

FACTUAL HISTORY

Appellant, then a 32-year-old mail carrier, slipped and fell on ice while delivering mail on January 5, 1988. She filed a claim for benefits, which OWCP accepted for fracture of the tarsal and metatarsal, left foot, impaction fracture of the distal phalanx of the left great toe and a sprain of the metatarsal joint. Appellant missed work for intermittent periods and underwent several surgeries related to her toe injury. She returned to full-time light duty with permanent restrictions on October 29, 2001.

In an August 15, 2002 report, Dr. Jay Schnitzer, a treating podiatrist, stated that appellant required physical therapy for her right foot. Appellant had reconstructive surgery on her left foot and strained her right foot during the recovery period. Dr. Schnitzer asserted that there was an acute tendinitis of several structures; the ankle was sore at both the anterior talofibular ligaments and calcaneofibular ligaments. He advised that the left foot had healed but that appellant's right foot continued to be painful secondary to the ankle sprain, which required 9 to 12 physical therapy visits.

By letter dated January 5, 2009, appellant, through her attorney, requested that the claim to be formally accepted for her right foot/ankle conditions.

OWCP referred appellant for a second opinion examination to Dr. Kevin Hanley, Board-certified in orthopedic surgery. In a March 19, 2009 report, Dr. Hanley listed findings on examination and reviewed the medical history and statement of accepted facts. He opined that there was no evidence in the medical record that a right foot or right ankle strain occurred and noted that appellant could not recall a specific injury or when she sustained a right ankle sprain. Dr. Hanley rejected the conclusion that, because she had left foot symptoms for so long, the right foot became symptomatic due to overuse. Since the 1988 work injury, appellant had not worked on her feet for more than one to two hours per day, was limited in her daily activities and used crutches for a period to offset the affected foot. On examination of the right foot, Dr. Hanley noted that there was a bunion at the metatarsal phalanx of the great toe. The right great toe motion was not limited and there was no crepitus within the joint, no instability or limitation of motion of the ankle joint itself; the dorsum of the right foot showed no signs of tendinitis without swelling, instability to touch or shape abnormality. Dr. Hanley advised that the symptomatic bunion was not a consequence of traumatic exposure and its development had nothing to do with use or overuse of the foot. He stated that appellant's level of activity since the 1988 injury had been well below the threshold for a normal foot in regards to symptom development and that she had been weight bearing not greater than one to two hours per day at work. Appellant had used crutches for three years, which transferred the majority of weight to the crutches and not the good foot. Dr. Hanley indicated that the development of contralateral symptomatology in the extremity was extremely unusual and there was no scientific basis or medical rationale to support that the left foot injury led to symptoms on the right. He noted that, if there was a prior ankle sprain, it was totally separate from her left-sided condition and had no relationship to it.

By decision dated March 27, 2009, OWCP denied the claim, finding that appellant failed to establish that her right foot/right ankle conditions were a consequence of her accepted left toe injury.

By letter dated March 31, 2009, appellant's attorney requested a hearing, which was held on July 29, 2009. Appellant stated that after her left foot surgery she ambulated on crutches and placed her weight on her right foot. She asserted that she "kind of twisted it, but ... did n[o]t pay any attention to it and ... tore one or two ligaments in [the] ankle." Appellant stated that her right ankle healed on its own without any medical treatment.

By decision dated October 16, 2009, an OWCP hearing representative affirmed the March 27, 2009 decision.

By letter dated February 17, 2010, appellant, through her attorney, requested reconsideration.

By decision dated May 19, 2010, OWCP denied modification.

In a May 5, 2011 report, Dr. Schnitzer expressed his disagreement with the opinion of Dr. Hanley. He stated that Dr. Hanley showed no recognition of gait function and the relationship of both feet to the ground in human anatomic gait, which was necessary for a clearer understanding of how a one-sided deficit can frequently cause contralateral knee, ankle and foot pain. Dr. Schnitzer explained that when a person is walking one foot engages the ground and the other foot swings forward toward the ground for the next phase of weight bearing; appellant had a nonfunctioning first metatarsal phalange joint on her left foot, which affected the weight-shifting and weight-bearing process involved in normal walking. He stated that, if a foot cannot propel or function properly, the instability and gait dysfunction can easily be seen to be transferred to the contralateral side and cause instability in that segment as it hit the floor after the swing phase. Dr. Schnitzer opined that it was a biochemical fact that if one side is altered there will be consequences on the other side; ankle sprains, chronic strains of the intrinsic and extrinsic musculature of the foot and leg were all consequences of an unstable gait which can originate on one side.

