

FACTUAL HISTORY

On October 27, 2006² appellant, then a 46-year-old transportation screener, filed a traumatic injury claim alleging that on October 5, 2006 she injured her left foot when another employee lost his footing, fell backwards and landed on appellant's left foot. OWCP accepted the claim for left foot and ankle crushing injury, which was subsequently expanded to include left lower limb reflex sympathetic dystrophy. Appellant stopped work on October 15, 2006 and has not returned. By letter dated September 9, 2008, OWCP placed appellant on the periodic rolls for temporary total disability.

In progress notes and treatment status reports, submitted following appellant's placement on the periodic rolls, Dr. James Clancy, a treating podiatrist, provided physical findings and diagnosed left foot complex regional pain syndrome (CRPS). Dr. Clancy concluded that appellant was totally disabled from working due to her employment injuries.

On August 20, 2009 appellant was referred for a second opinion evaluation with Dr. Peter Millheiser, a Board-certified orthopedic surgeon, to determine appellant's work capability. On September 2, 2009 Dr. Millheiser conducted a physical examination and reviewed medical evidence, a statement of accepted facts and a list of questions. He diagnosed postcontusion left foot and possible post CRPS. Dr. Millheiser concluded that appellant no longer had any residuals or disability due to the accepted conditions based on the lack of supporting objective evidence.

On October 7, 2009 Dr. Gary Richman, a treating physician, conducted an initial consultation in which he diagnosed left foot and ankle neuritis and possible left foot CRPS type 1. In subsequent office visit reports and status reports, he reported that appellant had sensitivity to light touch over her left foot lateral aspect, no edema or skin color changes. On February 3 and March 25, 2010 Dr. Richman diagnosed left foot CRPS type 1 and left ankle and foot neuritis.

On February 5, 2010 OWCP referred appellant to Dr. Steven E. Naide, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Millheiser, an OWCP referral physician, and Drs. Clancy and Richman, appellant's treating physicians, on the issue of whether appellant's accepted employment injury had resolved.

In a March 15, 2010 report, Dr. Naide reviewed medical evidence, a statement of accepted facts and list of questions and provided physical findings from his examination of appellant. He diagnosed status post crush left foot injury, ruled out CRPS and healed left 2nd and 3rd metatarsal fractures. Dr. Naide found that appellant had no disability or residuals due to her accepted employment conditions based on the lack of any objective findings.

On September 3, 2010 Dr. Richman indicated that appellant was capable of working a sedentary job with activities as tolerated.

² The record also contains copies of traumatic injury claims listing the dates of notice as November 5 and December 5, 2006.

In a supplemental November 22, 2010 report, Dr. Naide reviewed an August 4, 2010 bone scan. He stated that the results of the bone scan were not consistent with reflex sympathetic dystrophy and thus opined that appellant did not have any ongoing left foot reflex sympathetic dystrophy.

In a December 3, 2010 report, Dr. Richman provided physical findings and diagnoses of left foot CRPS type 1 and left ankle and foot neuritis. Appellant was released to sedentary work with activities as tolerated.

On January 27, 2011 OWCP issued a notice of proposed termination of medical and wage-loss benefits. It found that the opinion of Dr. Naide constituted the special weight of the evidence, based on his status as an impartial medical adviser, to establish that appellant's accepted conditions had resolved with no residuals.

On February 11, 2011 Dr. Richman provided physical finding and diagnoses of left foot CRPS type 1 and left ankle and foot neuritis. Appellant was released to sedentary work with activities as tolerated.

By decision dated March 24, 2012, OWCP finalized the termination of appellant's wage-loss and medical benefits effective March 25, 2011.

On September 16, 2011 appellant's counsel requested reconsideration and submitted a September 11, 2011 report in support of her request. He contended that OWCP erred in relying on Dr. Naide's opinion as it is speculative and unsupported by the objective evidence. Thus, appellant contends that it is insufficient to support that her accepted conditions had resolved and she had no residuals or disability.

In a September 9, 2011 report, Dr. Richman reviewed Dr. Naide's report and noted his disagreement with the conclusions made. He indicated that the physical findings found by Dr. Naide were not representative of appellant's true condition as the examination occurred shortly after appellant had the third in a series of lumbar sympathetic nerve blocks. Dr. Richman noted that in patients with CRPS that lesser symptomology may occur after the blocks. According to him this is consistent with his findings on examination following blocks. Dr. Richman related that negative bone scans did not rule out CRPS while a positive triple phase bone scan indicates the possibility of CRPS. In concluding, he stated that appellant continues to exhibit findings consistent with CRPS including discoloration, restricted motion and swelling. As a result of her CRPS, appellant is restricted to sedentary work.

By decision dated October 7, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening the case for further review of the merits under section 8128. It did not address appellant's arguments regarding Dr. Naide's report.

On appeal, appellant's counsel contends that OWCP erred in denying a merit review as both new evidence and new legal argument were submitted. She argued that Dr. Richman's September 9, 2011 report was not repetitive, but was in fact new and relevant to the underlying issue of whether OWCP erred in terminating her compensation benefits.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ 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.⁴ To be entitled to a merit review of an OWCP 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.⁵ 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.⁶

ANALYSIS

As noted above, the Board does not have jurisdiction over the merits of this case. The issue on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2) requiring OWCP to reopen the case for review of the merits. The Board finds that OWCP abused its discretion by denying her request for further merit review as she satisfied two of the three requirements.

In the December 22, 2009 request for reconsideration, appellant's counsel argued that the report of Dr. Naide, the impartial medical specialist, was not supported by the objective evidence and was not well rationalized. Thus, appellant contends that OWCP erred in relying upon Dr. Naide's report to terminate appellant's compensation benefits. The Board finds that counsel advanced a relevant legal argument not previously considered by OWCP.⁷ In its October 7, 2011 decision, OWCP did not address or mention appellant's argument regarding Dr. Naide.

The Board also finds that appellant submitted relevant and pertinent new evidence not previously considered by OWCP.⁸ Dr. Richman's September 9, 2011 report constitutes pertinent new evidence and is relevant to the issues addressed by the March 24, 2011 decision terminating her benefits. In his report, he explains why Dr. Naide's physical findings and resulting conclusion were inconsistent with appellant's actual condition. Dr. Richman also rebutted Dr. Naide's conclusion that appellant's accepted CRPS had resolved. To obtain merit review, a

³ 5 U.S.C. §§ 8101-8193. 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.

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

⁵ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ *Id.* at § 10.606(b)(2). See *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *Gregory Apicos*, 51 ECAB 272 (2000).

⁸ *Id.* at § 10.606(b)(2). See *Annette Louise*, 54 ECAB 783 (2003).

claimant need not submit all evidence that may be necessary to discharge her burden of proof. Rather, the evidence need only be relevant and pertinent and not previously considered by OWCP.⁹ Dr. Richman's September 9, 2011 report satisfies this requirement.

The Board finds that appellant advanced a relevant legal argument not previously considered by OWCP and submitted relevant and pertinent new evidence not previously considered. Appellant has met the requirements for obtaining further merit review. The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, OWCP shall issue a merit decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 7, 2011 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: October 23, 2012
Washington, DC

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

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

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

⁹ See *F.D. (S.D.)*, 58 ECAB 413 (2007); *Billy B. Scoles*, 57 ECAB 258 (2005); *Donald T. Pippin*, 53 ECAB 631 (2003).