

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

L.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
City of Industry, CA, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 17-1580
Issued: August 21, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 14, 2017 appellant filed a timely appeal from an April 13, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision, dated January 15, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On August 18, 2004 appellant, then a 41-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she initially became aware that she developed bilateral foot conditions beginning June 1, 2004, and first realized that they were a result of her federal employment duties of walking and mounting/dismounting mail delivery vehicles on August 12, 2004.

By decision dated October 15, 2004, OWCP accepted the claim for bilateral plantar fasciitis. On July 27, 2010 it expanded acceptance of the claim to include bilateral tarsal tunnel syndrome.

Appellant underwent right foot surgery on December 5, 2008 and left foot surgery on March 27, 2009. She did not work from December 5, 2008 through June 1, 2009 and received wage-loss compensation on the supplemental rolls. Appellant returned to full-time light-duty employment, but stopped work again on May 25, 2012 for a left foot surgery and a right foot surgery on November 9, 2012. On May 22, 2013 she returned to part-time light duty.

Appellant continued seeking treatment with her attending physician and surgeon, Dr. Domenic Signorelli, a physician of podiatric medicine. In a July 31, 2014 medical report, Dr. Signorelli reported that appellant continued to suffer from residuals of her work-related injury.

On September 24, 2014 OWCP referred appellant, the case file, a series of questions, and a statement of accepted facts (SOAF) to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Swartz determined that appellant's work-related conditions had resolved with no remaining residuals and that she no longer required medical treatment for the accepted work injuries. Specifically, he noted that she had an equal range of motion of both ankles, which appeared functional and unremarkable, and that she did not limp and could stand well on her toes. Additionally, Dr. Swartz noted that appellant complained of no tenderness in the plantar surface of both feet, including heels. He found no evidence of bilateral plantar fasciitis or bilateral tarsal tunnel syndrome, or residuals of either condition, and determined that maximum medical improvement (MMI) was reached on September 24, 2014.

On October 21, 2014 OWCP notified appellant of a proposal to terminate her wage-loss compensation and medical benefits based on Dr. Swartz' report that she was not experiencing any residuals or disability connected to the June 1, 2004 employment injury as her conditions had ceased. It provided appellant 30 days to submit additional information.

In an October 30, 2014 medical report, Dr. Signorelli reported that he reviewed Dr. Swartz' report and agreed with his assessment that appellant's condition was permanent and stationary, and currently no longer required active treatment. He noted that appellant should be afforded functional biomechanical orthotics on a yearly basis to maintain the normal medial longitudinal arch. With regard to the ankle joint, Dr. Signorelli agreed that she had reached MMI and had no residuals from the sprain. He further agreed with Dr. Swartz that there was no nonindustrial preexisting disability. Dr. Signorelli concluded that appellant could continue with modified work as provided.

By decision dated April 1, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective March 2, 2015, finding that the medical evidence of record established that she no longer had any residuals related to the accepted work-related medical condition or continued disability as a result of the June 1, 2004 work injury. It noted that both Dr. Swartz and Dr. Signorelli agreed that appellant's accepted conditions of bilateral plantar fasciitis and bilateral tarsal tunnel syndrome had resolved, that there were no residuals of either condition, and that medical treatment was no longer necessary.

On December 4, 2015 appellant requested reconsideration of OWCP's April 1, 2015 decision. In support of her claim, she submitted medical reports dated March 26 through November 18, 2015.

In a March 26, 2015 report, Dr. Stephen C. Wan, a physician of podiatric medicine and treating physician, reported that he was treating appellant who had been continually improving since her surgical release of the plantar fascia on both feet by Dr. Signorelli. He further reported that her neuritic symptoms had also improved to the point where they were essentially absent.

In an April 30, 2015 medical report, Dr. Wan reported that appellant showed continuing improvement status postsurgical intervention by Dr. Signorelli. He noted that he agreed with both Dr. Swartz' and Dr. Signorelli's impression that she had reached MMI regarding her feet and also agreed with Dr. Signorelli's impression that she would warrant and benefit from continuous mechanical control status post plantar fascia release *via* the use of functional foot orthotics.

