United States Department of Labor
Employees' Compensation Appeals Board

K.T., Appellant	)	
and	)	**Docket No. 18-0927**
	)	**Issued: May 13, 2020**
U.S. POSTAL SERVICE, ELMWOOD POST OFFICE, Providence, RI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 3, 2018 appellant filed a timely appeal from a January 4, 2018 merit decision and a March 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of disability commencing April 26, 2017, causally related to his accepted March 13, 2017

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the March 14, 2018 decision, OWCP received additional evidence. 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*.

employment injury; and (2) 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 March 15, 2017 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2017 he sustained a bruised and swollen right foot when he hit his foot on a berm while in the performance of duty. He stopped work on March 15, 2017 and returned to full-time limited-duty work on March 16, 2017.

In a March 15, 2017 attending physician's report, Dr. Oliver Gherardi, an osteopathic physician specializing in family medicine, diagnosed right foot contusion and advised that appellant could resume light duty on March 16, 2017. On March 20, 2017 he released appellant to full duty without restrictions, effective March 21, 2017.

On April 26, 2017 appellant filed a recurrence (Form CA-2a) claiming total disability from work commencing that day. He indicated that his foot problem never went away, and that he had continued to experience pain, swelling, and discomfort since the March 13, 2017 injury. The employing establishment confirmed that appellant had returned to work on March 16, 2017.

In an April 26, 2017 injury status form report and a duty status report (Form CA-17), Dr. Gherardi diagnosed dislocation of the second right toe. He advised that appellant was unable to work until he was examined by a podiatrist.

In a letter dated May 8, 2017, OWCP notified appellant that, when his claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work and had not been formally considered. It informed him that his claim had been reopened for consideration because he had filed a claim of recurrence and, following adjudication, his claim had been accepted for right foot contusion.

In a May 12, 2017 form report, Dr. Aaron Milam, a podiatrist, advised that he had examined appellant that day for an injury to his second right toe. He indicated that the condition began on March 13, 2016 and that appellant could return to his regular job on May 15, 2017.

In a development letter dated May 31, 2017, OWCP advised appellant that, since his recurrence claim had been filed within 45 days of his March 13, 2017 employment injury, he was still eligible for continuation of pay (COP). It also informed him that the medical evidence submitted was insufficient to establish a recurrence of disability, noting that, to establish his recurrence claim, he must show a worsening of his original injury without an intervening injury or new exposure such that he was no longer able to work. OWCP requested that appellant respond to specific questions regarding the April 26, 2017 date of alleged recurrence and that he submit medical evidence, which explained why he was unable to work during his claimed disability period as a result of his accepted injury. It afforded him 30 days to submit additional evidence.

Appellant forwarded March 15 and 20, 2017 treatment notes in which Dr. Gherardi described examination findings and diagnosed a right foot contusion. In an April 26, 2017 treatment note, Dr. Gherardi described appellant's continued complaint of right foot pain and

swelling. He provided examination findings and diagnosed a right foot dislocated second toe. Dr. Gherardi indicated that appellant would follow-up with a podiatrist.

In a May 12, 2017 treatment note, Dr. Milam noted a history that on March 13, 2017 appellant injured his right foot while working. He reported pain on palpation to the second metatarsophalangeal (MPJ) joint of the right foot and observed a dislocated second digit in a dorsally contracted position. Dr. Milam indicated that a right foot x-ray showed a dorsally dislocated position of the second toe on the MPJ joint. He advised that appellant's presentation was consistent with a post-traumatic dislocated second toe with bursitis/synovitis. Dr. Milam diagnosed closed dislocation of the MPJ joint of the right foot, bursitis of the second right metatarsal, and right-sided metatarsalgia. In a May 13, 2017 Form CA-17 report, he indicated that appellant could resume full-time regular duty on May 15, 2017.[3]

On July 3, 2017 appellant forwarded his completed OWCP development questionnaire. He wrote the that he injured his right foot on March 13, 2017 when he banged it on a cement curb and that he had worked light duty for one week. Appellant maintained that his current disability was due to his original injury because the injury had not healed and his symptoms were continuous.

By decision dated July 5, 2017, OWCP denied appellant's request to expand his claim to include the additional conditions of a dislocation and bursitis of the second right toe because the medical evidence submitted failed to establish that these conditions were causally related to the accepted March 13, 2017 injury. It also denied his claim for a recurrence of disability, effective April 26, 2017, because the medical evidence of record was insufficient to establish that his disability from work was causally related to the accepted injury.

On July 28, 2017 appellant requested a hearing before OWCP's Branch of Hearings and Review. He explained that the March 13, 2017 injury had not healed so he sought further medical treatment in May 2017. Appellant maintained that, if the employing establishment had allowed him to see a podiatrist when the original injury occurred, he would have received a proper diagnosis and treatment.

