

this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.⁴

ISSUE

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

FACTUAL HISTORY

On March 12, 2015 appellant, a 53-year-old machinist, filed a traumatic injury claim (Form CA-1) alleging that she ruptured the posterior tibial tendon on her right ankle/foot on September 29, 2014 while operating a cylindrical grinder in a hydraulic cell. She indicated that she was setting up a new part when the inside of her right ankle began to hurt due to twisting and standing at the machine. Appellant stopped work on the date of injury, but then returned to full-time regular duty, without restrictions, on November 6, 2014.

By decision dated April 24, 2015, OWCP denied the claim as appellant had failed to establish fact of injury. It found that the medical evidence of record did not contain a valid diagnosis causally related to the accepted September 29, 2014 employment incident. Thus, fact of injury was not established.

On August 19, 2015 appellant requested reconsideration and submitted additional evidence in support of her claim.

By decision dated August 31, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review because she failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

On November 16, 2015 appellant again requested reconsideration for a second time and submitted a narrative statement indicating that she had previously sustained a work injury on October 14, 2004, under OWCP File No. xxxxxx367, which had worsened over the years due to repetitive motion and working on a concrete floor. She also submitted additional evidence, including a July 15, 2015 report from Dr. Kevin Walker, a podiatrist, who noted that appellant was being seen for orthopedic aftercare due to right foot surgery, which had been put on hold due to heart surgery following a heart attack. On October 7, 2015 Dr. Walker diagnosed bilateral foot pain and noted that appellant had chronic pain caused by a previous trauma that occurred 11 years before when she lost part of her aspect of the foot. He reported that appellant underwent surgery to repair her posterior tibial tendon area and now she was having left posterior and tendon pain due to the chronic nature of her pain. Dr. Walker opined that appellant was not capable of weight-bearing at work.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The record provided the Board includes evidence received after OWCP issued its March 16, 2016 decision. However, the Board is precluded from reviewing evidence that was not part of the record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1).

By decision dated November 19, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review because she failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

On February 15, 2016 appellant, through counsel, requested reconsideration for a third time and submitted additional evidence.⁵

In an October 27, 2014 report, Dr. Walker diagnosed acute pain of the lower extremity, in particular pain in the posterior tibial tendon and navicular area. On October 31, 2014 he diagnosed posterior tibial tendon tear of the right foot and reported that he had performed a repair surgery that day. Appellant submitted progress reports dated December 17, 2014 through December 29, 2015 from Dr. Walker who provided light-duty work restrictions. In a March 9, 2015 report, Dr. Walker noted that on or about September 2014 appellant suffered an injury at work from repetitive motion. He explained that appellant's position required continuous standing and rotating, which placed further strain on her injured tendon that was already under stress from a prior work injury to the same foot which resulted in the loss of her pinky toe. Dr. Walker also noted that he believed the loss of appellant's balancing toe due to a previous work injury was a major contributing factor in the tearing of her ankle tendon. On December 29, 2015 he reiterated his opinion that appellant's work-related accident in 2004, which resulted in the loss of her pinky toe, may have caused her instability and severe right foot and ankle pain.

Appellant further submitted OSHA 301 forms dated March 11, 2015 and resubmitted reports from Dr. Walker dated July 15 and October 7, 2015.

By decision dated March 16, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review because she failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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.⁸ A timely application for reconsideration, including all supporting documents, must set

⁵ Counsel submitted the appeal request form that accompanied the April 24, 2015 merit decision, which OWCP received on February 15, 2016.

⁶ 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).

⁷ 20 C.F.R. § 10.607.

⁸ *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). *Id.* at Chapter 2.1602.4b.

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.⁹ 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.¹⁰

ANALYSIS

On reconsideration counsel submitted the appeal request form that accompanied the April 24, 2015 decision. Apart from requesting reconsideration, he did not elaborate on the basis for the request. Accordingly, the Board finds that the February 15, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that appellant did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Along with her reconsideration request, appellant submitted reports dated October 27, 2014 through December 29, 2015 from Dr. Walker who diagnosed posterior tibial tendon tear of the right foot and performed a repair surgery on October 31, 2014. Dr. Walker stated that he believed the loss of appellant's balancing toe due to a work-related accident in 2004, which resulted in the loss of her pinky toe, was a major contributing factor in the tearing of her ankle tendon and opined that it may have caused her condition. The Board finds that submission of this evidence did not require reopening appellant's case for merit review as it failed to address the issue of causal relationship between appellant's right ankle condition and the September 29, 2014 employment incident, which was the issue before OWCP.¹¹ Therefore, this evidence does not constitute relevant and pertinent new evidence and is insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also resubmitted reports from Dr. Walker dated July 15 and October 7, 2015. The Board finds that the submission of this evidence did not require reopening appellant's case for merit review because appellant had submitted the same evidence, which was previously reviewed by OWCP in its November 19, 2015 decision. As the documents repeat evidence already in the case record, it is duplicative and does not constitute relevant and pertinent new evidence. Thus, appellant has not established a basis for reopening her case.¹²

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

¹¹ The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case. *See J.W.*, Docket No. 17-0952 (issued September 1, 2017); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹² *See D.K.*, 59 ECAB 141 (2007).

In support of her request for reconsideration, appellant submitted OSHA 301 forms dated March 11, 2015. The Board finds that submission of these documents did not require reopening appellant's case for merit review as they do not address whether appellant's right ankle condition is causally related to the September 29, 2014 employment incident, which was the issue before OWCP.¹³ Therefore, these documents do not constitute relevant and pertinent new evidence and are insufficient to require OWCP to reopen appellant's claim for consideration of the merits in accordance with the third above-noted requirement under section 10.606(b)(3).¹⁴

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(3) and properly denied her request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

¹³ See 5 U.S.C. § 8101(2). See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004).

¹⁴ See *V.H.*, Docket No. 15-1262 (issued March 18, 2016).