

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

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| M.T., Appellant |) | |) |
| |) | |) |
| and |) | Docket No. 23-0281 |) |
| |) | Issued: April 17, 2023 |) |
| U.S. POSTAL SERVICE, POST OFFICE, Ridgewood, NJ, Employer |) | |) |
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 12, 2022 appellant filed a timely appeal from a September 27, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated May 18, 2022 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 27, 2022 decision, OWCP received additional evidence. 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.*

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 February 11, 2022 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2022 he injured the side of his left foot when he rolled and twisted it while delivering mail in the performance of duty. He stopped work on February 3, 2022.

On February 2, 2022 the employing establishment executed an authorization for examination and/or treatment (Form CA-16) authorizing appellant to seek medical care related to his left foot.

In a February 3, 2022 work status note, Dr. Michele Howe, a Board-certified osteopathic family physician, noted a February 2, 2022 date of injury and diagnosed left foot pain and contusion of left foot/fifth metatarsophalangeal (MTP) joint. She released appellant to work with restrictions including no ladders, unprotected heights, shoveling, raking, or sweeping and she provided that he should be permitted to alternate between sitting and standing as needed.

In a work status note dated February 5, 2022, Dr. Raymond Visconti, a family physician specializing in internal medicine, noted a February 2, 2022 date of injury and diagnosed a left foot sprain and contusion. He indicated that appellant was unable to return to work in any capacity.

In a statement dated February 8, 2022, appellant related that on February 2, 2022 he rolled and twisted his left foot while delivering mail and experienced immediate swelling and pain. He noted that he sought treatment the following day.

In a letter also dated February 8, 2022, the employing establishment controverted the claim.

In a February 10, 2022 work status note, Dr. Visconti diagnosed left foot sprain and contusion and referred appellant to an orthopedic. He continued to hold appellant off work in any capacity.

In a development letter dated March 1, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a report dated March 1, 2022, Dr. Erik Zachwieja, a Board-certified orthopedic surgeon, related appellant's complaints of left foot pain, which he attributed to an inversion injury while working on February 2, 2022. He noted that appellant had been unable to work since February 2, 2022 due to difficulty with ambulation. Dr. Zachwieja obtained x-rays of the left foot, which were normal, and performed a physical examination, which revealed a significantly antalgic gait and swelling and tenderness at the base of the left fifth metatarsal. He diagnosed a left foot contusion causally related to the February 2, 2022 employment injury. Dr. Zachwieja provided appellant

with a hard-soled shoe for all weight-bearing for the next two weeks and recommended that he use ice, elevation, and over-the-counter medication for pain relief. He further recommended that appellant undergo a magnetic resonance imaging (MRI) scan of the left foot and released him to sedentary-duty work, sitting for 45 minutes and standing for 15 minutes. Dr. Zachwieja noted that, if work was not available within those restrictions, appellant should remain off work.

A March 9, 2022 MRI scan of the left foot demonstrated mild soft tissue edema about the left foot and mild arthritic changes at the first MTP joint.

In a follow-up duty status report (Form CA-17) dated March 29, 2022, Dr. Zachwieja continued to recommend sedentary-duty work restrictions and referred appellant for physical therapy.

In an attending physician's report (Form CA-20) dated April 5, 2022, Dr. Zachwieja diagnosed a left foot contusion and continued to recommend sedentary-duty work restrictions.

On April 7, 2022 OWCP accepted appellant's claim for contusion of the left foot.

Beginning April 11, 2022, appellant filed claims for compensation (Form CA-7) for leave without pay for total disability commencing March 20, 2022 and continuing.

In an April 13, 2022 development letter, OWCP advised appellant that it had not received sufficient evidence to support his claim for wage-loss compensation. It informed him of the type of evidence needed to establish his wage-loss compensation claim and afforded him 30 days to submit the necessary evidence.

OWCP thereafter received a February 3, 2022 medical report by Dr. Howe, who documented physical examination findings of tenderness and erythema over the lateral left foot at the base of the fifth MTP joint. Dr. Howe diagnosed contusion and pain in the left foot. Dr. Visconti, in medical reports dated February 5 and 10, 2022, outlined similar examination findings.

In medical reports dated March 29 and April 15, 2022, Dr. Zachwieja reviewed appellant's March 9, 2022 MRI scan results and noted improving physical examination findings.

OWCP also received reports dated April 4 through 18, 2022 from Dr. Min Dao Nguyen, a chiropractor, who diagnosed pain and contusion to the left foot and provided therapeutic treatments.

In a note dated May 4, 2022 and Form CA-20 dated May 5, 2022, Dr. Zachwieja maintained appellant's sedentary duty restrictions, but advised that he could return to full-duty work, without restrictions effective May 9, 2022.

By decision dated May 18, 2022, OWCP denied appellant's claim for compensation, finding that he had not submitted sufficient medical evidence to establish disability from work, commencing March 20, 2022, causally related to his accepted employment injury.

OWCP continued to receive evidence, including chiropractic therapy notes from Dr. Nguyen dated April 20 through 29, 2022.

In a June 2, 2022 report, Dr. Zachwieja noted that appellant was working full duty and reported no significant pain. On physical examination, he documented mild tenderness at the base of the fifth MTP joint, but no swelling. Dr. Zachwieja further noted that appellant could fully weight bear and no longer walked with an antalgic gait. He opined that he was capable of full-duty work and discharged him from care.

A September 12, 2022 report of work status (Form CA-3) indicated that appellant returned to full-time regular-duty work on May 10, 2022.

On September 19, 2022 appellant filed a request for reconsideration of the May 18, 2022 decision. In support of his request, he submitted a statement which asserted that the employing establishment did not provide him with sedentary work. Appellant further noted that he returned to work full duty once cleared by his physician.

By decision dated September 27, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the

³ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.; B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁵ *Id.* at § 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 (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). *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 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.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).

Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Accordingly, appellant 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).⁸

In support of his request for reconsideration, appellant also did not submit any pertinent new and relevant medical evidence. The underlying issue in this case is whether he established disability from work for the period March 20 through May 9, 2022 causally related to the accepted February 2, 2022 employment injury. This issue is medical in nature, and, therefore, can only be addressed by submission of rationalized medical evidence from a qualified physician.⁹ In support of his request for reconsideration, appellant submitted a June 2, 2022 report from Dr. Zachwieja. While this evidence is new, it did not address the time period at issue in appellant's claim for compensation and, therefore, is not relevant.¹⁰ Appellant also submitted various chiropractic notes for therapeutic treatment for a left foot contusion. The Board has held, however, that, without a diagnosis of a subluxation by x-ray, a chiropractor is not considered a physician under FECA and his opinion on causal relationship does not constitute competent medical evidence.¹¹ Therefore, appellant is not entitled to further review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

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.

⁷ *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

⁸ *See C.C.*, Docket No. 19-1622 (issued May 28, 2020); *M.S.*, Docket No. 18-1041 (issued October 25, 2018).

⁹ *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

¹⁰ *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

¹¹ *L.C.*, Docket No. 18-1707 (issued April 3, 2019).

¹² *Id.*

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim.¹³

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹³ The Board notes that the employing establishment executed a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).