

On appeal, counsel contends that he provided new legal argument and evidence warranting a merit review on OWCP's determination of the date of maximum medical improvement for appellant's schedule award.

FACTUAL HISTORY

On October 29, 2003 appellant, then a 43-year-old police officer, injured his right foot and ankle during a basic training program. OWCP accepted the claim for right ankle sprain, right tarsal tunnel syndrome, right tendon sheath contracture, right tibialis tendinitis, and right rupture of other ankle and foot tendons. On March 10, 2004 it placed appellant on the periodic rolls for temporary total disability.

On December 7, 2004 appellant underwent surgery for a posterior tibial tendon repair and chronic plantar fasciitis of the right foot and ankle. In the December 7, 2004 operative report, Dr. Anthony K. Teebagy, a treating Board-certified orthopedic surgeon, stated that the preoperative and postoperative diagnoses were posterior right ankle tibial tendon tear and chronic right foot plantar fasciitis. He noted that appellant underwent right foot calcaneal osteotomy, posterior tibial tendon reconstruction with flexor digitorum longus transfer right foot and right foot partial planta fasciotomy. In a December 7, 2004 surgery discharge report, Dr. Teebagy stated that appellant underwent right foot tibial tendon transfer with calcaneal osteotomy and plantar fascia release. He related that appellant had progressed well postoperatively with no complications.

In November 5, 2007 chart notes, Dr. Teebagy reported that appellant felt he was ready to return to a modified job as he was getting stronger. He stated that appellant would be seen on an as needed basis and was pleased with the surgery results.

On June 19, 2008 Dr. Teebagy reported seeing appellant for right foot stiffness and peroneal tendinitis. A physical examination showed halting ability to invert the right foot, some decreased sensation along the sural nerve, no swelling, and some peroneal nerve tenderness. Dr. Teebagy reviewed x-rays which showed that appellant's osteotomy had healed nicely. Appellant noted that he hoped to continue working in his modified-job position.

On October 23, 2012 appellant filed a claim for a schedule award.

In a December 4, 2012 report, Dr. John L. Dunne, an examining osteopathic Board-certified physician specializing in occupational and preventive medicine, rated a seven percent impairment to the right leg using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He applied Table 16-2, p. 501 for the diagnosis of a ruptured tendon and grade modifiers.³ Dr. Dunne noted that, following a failure to improve, Dr. Teebagy operated on the foot and ankle on December 7, 2004. He opined that appellant reached maximum medical improvement in 2007 following removal of the hardware and recovery.

³ A.M.A., *Guides* 501, Table 16-2, Foot and Ankle Regional Grid.

On January 3, 2013 OWCP requested that a medical adviser review Dr. Dunne's report to determine the date of maximum medical improvement and percentage of impairment. Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and medical adviser, submitted a January 3, 2013 report concurring with Dr. Dunne's determination of seven percent impairment to the right lower extremity. He stated that the date of maximum medical improvement was December 4, 2012, the date of the Dr. Dunne's evaluation as there was no evidence to establish that maximum medical improvement had occurred at an earlier date.

By decision dated January 16, 2013, OWCP granted appellant a schedule award for a seven percent impairment of the right leg. The decision found the date of maximum medical improvement as December 4, 2012. The period of the award ran from December 4, 2012 to April 24, 2013. OWCP based the schedule award compensation on appellant's weekly pay rate of \$734.12 as of October 29, 2003 and compensation rate of 66 2/3 percent.

In a February 1, 2013 letter, appellant contended that the compensation rate was incorrect as he was entitled to compensation at the augmented rate of 75 percent based on his two dependents.

By decision dated February 6, 2013, OWCP issued a corrected schedule award to reflect a compensation rate of 75 percent. It stated that a payment would be issued for the difference in compensation rates for the period December 4, 2012 to February 9, 2013.

On October 30, 2013 counsel requested reconsideration. He argued that the October 25, 2013 report from Dr. Teebagy established that the date of maximum medical improvement was approximately October 26, 2007 and not December 4, 2012. In the October 25, 2013 addendum, Dr. Teebagy provided clarification of his October 26, 2007 report. He stated that appellant reached maximum medical improvement with respect to his right ankle and foot on approximately October 26, 2007.

By decision dated January 31, 2014, OWCP denied reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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.⁵ 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.⁶ When a claimant fails to meet one of the above standards, OWCP

⁴ 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.

⁵ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁶ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

will deny the application for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The Board finds that this case is not in posture for a decision. Counsel requested reconsideration by letter dated October 30, 2013. He contended that Dr. Teebagy's October 25, 2013 addendum to an October 26, 2007 report, clarified appellant's date of maximum medical improvement and constituted pertinent new and relevant medical evidence warranting a merit review. By decision dated January 31, 2014, OWCP denied merit review finding that appellant failed to submit pertinent new and relevant medical evidence or advance a relevant new argument concerning the date of maximum medical improvement.

The Board finds that the October 25, 2013 addendum from Dr. Teebagy constitutes pertinent new and relevant medical evidence warranting further consideration of the merits. Dr. Teebagy stated that appellant had reached maximum medical improvement on October 26, 2007 and not December 4, 2012 as OWCP had determined. Appellant also advanced a new and relevant argument that Dr. Teebagy's new report provided clarification on the date of maximum medical improvement.

The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.⁸ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁹ Dr. Teebagy provided an opinion that maximum medical improvement occurred on October 26, 2007. This is pertinent new and relevant evidence. Counsel also provided new argument regarding the date of maximum medical improvement. The case shall be remanded to OWCP to conduct a merit review. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

⁷ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁸ *R.T.*, Docket No. 11-749 (issued December 23, 2011); *Mary A. Ceglia*, 55 ECAB 626 (2004); see also *Billy Scoles*, 57 ECAB 258 (2005).

⁹ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 22, 2014
Washington, DC

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

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

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