

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

P.P., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Cleveland, OH, Employer**

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**Docket No. 12-1493
Issued: January 11, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 3, 2012 appellant, through his attorney, filed a timely appeal from a February 15, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for wage-loss compensation and an April 2, 2012 nonmerit decision denying his request for reconsideration. 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 merits of this case.²

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish entitlement to wage-loss compensation for total disability for the period May 4 through June 4, 2011; and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the April 2, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

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

On appeal appellant's attorney contends that OWCP's April 2, 2012 decision was contrary to fact and law.

FACTUAL HISTORY

OWCP accepted that appellant, then a 31-year-old medical supply technician, sustained a left foot and ankle contusion, left ankle sprain and left leg abrasion in the performance of duty on June 8, 2010.

In a May 4, 2011 report, Dr. Richard E. Grant, a Board-certified orthopedic surgeon, reviewed appellant's medical history and ordered a bone scan of the left ankle to determine whether or not he had chronic inflammation in the region. He doubted that appellant had regional pain syndrome, but suspected the majority of his issues were related to the cystic degeneration and chondromalacia. Dr. Grant noted that issues relevant to appellant's partially torn deltoid ligament also needed to be addressed.

In a May 4, 2011 report, Dr. Grant diagnosed left ankle sprain with left ankle arthritis. He indicated that appellant sprained his left ankle at work on June 8, 2010. Dr. Grant opined that appellant was totally disabled for the period May 4 through June 4, 2011 and would be able to resume light-duty work on August 4, 2011 with restrictions.

On May 27, 2011 appellant, through his attorney, filed a claim for wage-loss compensation (Form CA-7) for the period May 4 through June 4, 2011.

In a June 6, 2011 letter, OWCP notified appellant of the deficiencies of his claim and afforded 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a February 14, 2011 report by Dr. Patrick J. McIntyre, a Board-certified anesthesiologist, who indicated that appellant demonstrated signs of complex regional pain syndrome of the left lower extremity and was a candidate for a lumbar sympathetic block.

By decision dated August 18, 2011, OWCP denied the claim for compensation finding that the medical evidence submitted was not sufficient to establish that appellant was disabled for the period May 4 through June 4, 2011 causally related to the June 8, 2010 employment injury.

On August 25, 2011 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative and submitted a September 2, 2011 x-ray of the left ankle which revealed small calcification adjacent the medial malleolus without cortical disruption.

An oral hearing was held *via* telephone before an OWCP hearing representative on December 8, 2011. Appellant provided testimony and the hearing representative held the case open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a June 8, 2011 bone scan report which revealed increased tracer deposition along the medial aspect of the left ankle in all three phases and a June 15, 2011 progress report from Dr. Grant.

In a January 6, 2012 report by Dr. Shana Miskovsky, a Board-certified orthopedic surgeon, who diagnosed left ankle sprain, work-related injury in 2010 with history of chronic regional pain syndrome and posterior tibial tendon damage related to his ankle sprain. She indicated that appellant was having trouble doing his restricted duty.

By decision dated February 15, 2012, an OWCP hearing representative affirmed the August 18, 2011 decision.

On February 27, 2012 appellant, through his attorney, requested reconsideration and resubmitted a bone scan report dated June 8, 2011 and reports from Dr. Grant dated May 4 and June 15, 2011.

By decision dated April 2, 2012, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA³ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."⁴ This meaning, for brevity, is expressed as disability for work.⁵ For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.⁶ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁷

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁵ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁶ *See William A. Archer*, 55 ECAB 674 (2004).

⁷ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

receiving at the time of injury, has no disability as that term is used under FECA.⁸ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

ANALYSIS -- ISSUE 1

The Board finds appellant is not entitled to wage-loss compensation for total disability for the period May 4 through June 4, 2011.

In his reports, Dr. Grant diagnosed left ankle sprain with left ankle arthritis. He indicated that appellant sprain his left ankle at work on June 8, 2010 and opined that appellant was totally disabled for the period May 4 through June 4, 2011. Although Dr. Grant opined that appellant was totally disabled, he failed to provide a rationalized medical explanation as to how the residuals of the June 8, 2010 employment injury prevented him from continuing in his federal employment.

Appellant also submitted a February 14, 2011 report by Dr. McIntyre and a January 6, 2012 report by Dr. Miskovsky. The reports of Drs. McIntyre and Miskovsky are of diminished probative value as they fail to offer any probative medical opinion on whether appellant was disabled on the dates at issue due to his accepted conditions.¹⁰

The June 8, 2011 bone scan report and September 2, 2011 x-ray are diagnostic in nature and therefore do not address causal relationship.

As appellant has not submitted sufficient rationalized medical explanation as to how the residuals of the employment injury prevented him from continuing in his employment, he has not met his burden of proof to establish entitlement to wage-loss compensation for the period claimed.

On appeal appellant's attorney contends that OWCP's April 2, 2012 decision was contrary to fact and law. For the reasons stated above, the Board finds the attorney's arguments are not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁸ See *Merle J. Marceau*, 53 ECAB 197 (2001).

⁹ See *Fereidoon Kharabi*, *supra* note 7.

¹⁰ See *Sandra D. Pruitt*, 57 ECAB 126 (2005). See also *V.P.*, Docket No. 09-337 (issued August 4, 2009).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹¹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹²

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by 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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

In support of his February 27, 2012 reconsideration request, appellant resubmitted a bone scan report dated June 8, 2011 and reports from Dr. Grant dated May 4 and June 15, 2011. As these submissions repeat evidence or are duplicative of evidence already in the case record and reviewed by OWCP, the Board finds that they do not constitute relevant and pertinent new evidence. Therefore, appellant has not established a basis for reopening his case.¹⁷

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the OWCP. Because he only submitted repetitive and duplicative evidence with his request for reconsideration, the Board finds that he did not meet any of the necessary requirements and is not entitled to further merit review.¹⁸

¹¹ 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, 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).

¹² See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹³ 20 C.F.R. § 10.606(b)(2). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

¹⁶ See *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁷ See *D.K.*, 59 ECAB 141 (2007).

¹⁸ See *L.H.*, 59 ECAB 253 (2007).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to wage-loss compensation for total disability for the period May 4 through June 4, 2011. The Board further finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 2 and February 15, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 11, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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