In a July 14, 2017 treatment note, Dr. Milam noted appellant's complaint of continued right foot discomfort. Right foot examination findings included pain on palpation of the second MPJ joint. Dr. Milam repeated his opinion that appellant had a traumatically-induced dislocated second toe on the right foot that was in a dorsally contracted position. He also noted a recurrent bunion deformity. Dr. Milam diagnosed closed dislocation of MPJ joint of the right foot, bursitis of the second right metatarsal, and right-sided metatarsalgia.

In correspondence dated August 4, 2017, Dr. Milam provided a summary of appellant's treatment following the March 13, 2017 employment injury. He indicated that this caused a dislocation type injury of the second toe that had worsened to the point of requiring surgical correction to realign the toe. Dr. Milam advised that the second toe and great toe had become somewhat impinged upon each other which necessitated bunion correction as part of the surgical procedure. He opined that the need for surgery was causally related to the March 13, 2017 injury,

[3] The record does not indicate when appellant returned to work.

advising that current x-rays showed that the dislocation was in a position that was not reducible without surgical correction.

In an August 21, 2017 letter, Dr. Gherardi reported first examining appellant on March 15, 2017 for a work injury that occurred two days prior. He indicated that appellant had developed some swelling, bruising, and pain in appellant's right foot, primarily in his second toe. Dr. Gherardi advised that an x-ray was reported as not showing any acute abnormality, and that he advised appellant that he could return to light-duty work. He indicated that he next saw appellant on March 20, 2017 when appellant reported that his symptoms had improved and asked to return to full duty. Dr. Gherardi indicated that appellant had returned on April 26, 2017 complaining of a painful and swollen second toe. He advised that x-ray at that time showed a subluxation of the toe, and he referred appellant to podiatry for further care and treatment.

In a September 19, 2017 addendum to his August 4, 2017 report, Dr. Milam explained that, in reviewing his previous report, he found that additional information was necessary to complete appellant's medical summary. He reported that the mechanism of injury described by appellant would place significant force through his forefoot, specifically the second MPJ joint causing tearing and subsequent dislocation of the digit. Dr. Milam noted that this type of injury was often not noted on initial x-ray because it was a soft tissue injury that resulted in dislocation. He indicated that a strong enough force applied to this area would cause bursitis and inflammation of the metatarsal head and structures, as well as stretching out and tearing of the same structures, which would result in destabilization. Dr. Milam opined that not only would the impact damage the joint, but it would also force the tendons to contract and stretch across ligaments in response to the impact and create further damage.

On October 19, 2017 appellant withdrew his request for an oral hearing and indicated that he would like a review of the written record.

By decision dated January 4, 2018, an OWCP hearing representative affirmed in part and reversed in part the July 5, 2017 OWCP decision. She noted appellant's assertion that, if the employing establishment had not "forced [appellant]" to go to urgent care rather than seeing a podiatrist, he would have received a more accurate diagnosis earlier. The hearing representative found that the medical evidence submitted was sufficient to support a causal relationship between the March 13, 2017 employment incident and appellant's right second toe condition. She, however, also affirmed the denial of his recurrence claim finding that the medical evidence was insufficient to establish that he was disabled from work commencing April 26, 2017 due to the March 13, 2017 employment injury.

On January 5, 2018 OWCP expanded appellant's claim to include closed dislocation of MPJ joint of the right foot and bursitis of the second right metatarsal.

On February 9, 2018 appellant requested reconsideration. He noted that he had wanted to see a podiatrist when the injury occurred in March 2017, but that the postmaster did not want him to wait until the next day and instructed him to go to an urgent care facility. Appellant reiterated that Dr. Gherardi had not noticed the dislocation of his second toe because Dr. Gherardi is not a podiatrist. He reported that he returned to see Dr. Gherardi in April 2017 because his foot had

deteriorated since his last visit, and Dr. Gherardi had no other option, but to hold appellant off work until he could see a specialist.

In a February 2, 2018 treatment note, Dr. Milam indicated that appellant's right foot surgery had been approved, and he was seeing appellant for a preoperative consultation. He described findings on examination and noted that appellant had continued to work with discomfort and with the help of supportive hiking boots or low-cut hiking shoes. Dr. Milam advised that appellant would likely be out of work for 11 to 12 weeks following surgery.

By decision dated March 14, 2018, OWCP denied reconsideration of the merits of appellant's claim. It noted that the medical report he submitted was immaterial or irrelevant because it did not address the issue of his claimed disability. OWCP concluded that appellant had not met the requirements of 5 U.S.C. § 8128(a) sufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[4] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[5] An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[6] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.[7]

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.[8]

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

[4] 20 C.F.R. § 10.5(f); *see J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[5] *See J.R.*, Docket No. 19-0120 (issued September 11, 2019).

