

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 May 20, 2014 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 10, 2014 he sprained his right ankle when his right foot rolled while delivering mail in the performance of duty. OWCP accepted the claim for unspecified fracture of right calcaneus and permanent aggravation of degenerative joint disease of the right ankle and foot. Appellant stopped work on November 15, 2015 and resigned effective January 29, 2016.

On January 27, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that he had a recurrence of disability on November 2, 2015 causally related to his accepted May 10, 2014 employment injury.

A July 7, 2017 magnetic resonance imaging (MRI) scan of the right ankle revealed a normal medial ligament, lateral collateral ligaments, with intact bones, joints, peroneus longus tendon and brevis tendon.

By decision August 22, 2017, OWCP denied appellant's claim for a recurrence, finding that he had not established disability or a material change/worsening of the accepted employment-related conditions.

Dr. Carol A. Barrette, a Board-certified orthopedist, treated appellant on January 9, 2019 for chronic right ankle discomfort. She noted that an x-ray of the right foot revealed a large os trigonum, which may have been fractured in the past. Dr. Barrette diagnosed right peroneal tendinitis, os trigonum syndrome, and acquired valgus deformity of the right ankle. She recommended peroneal muscle strengthening exercises. Appellant was reevaluated on February 6, 2019 and reported his right ankle was getting worse and he was now limping. Dr. Barrette diagnosed os trigonum syndrome and pain in the joint of the right ankle. She indicated that appellant sustained a work-related injury in 2014. On March 1, 2019 Dr. Barrette requested authorization to perform a partial removal of the right ankle/heel.

On May 14, 2019 OWCP routed Dr. Barrette's February 6, 2019 report, a statement of accepted facts (SOAF), and the case file to Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for review and an opinion of whether the medical evidence supports that the proposed surgical procedure to partially remove the ankle/heel was medically necessary and causally related to appellant's accepted employment conditions. On May 21, 2019 Dr. Kuhn indicated that there was a temporal relationship between the employment injury of May 10, 2014 and the requested right ankle surgery as appellant had persistent symptoms since the industrial injury. The DMA advised that the proposed surgery was not medically necessary as recent clinical notes indicate slow improvement, there was no documentation of a dedicated rehabilitation course, and the MRI scan of the right ankle dated July 7, 2017 did not corroborate a fractured os trigonum.

On June 6, 2019 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF), a set of questions, and the medical record to Dr. Thomas P. Goss, a Board-certified orthopedic surgeon, to determine whether the proposed procedure to partially remove the ankle/heel (os trigonum) was medically necessary and causally related to appellant's accepted conditions.

In a report dated July 18, 2019, Dr. Goss noted that appellant sustained a relatively minor soft tissue injury to his right ankle on May 10, 2014, which would have healed reliably in four to six weeks. He opined that appellant reached maximal medical improvement in June 2014 and was capable of returning to his preinjury status with no restrictions and no lasting disability assigned to the May 10, 2014 employment injury. Dr. Goss found that the abnormality of appellant's right ankle predated the May 10, 2014 employment injury and was a normal congenital variant of os trigonum/stieda process, which was not work related.

On August 12, 2019 Dr. Barrette treated appellant for right ankle discomfort. She opined that at least some of appellant's discomfort was related to the os trigonum and believed it was reasonable to remove the os trigonum and again requested authorization for partial removal of the ankle/heel.

In an addendum report dated September 6, 2019, Dr. Goss reiterated that appellant's right ankle difficulties for which surgery was sought was unrelated to the employment injury on May 10, 2014.

In a letter dated October 2, 2019, OWCP advised appellant that a conflict in medical opinion evidence existed between Dr. Barrette, appellant's treating physician, and Dr. Goss, OWCP's second opinion examiner, as to whether the proposed surgery to remove the ankle/heel was warranted and necessitated by the May 10, 2014 employment injury.

OWCP referred appellant to Dr. Robert R. Pennell, a Board-certified orthopedist, to resolve the conflict in medical opinion between Dr. Barrette and Dr. Goss. In a report dated October 22, 2019, Dr. Pennell reviewed the file, the x-rays and MRI scan, and examined appellant's ankle. He opined that the work accident of May 10, 2014 was not capable of injuring his os trigonum. Dr. Pennell indicated that between May 10, 2014 and the present day appellant had no symptoms or physical findings consistent with a painful os trigonum and the diagnostic studies failed to demonstrate any abnormality of the os trigonum of his right ankle. He opined that the proposed surgery to remove the os trigonum from the back of appellant's right ankle was not reasonably necessary or causally related to the employment injury on May 10, 2014.

By decision dated November 25, 2019, OWCP denied appellant's request for authorization for partial removal of right ankle/heel (os trigonum) as the evidence of record did not support that it was "medically necessary to address the effects of [his] work-related injury."

On January 15, 2020 appellant requested reconsideration. In support of his request, appellant resubmitted reports from Dr. Pennell dated October 22, 2019 and the November 25, 2019 OWCP decision, previously of record.

By decision dated February 25, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

A timely request for reconsideration, including all supporting documents, must 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 When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

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).

In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, he is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).⁸

The underlying issue in this case is medical in nature; however, he did not submit any relevant and pertinent new medical evidence with his January 15, 2020 request for reconsideration.

Appellant resubmitted the reports from Dr. Pennell dated October 22, 2019 and an OWCP decision dated November 25, 2019 with his request for reconsideration. The Board finds that submission of this evidence does not require reopening appellant's case for merit review, as it had already been considered by OWCP and therefore does not constitute pertinent new and relevant evidence. As these reports repeat evidence already in the case record, they are cumulative in nature

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *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 (September 2020). 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.

⁶ *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

⁷ *Id.* at § 10.608.

⁸ *Id.* at § 10.606(b)(3); *B.R.*, Docket No. 19-0372 (issued February 20, 2020). *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

and do not constitute relevant and pertinent new evidence. Providing additional evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a claim.⁹ Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits. Because appellant has not provided relevant and pertinent new evidence, he was not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹⁰

The Board accordingly 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 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹¹

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).

⁹ *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁰ See 20 C.F.R. § 10.606(b)(3)(iii).

¹¹ *A.F.*, Docket No. 18-1154 (issued January 17, 2019); see *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2022
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board