In a June 11, 2015 medical report, Dr. Wan noted that appellant reported residual right ankle symptoms proportionate to the amount of standing and walking and that she returned for orthotic dispense and training. He noted that her gait demonstrated stability with no areas of irritation voiced by appellant. Dr. Wan diagnosed plantar fasciitis and noted that appellant continued to demonstrate over pronation on both feet and ankles. He reported that despite the continuing improvement status postsurgical intervention by her previous surgeon Dr. Signorelli, she still demonstrated residual fascial tenderness (grades 1 to 3 on the pain scale). With appellant's work duties/demands and her weight issue, Dr. Wan noted that it was consistent that she would continue to experience over pronation on both feet and ankles, requiring the continued assistance of foot orthotic treatment in order to address the soft tissue symptoms associated with over pronation. He noted that the orthotic was intended for functional and mechanical control.

In a November 18, 2015 medical report, Dr. Hosea Brown III, Board-certified in internal medicine and a treating physician, reported that he disagreed with OWCP's decision to terminate appellant's benefits as she continued to work with restrictions due to residuals of the bilateral plantar fibromatosis. He noted that she exhibited persistent tenderness along the plantar aspects of both feet as well as calcaneal motion tenderness and significant trigger point tenderness located at the insertion of the longitudinal arch of the calcaneus bilaterally. Furthermore, Dr. Brown reported complaints of persistent pain and discomfort in appellant's feet upon performing prolonged ambulation or standing. He noted that Dr. Signorelli determined that she had reached MMI from a podiatric standpoint, but that she should be provided the opportunity to continue her medical benefits pertinent to this claim in order to obtain additional orthotic intervention and therapy as indicated by her symptoms. Dr. Brown reported that Dr. Swartz was a Board-certified orthopedic surgeon while Dr. Wan and Dr. Signorelli were both Board-certified podiatric

physicians who determined that appellant clearly had persistent symptomatology pertinent to her accepted condition of bilateral plantar fibromatosis. He concluded that her claim should remain open so that she may receive continued medical care.

By decision dated January 15, 2016, OWCP denied modification of the April 1, 2015 decision terminating appellant's wage-loss compensation and medical benefits. It noted that the medical evidence submitted only revealed subjective complaints and the desire to keep the claim open was based on possible future injury.

On March 25, 2016 appellant requested reconsideration of OWCP's January 15, 2016 decision.

In a February 24, 2016 medical report, Dr. Brown disagreed with the January 15, 2016 OWCP decision and argued that appellant exhibited persistent findings on physical examination which constituted objective evidence regarding her persistent symptomatology. He noted specifically that she exhibited persistent tenderness along the plantar aspects of both feet as well as calcaneal motion tenderness, both of which were objective findings indicative of bilateral plantar fibromatosis. Dr. Brown indicated that the medical opinions of Dr. Wan and Dr. Signorelli should be given greater weight than the opinion of Dr. Swartz as they were specialists in the appropriate field in accordance with FECA guidelines. He further noted that Dr. Signorelli indicated that although appellant had reached MMI, she would require future podiatric treatment for acute exacerbations of pain and discomfort in her feet, a symptomology which was well known to recur in the case of bilateral plantar fibromatosis.

In a March 31, 2016 medical report, Dr. Wan provided findings on physical examination and diagnosed plantar fasciitis, both feet currently asymptomatic, and quiescent. He reported that with the over pronation status, appellant would require annual examination to assess the effectiveness of her foot orthotic. Appellant's mechanical function would continue to need to be controlled by custom functional foot orthotics in order to avoid exacerbation of symptoms. Fascial tissues, despite surgical release, could reattach and produce fasciitis symptoms if mechanical stress forces were not under proper functional control. Dr. Wan noted that appellant had reached MMI, but would continue to require annual evaluation for the need for foot orthotics in order to control her mechanical stress issues, which were at the root cause of her original initial presenting signs and symptoms.

In an April 7, 2016 medical report, Dr. Wan disagreed with OWCP's assessment and interpretation of his reports in its January 15, 2016 decision. He noted that while his report indicated a benign examination, his musculoskeletal examination findings revealed tenderness which signified ongoing residuals and issues concerning appellant's plantar fasciitis. Dr. Wan further noted that while he agreed with Dr. Swartz' and Dr. Signorelli's impression that she had reached MMI regarding her feet, he also agreed with Dr. Signorelli's impression that she would warrant and benefit from continuous mechanical control status post plantar fascia release *via* the use of functional foot orthotics. He argued that this indicated required ongoing care. Dr. Wan further noted that while his June 11, 2015 report noted that appellant voiced no irritation in regard to her gait, the report also noted that she demonstrated residual fascial tenderness, grades 1 to 3/10 on the Mankoski Pain Scale. He concluded that she required periodic orthotic care, most preferably on an annual basis to maintain her MMI status and to keep her symptom free.

