

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 28, 2015 appellant, then a 45-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on November 19, 2014 he sustained a work-related injury to his right heel in the form of tendinitis of his Achilles tendon. He asserted that the injury occurred when he was running a mile and a half as part of mandatory physical training conducted on the premises of the employment establishment.³ Appellant did not stop work.

In a June 11, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted a December 12, 2014 report from Dr. Julian Grafton, Jr., an attending Board-certified family practitioner, who reported right foot pain localized to the posterior heel. Dr. Grafton advised that the discomfort developed gradually several weeks prior, noting that the onset of pain was related to jogging. He diagnosed right Achilles tendinitis. In a December 29, 2014 report, Dr. Grafton indicated that appellant reported that his right Achilles tendinitis was aggravated by standing for long periods and walking. He noted that appellant could not attribute the onset of his right heel pain to any specific activity or event.

In an April 21, 2015 report, Dr. Steven D. Nowicki, an attending Board-certified orthopedic surgeon, noted that appellant reported having right heel pain that had been ongoing for five months and that had not gotten any better. He diagnosed insertional calcific Achilles tendinitis. In a June 2, 2015 report, Dr. Nowicki advised that appellant reported his right heel condition was approximately 50 percent better and he indicated that appellant should be on limited duty.

In a July 15, 2015 decision, OWCP denied appellant's claim for a November 19, 2014 employment injury. Appellant established that the incident occurred as alleged and that a medical condition had been diagnosed; however, he failed to establish a causal relationship between the November 19, 2014 employment incident and the diagnosed condition.

Appellant disagreed with the July 15, 2015 decision and requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. He submitted additional evidence prior to the hearing being held.

A July 1, 2015 right ankle magnetic resonance imaging (MRI) scan revealed a thickened signal compatible with insertional Achilles tendinopathy.

³ On the same form, appellant's immediate supervisor indicated that the employing establishment was challenging appellant's traumatic injury claim as he did not file his Form CA-1 within 30 days of the claimed injury.

In an undated addendum to his April 21, 2015 report, Dr. Nowicki indicated that appellant was diagnosed with insertional calcific Achilles tendinitis. He noted that appellant reported his pain began “as a result of his line of duty at work” in that he injured his right foot while running at work on November 19, 2014.

During the hearing held on March 15, 2016, appellant testified regarding the circumstances of the filing of his claim and the medical treatment he received for his claimed November 19, 2014 work injury. He asserted that he did not have any foot or heel injury/symptoms prior to November 19, 2014. Appellant advised that, while he used to engage in some exercise, he did not usually engage in running. He described the symptoms he experienced while running on November 19, 2014. Appellant noted that his condition continued to bother him, and that he was still performing modified duty at work. His immediate supervisor also testified at the hearing, noting that he was running beside appellant on November 19, 2014 when he heard a popping sound and appellant stated that his foot was hurting.

Appellant submitted additional evidence after the March 15, 2016 hearing. In an August 11, 2015 progress note, Dr. Nowicki noted that appellant was eight days status post right Achilles tendon debridement and Haglund’s deformity excision.⁴ He indicated that appellant’s wounds showed mild swelling, erythema, and slight serous drainage. Dr. Nowicki advised in an August 18, 2015 progress note that appellant had a very satisfactory postoperative course and he ordered a walking boot for him. On September 22, 2015 he noted appellant’s wound was well healed and that he was walking without aid. Dr. Nowicki ordered physical therapy for appellant.

In a March 22, 2016 report, Dr. Nowicki indicated that appellant underwent debridement in August 2015 for a degenerative right Achilles tendon and excision of a Haglund’s deformity on his calcaneus. He noted that this condition was brought on by a combination of factors that increased stress on the Achilles tendon, including physical exercise and physical fitness testing and running.

In an April 29, 2016 decision, OWCP’s hearing representative affirmed OWCP’s July 15, 2015 decision. She found that appellant had established the occurrence of an employment incident on November 19, 2014 in the form of running a mile and a half, but that he failed to submit rationalized medical evidence establishing causal relationship between a diagnosed medical condition and the November 19, 2014 employment incident.

On April 28, 2017 counsel, on behalf of appellant, requested reconsideration of the April 29, 2016 decision. He noted that the claimed November 19, 2014 employment injury was witnessed, as indicated in the record, and asserted that there is no evidence that the injury did not happen. Counsel claimed that appellant “presented a diagnosed condition plausibly connected to the event” and had established a *prima facie* case with no contrary evidence. Appellant had presented sufficient evidence such that a reasonable person could conclude that a causal connection existed between the accepted event and the diagnosed condition. Counsel argued that OWCP was not an adversary party and that it had a duty to investigate the claim, to include asking the attending physician to provide an opinion on causal relationship or to send appellant

⁴ The record does not contain a copy of the surgical report for this procedure.

for a medical evaluation. He asserted that the July 15, 2015 and April 29, 2016 decisions should be vacated and the case remanded to OWCP for further development.

In a May 10, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the April 28, 2017 request for reconsideration did not contain a relevant legal argument that had not previously been considered and counsel did not show that OWCP erroneously applied or interpreted a point of law.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

The submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a claim.¹⁰ Moreover, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ Reopening of a case may be predicated solely on a legal premise not previously considered; however, such reopening is not required where the legal contention does not have a reasonable color of validity.¹²

⁵ This section provides in pertinent part: “[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).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). See Chapter 2.1602.4b.

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (b).

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹¹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹² *John F. Critz*, 44 ECAB 788, 794 (1993).

ANALYSIS

OWCP issued a merit decision on April 29, 2016, and appellant timely requested reconsideration of this decision on April 28, 2017.

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 his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that OWCP erroneously applied or interpreted the law, nor did he advance a new and relevant legal argument not previously considered by OWCP. Counsel argued, on behalf of appellant, that there was a witness to the November 19, 2014 employment incident and that the medical evidence showed that appellant's right heel/foot injury was related to his running at work on that date.

The Board notes that it has been accepted that a November 19, 2014 employment incident occurred in the form of appellant running a mile and a half. The underlying issue in this case was whether appellant's diagnosed right Achilles tendon condition was causally related to the accepted November 19, 2014 employment incident. That is a medical issue which must be addressed by relevant medical evidence.¹³ A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case. Counsel's mere opinion on causal relationship would not be a substitute for the submission of such medical evidence, and therefore, this argument is not relevant to the main issue of the present case. As noted above, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴

Counsel argued that the previously submitted medical evidence was sufficient to require further development of the medical evidence by OWCP, but he did not provide support, based on the specifics of the present case, for holding this position. The Board has held that, while a 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. Counsel's argument for further development does not have a reasonable color of validity.¹⁵

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹³ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁴ See *supra* note 11.

¹⁵ See *supra* note 12. On appeal, counsel cites several Board cases regarding the referral of cases to OWCP for further development of the medical evidence. However, he did not explain why such a referral for further development would be appropriate under the facts of the present case. In its June 11, 2015 claim development letter, OWCP explained that appellant needed to submit medical evidence regarding causal relationship. The hearing representative reiterated that point during the March 15, 2016 hearing, and afforded appellant additional time to submit the requisite medical evidence.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board