Dr. Schnitzer also disagreed with Dr. Hanley's opinion that hereditary factors such as bone morphology, length of bones and some anomalies were a major factor in the development of bunions on her right foot. He asserted that a subtle instability over a long period can cause chronic repetitive stress, with muscles and ligaments altering their influence on the first metatarsal phalangeal joint as well as the right foot ankle; these do not function in the plane in which they were originally made to function. Dr. Schnitzer advised that this instability was felt in the first metatarsal phalangeal, mid-tarsal and subtalar joints, which directly affected the ankle mortise, resulting in overuse of the right foot. He concluded that the assertions of Dr. Hanley regarding the dynamics of the pathology in the left foot and its consequences to the right foot and ankle were naive and misleading. Dr. Schnitzer opined that this was a permanent injury which would cause chronic effects.

By letter dated August 1, 2011, OWCP asked appellant for additional information pertaining to her claimed right foot/ankle injury. It noted that the record contained physical therapy notes dated October 30, 2002 indicating that she had undergone left toe surgery one year prior and that during this time she twisted her right ankle while her left foot was in a cast. OWCP advised that her testimony at the hearing concerning her right ankle injury was vague and required clarification. It therefore asked appellant to submit a statement indicating the proximate

date she twisted her ankle; the circumstances surrounding the incident; the immediate effects of the injury; any self-treatment; whether she sought medical treatment; whether she had any prior right ankle conditions or injuries; the date she first reported her right ankle injury to a physician; and any current symptoms. OWCP asked appellant to respond within 30 days or a decision would be made based on the evidence in the record. Appellant did not submit any additional evidence within 30 days.

By decision dated September 12, 2011, OWCP denied modification of its prior decisions. It found that, while Dr. Schnitzer's opinion could be considered to create a conflict with that of Dr. Hanley, the second opinion examiner, regarding whether appellant's right foot/ankle condition developed as a consequence of his accepted left foot conditions, a referee examination was not warranted because she failed to submit additional information clarifying the development and progression of her claimed right foot/ankle condition, as requested. Accordingly, OWCP stated that it was unable to determine whether Dr. Schnitzer's opinion was based on a complete factual background. It therefore found that the medical evidence was insufficient to establish whether his opinion was sufficiently rationalized as to create a conflict with that of Dr. Hanley because the record lacked the description of the development and progression of the claimed right foot/ankle condition.

By letter dated April 11, 2012, appellant's attorney requested reconsideration. He attached a copy of appellant's handwritten, annotated answers to OWCP's August 1, 2011 developmental letter. Appellant indicated on the letter that the approximate date she sustained her right ankle injury was July 6, 2002, when her ankle twisted under her, causing her to fall. She stated that she experienced severe pain in her right ankle and right foot, after which she treated it with ice and ibuprofen. Appellant stated that she sought treatment with Dr. Schnitzer approximately two weeks later, on July 18, 2002. She asserted that she had no prior right ankle conditions or injuries and that she still experienced occasional pain and twisting with the ankle.

By decision dated April 17, 2012, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision. It found that her handwritten, annotated responses to OWCP's August 1, 2011 developmental letter were vague and insufficiently specific. OWCP noted that appellant's handwritten response to the August 1, 2011 letter indicated that the date of injury to her right ankle was "July 6, 2002, approximate." It stated that this information was vague since she did not provide a specific date of injury or explain why she waited over six years to claim this as a work-related condition.

