

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 November 15, 2016 appellant, then a 60-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that, on June 1, 2014, he first realized that he developed a medical condition due to his repetitive work duties.³ He did not stop work. In an accompanying statement, appellant described his work duties, noting in detail the foot pivoting he had to perform while casing mail and delivering his mail route.

By development letter dated November 23, 2016, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him regarding the type of medical and factual evidence required to establish his claim. OWCP afforded appellant 30 days to submit the requested information.

Appellant submitted a narrative report dated October 25, 2016, a progress report dated November 3, 2016, and a duty status report (Form CA-17) dated November 28, 2016 from Dr. Roderick A. Moore, a treating podiatrist. In the October 25, 2016 narrative report, Dr. Moore related that he had reviewed an attached statement of appellant's employment duties. He related that appellant's job required constant pivoting on the forefoot which appeared to be placing stress into his implant. Dr. Moore explained that appellant's constant pivoting was different than the range of motion the joint would undergo in normal walking and was leading to repetitive stress as noted in increased sclerosis to his hallux and was directly responsible for his foot pain. He diagnosed right subtalar joint arthrodesis, right foot first metatarsal phalangeal joint osteoarthritis, first right foot metatarsal arthrosurface implantation, scar tissue limiting first metatarsal phalangeal joint motion, right foot first metatarsal phalangeal joint arthroplasty, and pain to right first metatarsal phalangeal joint implant with rotational motion. On a November 28, 2016 Form CA-17, Dr. Moore diagnosed right implant impaction osteoarthritis.

By decision dated December 28, 2016, OWCP denied appellant's claim. It found that the evidence of record was insufficient to establish that his diagnosed medical conditions were causally related to the accepted factors of his federal employment.

In a letter dated and received by OWCP on December 27, 2017, appellant requested reconsideration. In support of his request, he submitted a December 26, 2017 report from Dr. Moore.

In the December 26, 2017 report, Dr. Moore detailed appellant's right foot injury history. He opined that appellant's employment duties aggravated his right foot condition. In support of this conclusion, Dr. Moore noted that the biomechanical demands of appellant's job required a large percent of pivoting, flexion, and twisting of his first metatarsal joint, which aggravated

³ The record indicates that appellant ceased working for the employing establishment effective May 22, 2017.

appellant's preexisting foot condition. He explained that appellant's job required turning to place letters in various heightened slots. Appellant performed this task repeatedly through the course of the day several days a week for many years. This involved pivoting with varying degrees of joint flexion and varying degrees of body force depending on the height of the slot the letter was to be placed into. These forces increased pressure in the area initially to the sesamoidal apparatus at the 1st metatarsal phalangeal joint and then as the joint lost motion from a worsening of the osteoarthritis and scarring resulting from this process the force shifted to the implant bone interfaces. Dr. Moore concluded that the pivoting/varying degrees of flexion with varying degrees of load forced overtime initially caused appellant's osteoarthritis and led to failure of his joint implantation.

By decision dated January 4, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a), finding that the evidence was cumulative and substantially similar to evidence previously submitted and reviewed in the December 28, 2016 decision. It concluded, therefore, that the evidence was insufficient to warrant further merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with a discretionary authority to determine whether to review an award for or against compensation either under its own authority or on application by a claimant.⁴ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

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

⁴ 5 U.S.C. § 8128(a); *see also* *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3); *see also* *R.S.*, Docket No. 18-0684 (issued October 18, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

As appellant's request for reconsideration did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by OWCP, it did not warrant a review of the merits of his claim based on the first and second requirements under section 10.606(b)(3).⁸

Appellant did however submit relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether the accepted factors of his employment caused or aggravated his diagnosed medical conditions.

In support of his request for reconsideration, appellant submitted a December 26, 2017 report from Dr. Moore. Dr. Moore had previously recounted in general terms that appellant's employment duties, which required repeated pivoting of his forefoot, placed stress on his implant and had led to appellant's increased pain complaints. In his December 26, 2017 report, however, he provided a more detailed description of the mechanism of injury related to appellant's specific employment duty of casing mail, which involved pivoting his foot with varying degrees of joint flexion and body force. Dr. Moore explained, for the first time, that this pivoting is what caused appellant's osteoarthritis of the foot initially, and then led to the failure of his joint implementation. The Board thus finds that this evidence is not duplicative of the evidence previously of record.

The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁹ The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(iii), this new evidence from Dr. Moore is sufficient to require reopening appellant's case for further review on its merits.¹⁰

Therefore, OWCP improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for it to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, OWCP shall issue an appropriate decision on the merits of appellant's claim.

CONCLUSION

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

⁸ See *S.M.*, Docket No. 17-1899 (issued August 3, 2018).

⁹ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ See *A.C.*, Docket No. 17-1616 (issued November 27, 2018).

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: February 11, 2019
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