[6] *A.P.*, Docket No. 19-0446 (issued July 10, 2019).

[7] *Id*.

[8] *Supra* note 4 at § 10.5(x).

injury, and supports that conclusion with medical reasoning.[9] Where no such rationale is present, the medical evidence is of diminished probative value.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing April 26, 2017 causally related to his accepted March 13, 2017 employment injury.

OWCP initially accepted a right foot contusion caused by the March 13, 2017 injury. On January 5, 2018 it expanded the claim to include dislocation of the MPJ joint of appellant's right second toe.

In support of his recurrence claim, appellant submitted an April 26, 2017 Form CA-17 report in which Dr. Gherardi diagnosed dislocation of appellant's second right toe. Dr. Gherardi advised that appellant was unable to work until he was examined by a podiatrist. On August 21, 2017 he additionally indicated that when he saw appellant on April 26, 2017 appellant was complaining of a painful and swollen second toe. Dr. Gherardi advised that an x-ray at that time showed a subluxation of the toe and that he had referred appellant to a podiatrist. He did not comment on disability from work at that time. While appellant had not seen a podiatrist until May 12, 2017, the Board finds that Dr. Gherardi did not provide a rationalized medical opinion explaining why appellant's employment injury prevented him from working for the claimed period. Rather, Dr. Gherardi's mere conclusory opinion, without the necessary rationale explaining how and why the employment injury caused disability from work, is insufficient to establish appellant's claim.[11]

Appellant first saw Dr. Milam on May 12, 2017. In his note, Dr. Milam provided examination findings, diagnosed a post-traumatic dislocated second toe with bursitis/synovitis, and advised that appellant could return to full duty on May 15, 2017. In later reports, he repeated his diagnoses and advised that appellant needed surgery to reduce the dislocation in his second toe. However, Dr. Milam did not address the period of claimed recurrence or indicate that appellant was totally disabled for any period.

As noted, a claimant must submit rationalized medical evidence supporting causal relationship between the disabling condition and the accepted employment injury. Furthermore, the medical evidence must directly address the dates of disability for work for which compensation is claimed.[12] None of the medical evidence of record provided a discussion of how appellant's accepted March 13, 2017 employment injury caused total disability from work during the period in question. As appellant has not submitted medical evidence establishing a recurrence of

[9] *See J.S.*, *supra* note 4.

[10] *Id*.

[11] *M.N.*, Docket No. 18-0741 (issued April 2, 2020).

[12] *See T.J.*, Docket No. 18-0831 (issued March 23, 2020); *William A. Archer*, 55 ECAB 674 (2004).

disability commencing April 26, 2017, causally related to his accepted employment injury, the Board finds that he has not met his burden of proof.[13]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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.[14]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.[15]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[16] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[17] 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.[18]

ANALYSIS -- ISSUE 2

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

Appellant alleged in his February 9, 2018 reconsideration request that he wanted to see a podiatrist immediately after his surgery, but was prevented by the postmaster. However, the merit issue in this case is whether he met his burden of proof to establish total disability commencing

[13] *Id.* The Board further notes that, in its May 31, 2017 development letter, OWCP informed appellant that he was still entitled to receive COP. A review of OWCP's Integrated Federal Employees' Compensation System (iFECS) indicates that appellant received COP for 45 days.

[14] 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[15] 20 C.F.R § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[16] 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 iFECS. *Id*. at Chapter 2.1602.4b.

[17] *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

[18] *Id.* at § 10.608(b); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020).

April 26, 2017. The Board notes that in the March 14, 2018 decision, OWCP's hearing representative noted appellant's assertion. The hearing representative found that the evidence of record was insufficient to establish that appellant was totally disabled for work commencing April 26, 2017 in spite of the assertion by him. The Board thus finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law and 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 20 C.F.R. § 10.606(b)(3).[19]

Appellant also submitted a February 2, 2018 treatment note from Dr. Milam. While this report is new, it is not relevant as Dr. Milam did not discuss the period of claimed disability nor did he provide an opinion regarding appellant's claimed recurrence of disability commencing April 26, 2017. Dr. Milam's February 2, 2018 medical report is, therefore, insufficient to require further merit review of appellant's claim. As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).[20]

The Board accordingly finds that appellant has not met 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.[21]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing April 26, 2017 causally related to his March 13, 2017 employment injury. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[19] *Id*. at § 10.606(b)(3); *see D.S.*, Docket No. 18-0353 (issued February 18, 2020).

[20] *Id*.

[21] *D.S., supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the March 14 and January 4, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 13, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board