By decision dated May 20, 2016, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It noted that the medical evidence submitted was cumulative and substantially similar to documentation previously considered and already contained in the case file.

On June 20, 2016 appellant filed a schedule award claim (Form CA-7).

Appellant requested reconsideration of the May 20, 2016 OWCP decision on July 15, 2016. She alleged that the medical documentation submitted in support of her schedule award claim was new evidence which established that her claim should not have been terminated.

Appellant submitted an April 7, 2016 magnetic resonance imaging scan of the right and left foot which revealed no gross acute abnormality. In an April 15, 2016 impairment rating, Dr. Charles Xeller, a Board-certified orthopedic surgeon, reported that appellant had reached MMI and calculated 16 percent permanent impairment of the right and left lower extremities. On July 31, 2016, a district medical adviser reviewed the medical evidence and determined that she sustained three percent permanent impairment to the right lower extremity and three percent permanent impairment to the left lower extremity.

In an August 24, 2016 medical report, Dr. Brown reported that appellant's benefits should not have been terminated and he agreed with Dr. Wan's April 7, 2016 narrative regarding her condition. He noted that she continued to complain of significant pain and discomfort in both ankles and feet while working eight hours daily. Dr. Brown reported objective findings of diminished range of motion at both ankles with significant pain and discomfort upon range of motion examination. He further noted persistent tenderness upon physical examination and diagnosed bilateral plantar fibromatosis.

By decision dated November 7, 2016, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review.³

In another decision dated November 7, 2016, OWCP granted appellant a schedule award for three percent permanent impairment to the right lower extremity and three percent permanent impairment to the left lower extremity.

On December 20, 2016 appellant requested reconsideration of OWCP's November 7, 2016 decision which had denied reconsideration. In support of her claim she resubmitted Dr. Wan's April 7, 2016 medical report, as well as a new November 17, 2016 report.

In his November 17, 2016 report, Dr. Wan noted that appellant's permanent impairment and entitlement to a schedule award established the ongoing pathology of her condition. He further

³ OWCP noted that determination of a claim for all benefits due to a finding of no residuals of the accepted conditions does not bar a subsequent schedule award and the schedule award should be considered separately from the termination of benefits.

noted that her ongoing impairment needed to be addressed in terms of functional orthotics in order to continue to control the function and mechanical stress placed on the foot and ankle areas.

By decision dated December 21, 2016, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review of the January 15, 2016 decision.

On December 29, 2016 and January 13, 2017 appellant requested reconsideration of the January 15, 2016 OWCP decision. In support of her claim, she resubmitted Dr. Wan's medical reports previously of record dated June 11, 2015, April 7, and November 17, 2016. Appellant also submitted a January 5, 2017 report from Dr. Wan.

In his January 5, 2017 report, Dr. Wan claimed that there was a conflict in medical opinion between Dr. Swartz, serving as the second opinion physician, and her treating physicians regarding the necessity of future medical care. He reported that, in accordance with FECA procedures, OWCP should refer appellant for a referee examination to resolve this conflict.

By decision dated April 13, 2017, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review of the January 15, 2016 decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by 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.⁴ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

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).⁶

In her applications for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. She also did not advance a new and relevant legal argument not previously considered. Consequently, appellant is not entitled to further review of

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

With her reconsideration requests, appellant resubmitted medical reports from Dr. Wan dated June 11, 2015 and April 7 and November 17, 2016. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.⁷ The only new medical evidence received following the December 21, 2016 reconsideration denial was Dr. Wan's January 5, 2017 report requesting that the case be referred for a referee examination due to a conflict in medical opinion as to whether appellant would require future medical care. Dr. Wan had however offered opinions regarding future medical care in his previous reports, and Dr. Brown had previously offered this opinion regarding a conflict of medical opinion in his February 24, 2016 report. As this opinion is therefore repetitive of a prior opinion already in the case record and previously reviewed by OWCP, it does not constitute a basis for reopening the case for further merit review.⁸

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

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).

⁷ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁸ See *D.P.*, Docket No. 17-0450 (issued June 20, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2018
Washington, DC

Christopher J. Godfrey, 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