

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

M.M., Appellant)	
)	
and)	Docket No. 20-0806
)	Issued: June 4, 2021
U.S. POSTAL SERVICE, WEST GARDEN)	
POST OFFICE, Garden Grove, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 29, 2020 appellant filed a timely appeal from a September 4, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision, dated July 24, 2018, to the filing of this appeal, pursuant

¹ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted because OWCP improperly denied her request for merit review. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board lacks jurisdiction over the merits of this claim. As such, the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. Consequently, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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).

FACTUAL HISTORY

On June 23, 2006 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained lacerations to her right thigh and elbow and a fractured left tibia and fibula when she was involved in a motor vehicle accident (MVA) while in the performance of duty. OWCP accepted the claim for an open wound of the right elbow and arm without complications and an open fracture of the left medial malleolus of the ankle. It subsequently expanded acceptance of the claim to include a fracture of the phalanges of the left foot and contact dermatitis of the right foot/ankle due to drugs and medicine. OWCP paid appellant wage-loss compensation for total disability from June 24, 2006 until April 4, 2007, when she returned to modified employment. It paid her wage-loss compensation for intermittent time lost from work for the period November 28, 2007 to June 16, 2012.

In a report dated August 27, 2009, Dr. John B. Dorsey, a Board-certified orthopedic surgeon, advised that he was treating appellant for "a crush injury involving the left foot and ankle with healed fractures and retained hardware." He noted that she had "developed a rash overlying the metallic plate, which was used to repair the fibular fracture." Dr. Dorsey indicated that he was awaiting clarification from a dermatologist regarding whether the rash was an allergic reaction to the metal. He further asserted that appellant had pain in her lower back due to an antalgic gait.

In a report dated July 9, 2013, Dr. Steven M. Ma, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant's injuries, due to her June 23, 2006 MVA, had healed with the exception of contact dermatitis of the right foot/ankle due to drugs and medication. He noted that on June 23, 2006 she had undergone an emergency left ankle surgery, which included the placement of a metal plate and nine screws in the left ankle. Appellant developed a rash on her left foot and subsequently developed a right foot rash. On examination Dr. Ma found a skin rash over the arch of the feet bilaterally. He found that appellant had residual problems and disability due to her employment injury from the left ankle fracture and bilateral rash on her feet. Dr. Ma recommended treatment with a dermatologist.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the September 4, 2019 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.*

On June 5, 2014 Dr. Jenny Soung, a Board-certified dermatologist, diagnosed Koebner phenomenon, noting that appellant's skin condition had appeared soon after a MVA.

In a report dated October 8, 2014, Dr. Dorsey advised that appellant was unable to work from December 30, 2013 to May 29, 2014 due to psoriasis of the left foot, which a dermatologist had found to be Koebner phenomenon. He related that she was unable to wear the required work shoes. Dr. Dorsey related, "[Appellant] has sustained crush injuries to her left foot, and the crush injury resulted in Koebner's phenomenon, which was, in essence, psoriasis on her left foot at the operative site."

In a state workers' compensation form report dated December 9, 2014, Dr. Dorsey diagnosed an open wound of the lower arm and topical dermatitis. He noted that appellant had a history of Koebner phenomenon. Dr. Dorsey advised that she could perform modified employment. In a duty status report (Form CA-17) dated December 10, 2014, he diagnosed a rash on both feet, back pain, a left ankle fracture, and a crush injury to the foot. Dr. Dorsey found that appellant should limit walking to one and half hours per day. He continued to submit Form CA-17s providing work limitations.

In a report dated April 30, 2015, Dr. Dorsey noted that appellant was off work from December 30, 2013 to May 29, 2014 because she was unable to wear work shoes due to her rash. He indicated that she was currently working in tennis shoes. In Form CA-17s dated April through November 2015, Dr. Dorsey primarily diagnosed dermatitis/psoriasis and found that appellant should limit walking to one and a half hours.⁴

On December 16, 2015 Dr. Dorsey advised that appellant had continued ankle pain due to her crush injury and subsequent chronic psoriasis, or Koebner phenomenon. He indicated that appellant could not wear her required work shoes as it exacerbated her rash.

On July 8, 2016 OWCP referred appellant to Dr. Vipal Soni, a Board-certified dermatologist, for a second opinion examination. It requested that Dr. Soni address whether she had sustained chronic psoriasis and Koebner phenomenon as a consequence of her accepted employment injury.

In a report dated October 17, 2016, Dr. Soni noted that appellant had a painful rash on her feet that had begun after her 2006 MVA. He diagnosed psoriasis or dyshidrotic dermatitis. On examination Dr. Soni found papulosquamous eruptions on the soles of the feet. He asserted that appellant's condition was inconsistent with Koebner phenomenon, which occurred in the exact location of prior trauma. Dr. Soni opined that it was possible that appellant had chronic psoriasis, but that the "stress of the MVA and/or dog bite at most would have been an aggravating or precipitating factor and not the underlying cause of the condition."⁵ He related that it was "difficult to state with certainty whether the aggravation is temporary or permanent in this particular case,"

⁴ Dr. Dorsey also submitted state workers' compensation forms describing appellant's current symptoms and referring to the Form CA-17s for her disability status.

