claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision.

Issued: June 4, 2012
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

¹³ See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

¹⁴ *Donald T. Pippin*, 54 ECAB 631 (2003).