

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

C.C., Appellant)

and)

U.S. POSTALSERVICE, POST OFFICE,)
North Charleston, SC, Employer)

Docket No. 13-1281
Issued: November 22, 2013

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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On May 7, 2013 appellant filed a timely appeal from a March 4, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As more than 180 days elapsed between the last merit decision dated May 2, 2012 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen her claim for further merit review under 5 U.S.C. § 8128(a).

¹5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 15, 2008 appellant, then a 45-year-old sales and service associate, filed an occupational disease claim alleging that she sustained stress fractures in her left foot causally related to factors of her federal employment. She stopped work on December 11, 2007 and returned to modified employment on December 17, 2007. OWCP accepted the claim for stress fractures of the left metatarsals.

By decision dated August 31, 2010, OWCP denied appellant's claim for a schedule award.² It found that she had not submitted an impairment evaluation in support of her claim.³

On November 16, 2010 Dr. Dennis Martin, a podiatrist, diagnosed stress fractures of the left foot. In a report dated February 28, 2011, he related that he initially diagnosed a stress fracture of the cuboid and calcaneus bones with some "early signs of tendinopathy along the peroneal tendons." Dr. Martin submitted a February 28, 2011 impairment evaluation based on the November 16, 2011 examination. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) and found that appellant had a 10 percent impairment due to class 2 post-traumatic arthritis of the calcaneal-cuboid joint.⁴ Dr. Martin further found a class 2 impairment due to peroneal tendinitis, which following the application of grade modifiers yielded a five percent impairment under Table 16-2 on page 501 of the A.M.A., *Guides*. He combined the impairment findings and determined that appellant had a 15 percent impairment of the left lower extremity. Dr. Martin did not respond to the question on the form regarding whether the subsidiary diagnosis was directly related to the primary diagnosis.

On October 19, 2011 an OWCP medical adviser reviewed Dr. Martin's report and noted that the accepted condition was a metatarsal stress fracture rather than arthritis or tendinitis. He determined that appellant had a one percent impairment of the left lower extremity according to Table 16-2 on page 504 of the A.M.A., *Guides* as a result of the stress fracture.

On January 10, 2012 OWCP vacated its August 31, 2010 decision and found that appellant was entitled to a schedule award for a one percent left leg impairment. By decision dated May 2, 2012, it granted her a schedule award for a one percent permanent impairment of the left leg. The period of the award ran for 2.88 weeks from November 16 to December 6, 2012.

On February 19, 2013 appellant requested reconsideration. She resubmitted reports from Dr. Martin dated November 16, 2010 and February 28 and July 12, 2011. Appellant further submitted a September 21, 2012 impairment evaluation from him, which contained the same impairment findings and rating as in his February 28, 2011 impairment evaluation. Dr. Martin indicated that the subsidiary diagnosis of residual peroneal tendinitis was directly related to the

² By decision dated August 27, 2009, OWCP found that appellant had not established that she was disabled from November 28 to December 31, 2007.

³ In a decision dated June 2, 2011, OWCP denied appellant's request for an oral hearing as untimely.

⁴ A.M.A., *Guides* 507, Table 16-2.

primary diagnosis of calcaneal-cubital post-traumatic arthritis. In a January 25, 2013 report, he discussed appellant's history of a stress fracture and her resulting "chronic foot condition." Dr. Martin stated, "One of the primary secondary problems that has developed is a peroneal tendinitis along the outside aspect of her midfoot or foot and ankle and lower leg region." He discussed treatment options.

By decision dated March 4, 2013, OWCP denied appellant's request for reconsideration after finding that she had not submitted new evidence or raised an argument sufficient to warrant reopening the case for further merit review under section 8128.

On appeal, appellant asserts that the new evidence from Dr. Martin supports that she sustained a secondary condition related to her original diagnosis. She notes that she has to wear an ankle brace and take pain medication.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ 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.¹¹

⁵*Supra* note 1. Section 8128(a) of FECA provides that "[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."

⁶20 C.F.R. § 10.606(b)(3).

⁷*Id.* at § 10.607(a).

⁸*Id.* at § 10.608(b).

⁹*F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁰*P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹¹*Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ANALYSIS

OWCP issued a May 2, 2012 decision granting appellant a schedule award for a one percent permanent impairment of the left lower extremity. On February 19, 2013 appellant requested reconsideration of the schedule award determination.

As noted above, the Board does not have jurisdiction over the May 2, 2012 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her February 19, 2013 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument not previously considered.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. Appellant submitted a September 21, 2012 impairment evaluation from Dr. Martin containing the same impairment ratings for calcaneal-cubital arthritis and peroneal tendinitis as in his February 28, 2011 evaluation previously reviewed by OWCP. Dr. Martin indicated on the September 21, 2012 evaluation form that the peroneal tendinitis was directly related to the primary diagnosis of calcaneal-cubital post-traumatic arthritis. In a narrative report dated January 25, 2013, he diagnosed a stress fracture and found that appellant had developed peroneal tendinitis as a secondary problem. The relevant issue, however, is the extent of her permanent impairment due to the accepted condition of stress fractures of the left metatarsals. Dr. Martin's September 21, 2012 impairment evaluation and January 25, 2013 report do not address this issue. Consequently, his opinion is insufficient to warrant reopening the case for further merit review as it does not address the particular issue involved.¹²

Appellant further resubmitted Dr. Martin's November 16, 2010 and February 28 and July 12, 2011 reports. As this evidence repeats or duplicates evidence already in the case record, it has no evidentiary value and does not constitute a basis for reopening a case.¹³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that the new evidence from Dr. Martin supports that she sustained a secondary condition related to her original diagnosis. If she believes that she sustained additional conditions beyond a stress fracture due to her November 28, 2007 work

¹²*J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹³*See Richard Yadron*, 57 ECAB 207 (2005).

injury she may pursue expanding her claim before OWCP.¹⁴ Appellant also indicates that she has to wear an ankle brace for support and take pain medication. Her lay opinion, however, regarding the extent of her impairment is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹⁵

The Board notes that a claim for an increased schedule award may be based on relevant medical evidence establishing the progression of the accepted employment-related condition.¹⁶ To support a contention, appellant may at any time submit medical evidence to OWCP with a request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen the claim for further merit review under section 8128.

¹⁴ Where appellant claims that a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence. *See JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

¹⁵ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁶ *See A.A.*, 59 ECAB 726 (2008).

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board