⁵ OWCP accepted under OWCP File No. xxxxxx175 that appellant sustained an open wound of the right hip and thigh due to a dog bite on February 18, 2012.

but that he had not seen stress permanently aggravate psoriasis. Dr. Soni found that appellant had no skin-related residuals.

On August 8, 2017 appellant filed claims for compensation (Form CA-7) requesting intermittent wage-loss compensation from December 16, 2014 through June 1, 2017. In an attached time analysis form, the employing establishment listed dates and time missed from work and indicated that the reason was that it had no work available within her medical restrictions.

Appellant submitted Form CA-17s from Dr. Dorsey dated May 4, 2016 to May 17, 2017 diagnosing primarily a rash or psoriasis and finding that she should not walk over one and a half hours per day.

In a development letter dated September 6, 2017, OWCP advised appellant that it had not accepted her claim for psoriasis or Koebner phenomenon. It informed her of the evidence necessary to establish her claim for disability compensation, including medical evidence supporting that she had work restrictions for the claimed period as a result of her employment injury. OWCP afforded appellant 30 days to submit the necessary information.

By decision dated February 15, 2018, OWCP denied appellant's claim for wage-loss compensation, beginning December 16, 2014. It noted that it had not accepted psoriasis and Koebner phenomenon as employment related.

Thereafter, OWCP received a January 10, 2018 report from Dr. Dorsey. Dr. Dorsey asserted that appellant had continued left ankle pain due to her June 23, 2006 crush injury. He indicated that she had developed Koebner phenomenon, which was "a medical condition that expresses proliferative isomorphic response to otherwise healthy skin." Dr. Dorsey found that walking and standing in the course of her employment exacerbated her rash.

On April 27, 2018 appellant, through her representative, requested reconsideration. The representative noted that OWCP had accepted contact dermatitis, which she asserted had likely resulted in Koebner phenomenon. She related that appellant could not wear shoes or perform her letter carrier duties because of the rashes on her feet that had begun near the placement of the metal hardware. The representative noted that, in August 2009, Dr. Dorsey had found that the psoriasis was an allergic reaction to the metal.

By decision dated July 24, 2018, OWCP denied modification of its February 15, 2018 decision. It indicated that the evidence demonstrated that the stress of appellant's MVA would, at most, have aggravated or precipitated her chronic psoriasis rather than being an underlying cause.

On May 16, 2019 appellant, through her representative, requested reconsideration. She maintained that the employing establishment had refused to provide her with work based on nonexistent restrictions. Appellant submitted duty status reports (Form CA-7) from 2016 that limiting walking.

By decision dated May 30, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted that she also had an accepted condition for intervertebral disc degeneration of the lumbar spine under another file number.

On July 24, 2019 appellant, through her representative, again requested reconsideration. She noted that appellant had nine screws in her ankle due to her MVA and that she had developed a rash around the site of the incision and hardware around a year later. On November 24, 2008 the rash had been tentatively diagnosed as psoriasis due to Koebnerization of the wound. The representative asserted that Dr. Ma had found that the rash on her feet was causally related to her June 2006 MVA. She further noted that Dr. Soni had diagnosed psoriasis or dyshidrotic eczema and found that stress was a primary cause of the condition. The representative maintained that, while physicians differed on the exact diagnosis of the rash, OWCP had accepted that the rash had developed due to her employment injury. She noted that the Form CA-17s primarily limited walking and questioned why the employing establishment failed to provide appellant with work accommodations.

Appellant resubmitted medical evidence from 2019. She further resubmitted the July 9, 2013 report from Dr. Ma and the October 17, 2016 report by Dr. Soni.

By decision dated September 4, 2019, OWCP denied appellant's request for reconsideration.

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 own motion or on application.⁶

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 OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the

⁶ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

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

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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). Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

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

OWCP denied appellant's claim for intermittent wage-loss compensation from December 16, 2014 through June 1, 2017. It found that the evidence supported that she missed time from work during this period due to psoriasis or eczema that it had not accepted as employment related.

Appellant's July 24, 2019 timely request for reconsideration failed to show that OWCP had erroneously applied or interpreted a specific point of law; consequently, she is not entitled to a review of the merits based on the first requirement pursuant to 20 C.F.R. § 10.606(b)(3).

On reconsideration appellant's representative contended that the physicians had agreed that the rash on her feet was employment related even though they differed on the exact diagnosis. She asserted that Dr. Ma, an OWCP referral physician, had found in his July 9, 2013 report that appellant's bilateral foot rash was causally related to her employment injury. Appellant's representative further asserted that Dr. Soni, another OWCP referral physician, had diagnosed either psoriasis or dyshidrotic dermatitis. Dr. Soni found that stress from the MVA would at most have aggravated her chronic psoriasis and that it was unclear whether such aggravation was temporary or permanent. The representative asserted that, as this was the first mention of this particular diagnosis, it should have been developed as one of the main causes for the onset of the condition. The Board finds that this constitutes a new and relevant legal argument not previously considered, which directly addresses the relevant underlying issue of whether the claimed disability is employment related.¹¹

As appellant has advanced a new and relevant legal argument, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹² Following any further development as 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 her claim, pursuant to 5 U.S.C. § 8128(a).

¹⁰ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *See D.T. (L.S.)*, Docket No. 19-1060 (issued October 20, 2020).

¹² *M.L. (E.L.)*, Docket No. 20-0605 (issued January 27, 2021).

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 4, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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