OWCP therefore determined that appellant failed to establish the facts of injury as alleged. It further found that she failed to explain why she believed that her alleged right foot/ankle condition was related to the accepted, January 5, 1988 left foot injury and failed to provide a rationalized medical opinion that she sustained a right foot/ankle condition as a result of the accepted left foot injury. OWCP concluded that because appellant failed to state a point of law not previously considered by OWCP nor submit relevant or pertinent evidence not previously considered by OWCP she was not entitled to merit review of her claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by OWCP; or (3) constitute submit relevant and pertinent evidence not previously considered by OWCP.³ 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.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of OWCP whether to reopen a case for further consideration under section 8128(a) of FECA.⁵

ANALYSIS

The only decision before the Board on this appeal is OWCP's April 17, 2012 decision denying appellant's request for a review on the merits of its September 12, 2011 decision. Because more than one year has elapsed between the issuance of OWCP's September 12, 2011 decision and June 26, 2012, the date she filed her appeal with the Board, the Board lacks jurisdiction to review the April 17, 2012 decision.⁶

OWCP found in its April 17, 2012 decision that appellant's handwritten, annotated responses to OWCP's August 1, 2011 developmental letter were not sufficient to clarify the history of her claimed consequential right foot/ankle injury and therefore did not constitute relevant and pertinent evidence not previously considered by OWCP, requiring merit review of its September 12, 2011 merit decision. In his appeal to the Board, appellant's attorney argues that Dr. Schnitzer's May 5, 2011 report clarified his opinion, previously presented in his August 15, 2002 report, that appellant's abnormal gait caused her right foot/ankle condition. He further contends that appellant explained in her April 11, 2012 responses to the August 1, 2011 developmental letter that she did not have any prior problems with her right ankle before her work injury. Counsel therefore contends that Dr. Schnitzer's May 5, 2011 report is sufficient to create a conflict in the medical evidence with the opinion of Dr. Hanley as to whether appellant developed a right foot/ankle condition as a consequence of her accepted left foot conditions therefore requiring referral to an impartial medical specialist to resolve the conflict and a review on the merits under section 8128(a). The Board has duly reviewed the case record and finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

² 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

⁴ *Id.*

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ *See* 20 C.F.R. § 501.3(d)(2).

OWCP found in its September 12, 2011 decision that because appellant had failed to provide a response to its August 1, 2011 developmental letter, there was an insufficient factual background for Dr. Schnitzer's May 5, 2011 report so as to create a conflict in the medical evidence with Dr. Hanley's March 19, 2009 referral report, thereby requiring referral to an impartial medical specialist. Appellant subsequently requested reconsideration on April 11, 2012 and provided specific, handwritten responses to the August 1, 2011 developmental letter. OWCP however found in its April 17, 2012 decision that Dr. Schnitzer failed to provide any further details as to how the strain occurred and gave no opinion on the cause of the condition or how it was causally related to the effects of the accepted left foot injury; therefore, it found that he did not provide a rationalized medical opinion in support of his claim for a consequential right ankle/foot condition. It did not mention or consider Dr. Schnitzer's updated, May 5, 2011 report, which presented a thorough, rationalized opinion regarding the manner in which appellant's right ankle/foot condition could have developed as a consequence of her accepted left foot condition. OWCP also found that appellant was unable to provide specific details concerning when or how she injured her right foot or ankle and therefore failed to establish the facts of injury as alleged. It stated that although she indicated in her April 11, 2012 responses that she initially sought medical care on July 18, 2002, she did not submit a report from that examination. OWCP noted that the initial medical report received after the alleged date of injury was Dr. Schnitzer's August 15, 2002 report, which it had previously considered and determined to be insufficient to support entitlement to compensation. It therefore denied merit review.

The Board finds that appellant's responses to OWCP's August 1, 2011 questionnaire constituted new and pertinent evidence relevant to the issue of whether she sustained a right foot/ankle condition as a consequence of her accepted 1988 left foot injury. Appellant did not submit this information prior to the September 12, 2011 merit decision. However, she did provide the requested factual information, in response to OWCP's specific questions regarding the development of her right foot/ankle condition, subsequent to the September 12, 2011 decision. Appellant submitted relevant and pertinent evidence not previously considered by OWCP. Accordingly, the refusal of OWCP to reopen her case for further consideration of the merits of her claim constituted an abuse of discretion.⁷ This case will be remanded for OWCP to exercise its discretion pursuant to 5 U.S.C. § 8128 to reopen appellant's claim for merit review.

The decision of OWCP dated April 17, 2012, is therefore set aside and the case is remanded to OWCP for review of the merits of appellant's claim.

CONCLUSION

The Board finds that OWCP abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

⁷ *Carol Cherry (Donald Cherry)* 47 ECAB 658 (1996).

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development to be followed by an appropriate decision.

Issued: January 14, 2013
Washington, DC

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

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

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