

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 April 28, 2015 appellant, a 57-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left foot injury while in the performance of duty that day.³ He indicated that he was walking up to a porch while delivering mail and felt pain in his left foot. Appellant stopped work on the date of injury and has not returned.

The record establishes that appellant also filed an occupational disease claim (Form CA-2), alleging that he developed a left foot condition due to factors of his federal employment. OWCP accepted that claim, assigned File No. xxxxxx852, for aggravation of left foot plantar fasciitis.

In an April 28, 2015 report, Robert Almanza, a physician assistant, diagnosed left foot tendinitis due to an injury sustained at 1:35 p.m. that day and released appellant to modified work with restrictions of a sit-down job only, no prolonged standing or walking, and lifting/carrying up to 20 pounds.

In a May 21, 2015 development letter, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted reports dated April 28 and 30, and May 28, 2015 from Dr. Jack Feldsher, a family practitioner, who diagnosed tendinitis of the left foot/ankle, prescribed physical therapy, and released appellant to regular-duty work without restrictions, effective May 28, 2015.

By decision dated June 22, 2015, OWCP accepted that the April 28, 2015 employment incident occurred as alleged, but denied the claim because the medical evidence of record failed to establish causal relationship between appellant's diagnosed condition and the accepted April 28, 2015 work incident.

On August 1, 2015 appellant requested reconsideration and submitted a June 8, 2015 progress note from Dr. Feldsher who reiterated his diagnosis. He also submitted two reports dated June 29, 2015 from Robert Cha, a physician assistant, which discharged him from care because no further visits were necessary for his left foot/ankle tendinitis, and released him to regular-duty work without restrictions.

By decision dated November 2, 2015, OWCP denied modification of its prior decision.

On November 2, 2016 appellant, through counsel, requested reconsideration and submitted a January 5, 2016 report from Dr. Phillip McKinley, a Board-certified emergency medicine

³ The claim was assigned OWCP File No. xxxxxx339.

physician, who diagnosed cumulative trauma with lumbar disc syndrome, lumbar radiculopathy, left posterior tibial tendon function, first metatarsophalangeal (MPJ) arthritis, and plantar fasciitis. Dr. McKinley opined that appellant's employment required frequent twisting, pivoting, bending, reaching, pulling, and pushing, which contributed to his diagnosed conditions.

In a January 22, 2016 report, Dr. James T. Tran, a family practitioner, diagnosed spinal stenosis of lumbar region, with neurogenic claudication, lumbar disc degeneration, lumbar disc displacement, connective tissue and disc stenosis of intervertebral foramina of lumbar region, and osseous stenosis of neural canal of lumbar region. Dr. Tran opined that appellant's federal employment duties were causally related to his lumbar conditions.

Electromyography and nerve conduction velocity (EMG/NCV) studies, dated February 24, 2016 from Dr. Maliheh Massih, a Board-certified physiatrist, found left L4, L5, and S1 subacute radiculopathy, right L5-S1 subacute radiculopathy, and a mild form of peripheral neuropathy of the motor nerves in the lower extremities.

By decision dated January 6, 2017, OWCP denied appellant's request for reconsideration because he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence. It noted that appellant had previously submitted Dr. McKinley's January 5, 2016 report and Dr. Tran's January 22, 2016 report in support of his occupational disease claim under OWCP File No. xxxxxx852.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶ 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.⁷ When a timely application for reconsideration does not meet at least one

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *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.

⁷ 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

Appellant's November 2, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his 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 his reconsideration request, appellant submitted a January 5, 2016 report from Dr. McKinley and a January 22, 2016 report from Dr. Tran. The Board finds that submission of this evidence did not require reopening appellant's case for merit review. The Board finds that the medical reports of Drs. McKinley and Tran relate specifically to appellant's occupational disease claim and provide no opinion relevant to the issue of causal relationship between the diagnosed conditions and the April 28, 2015 employment incident. Thus, this evidence is irrelevant and is thus insufficient to require OWCP to reopen appellant's claim for consideration of the merits.⁹

Appellant further submitted a diagnostic EMG/NCV study dated February 24, 2016 from Dr. Massih diagnosing left L4, L5, and S1 subacute radiculopathy, right L5-S1 subacute radiculopathy, and a mild form of peripheral neuropathy of the motor nerves in the lower extremities. The Board finds that submission of this report did not require reopening appellant's case for merit review because it does not contain rationale by Dr. Massih relating the diagnosed conditions to the April 28, 2015 employment incident, which was the issue before OWCP.¹⁰ Therefore, this report does not constitute relevant and pertinent new evidence and is 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).¹¹

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

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).

⁸ *Id.* at § 10.608(a), (b).

⁹ *See L.H.*, 59 ECAB 253 (2007).

¹⁰ *See* 5 U.S.C. § 8101(2). *See also Paul Foster*, 56 ECAB 208, 212 n.12 (2004).

¹¹ *See supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2018
Washington, DC

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

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

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