

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

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**G.R., Appellant**

**and**

**U.S. POSTAL SERVICE, HENDERSON MAIN  
POST OFFICE, Henderson, NV, Employer**

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**Docket No. 20-0749  
Issued: December 23, 2020**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

CHRISTOPHER J. GODFREY, Deputy Chief Judge

JANICE B. ASKIN, Judge

**JURISDICTION**

On February 10, 2020 appellant filed a timely appeal from an August 29, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated April 26, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

**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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On March 6, 2019 appellant, then a 45-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a partial right ankle tear and swelling on February 11, 2019, due to the constant mounting and dismounting of his work vehicle while in the performance of duty. On the reverse side of the claim form the employing establishment acknowledged that appellant was injured in the performance of duty. Appellant stopped work on February 11, 2019 and returned to work on February 15, 2019.

In support of his claim, appellant submitted a magnetic resonance imaging (MRI) scan report regarding his right ankle, dated February 13, 2019, which revealed a complete tear of the anterior talofibular ligament, a partial tear of the calcaneofibular ligament, small tibiotalar joint effusion, and mild tenosynovitis.

A medical status report dated February 27, 2019, containing an illegible signature, indicated that appellant could not return to full-duty work. The report indicated that appellant could work four hours per day with restrictions. It further noted that appellant had chronic ankle pain following multiple surgeries.

In a development letter dated March 19, 2019, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised appellant of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded him 30 days to submit the necessary evidence.

OWCP subsequently received a May 16, 2017 operative report from Dr. Richard Gardner, a podiatrist, who described the results of appellant's right gastrocnemius recession and right foot retrocalcaneal exostectomy with Achilles tendon repair procedures. He noted a postoperative diagnosis of right Haglund's and right ankle equinus.

A right lower extremity MRI scan report dated April 30, 2018, revealed prominent thickening of the distal Achilles tendon fibers, mild plantar fasciitis, nonvisualization of the anterior talofibular ligament compatible with old tear, thin and attenuated calcaneofibular ligament compatible with chronic/old injury, diminutive deep portion deltoid ligament complex likely from chronic injury/partial tear, and mild tenosynovitis of the flexor tendons.

In a separate operative report dated August 9, 2018, Dr. Gardner described the results of a recent right foot retrocalcaneal exostectomy and right Achilles tendon repair procedures. He noted a postoperative diagnosis of retrocalcaneal exostosis.

In a February 12, 2019 report, Dr. Gardner noted that appellant had severe pain and swelling in the right lower extremities after he returned to work. He examined appellant and diagnosed insertional Achilles tendinopathy.

In a letter dated March 7, 2019, the employing establishment controverted appellant's traumatic injury claim, noting that on February 11, 2019 appellant stated that he was unable to carry mail because of an off-duty, nonwork-related injury. It further indicated that appellant just came back from surgery and indicated that he believed his physician released him to full-duty work prematurely. The employing establishment noted that appellant could not specify how his injury occurred and alleged that his injury was not work related.

On March 31, 2019 appellant responded to OWCP's development questionnaire. He noted that he had only been back to work as a city mail carrier since February 2, 2019 and he had not been acclimated to his employment duties and that he had delayed filing his traumatic injury claim because he believed that his condition was caused by not having enough time to acclimate to his work activities after being on leave for two years. Appellant indicated that he had an Achilles bone spur removed twice from his right foot. He noted that he had developed pain and swelling since February 11, 2019. Appellant noted his employment duties and stated that he stopped work on February 19, 2019 when his physician notified him of a ligament tear. He reported that he did not sustain any other injuries between the date of injury and the date of the report. Appellant alleged that his duties as a city mail carrier caused his right foot condition.

In a duty status report (Form CA-17) dated April 10, 2019, Dr. Gardner diagnosed insertional Achilles tendinopathy and ankle instability. He checked a box marked "Yes" to indicate that appellant's conditions corresponded to him getting in and out of a vehicle. Dr. Gardner indicated that appellant was not advised to resume full-time work, but could perform part-time work up to four hours per day.

By decision dated April 26, 2019, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a causal relationship between his diagnosed conditions and the accepted February 11, 2019 employment incident.

On May 31, 2019 appellant requested reconsideration. He submitted a May 13, 2019 amendment report from Dr. Gardner along with his request. Dr. Gardner noted that appellant had insertional Achilles tendinitis, which resulted in an aggressive bone spur. He indicated that appellant improved with physical therapy treatment, but experienced a recurrence of the bone spur after returning to work. Dr. Gardner opined that, by carrying heavy mail, appellant would create tension within the posterior quadrant of the lower extremity, *i.e.*, tight hamstring and Achilles tendon. He noted that the tightness in appellant's Achilles tendon was likely contributing to the formation of the bone spur. Dr. Gardner noted that appellant's pain and weakness in his right ankle would worsen as a result of his work activities.

By decision dated August 29, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation, at any time, on his or her own motion or on application.<sup>3</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

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<sup>3</sup> 5 U.S.C. § 8128(a). 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). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016); see J.T., Docket No. 19-1829 (issued August 21, 2020); W.C., 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>7</sup>

## ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

In his timely request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Appellant filed a claim for a traumatic injury (Form CA-1). However, his March 31, 2019 response to OWCP's development questionnaire and the medical evidence of record indicate that he should have been filed occupational disease claim (Form CA-2). A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift.<sup>8</sup> An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.<sup>9</sup> Appellant repeatedly alleged that the repetitive nature of his work activities and the constant entering/exiting of his work vehicle caused his right ankle condition.

Under FECA, although it is the employee's burden of proof to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence.<sup>10</sup> It is the duty of the claims examiner to develop a claim based on the facts at hand and not solely on the basis of the type of claim form filed.<sup>11</sup> OWCP's procedures provide that, if the actual benefits claimed cannot be determined from review of the form, OWCP should develop the claim based upon the claim form filed and direct questions to the claimant to determine the type of benefits claimed. Based

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<sup>4</sup> 20 C.F.R. § 10.606(b)(3); *see J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>5</sup> *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020).

<sup>6</sup> *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *see J.V.*, *supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> 20 C.F.R. § 10.5(ee).

<sup>9</sup> *Id.* at § 10.5(q).

<sup>10</sup> *L.T.*, Docket No. 18-1034 (issued April 30, 2020).

<sup>11</sup> *Id.*

upon the response to the development letter, OWCP should make a determination as to whether the correct claim was filed and, if not, it should convert the claim to the proper type of claim and notify both appellant and the employing establishment (and any representative, if applicable) of the conversion.<sup>12</sup> Herein, OWCP failed to consider whether appellant's claim was an occupational disease claim, rather than a traumatic injury claim, in accordance with its procedures.<sup>13</sup>

The Board finds that Dr. Gardner's May 13, 2019 amendment is new and relevant evidence that is not substantially similar to evidence previously considered. The Board notes that Dr. Gardner's opinion provided information on how appellant's repetitive work activities caused his diagnosed conditions. As such, the Board finds that Dr. Gardner's amendment constitutes relevant and pertinent new evidence under the third requirement of 20 C.F.R. § 10.606(b).

Accordingly, the Board will remand the case to OWCP to consider appellant's claim, in the alternative, as an occupational disease claim based upon the report of Dr. Gardner. Following this and any other further development deemed necessary, OWCP shall issue an appropriate merit decision on 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).

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c)(2)(b) (June 2011); *C.f. S.N.*, Docket No. 12-1814 (issued March 11, 2013).

<sup>13</sup> *J.W.*, Docket No. 18-0822 (issued July 1, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 29, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: December 23, 2020  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board