

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

_____)	
D.P., Appellant)	
)	
and)	Docket No. 22-0840
)	Issued: March 7, 2023
U.S. POSTAL SERVICE, WARREN POST OFFICE, Warren, MI, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 9, 2022 appellant, through counsel, filed a timely appeal from an April 26, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to consider the merits of this case.⁴

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The case record also contains a December 8, 2021 merit decision of OWCP. As counsel did not appeal from that decision, it is not presently before the Board. *See* 20 C.F.R. § 501.3.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the April 26, 2022 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.*

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 August 2, 2016 appellant, then a 30-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date he sprained his right ankle ligament when his right foot got caught in an unpaved/cracked sidewalk while in the performance of duty. He stopped work on August 2, 2016. OWCP accepted the claim for right ankle ligament sprain, and subsequently expanded acceptance of the claim to include other pulmonary embolism without acute cor pulmonale. It authorized right ankle ligament repair, which was performed on February 10, 2017. On December 12, 2018 appellant underwent an OWCP-authorized right peroneal retinaculum reconstruction. OWCP paid him for intermittent periods of disability on the supplemental rolls from September 17, 2016 to April 29, 2017, on the periodic rolls from April 30 to July 22, 2017, on the supplemental rolls from December 12, 2018 to March 2, 2019, and on the periodic rolls again from March 3, 2019 to February 21, 2021.

On October 22, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Jiab H. Suleiman, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of his accepted conditions, the extent of any disability and appropriate treatment. In a November 12, 2019 report, Dr. Suleiman provided physical examination findings and noted appellant's accepted conditions of right ankle ligament sprain, which had resolved, and pulmonary emboli with acute cor pulmonale. He related that appellant had slight stiffness in his ankle joint and neurapraxia of the superficial peroneal nerve. Dr. Suleiman opined that the requested additional peroneal surgery was unnecessary. He found that appellant was capable of working eight hours per day with permanent restrictions of four hours standing and sitting, and lifting up to 35 pounds.

In a January 20, 2020 report, Dr. Allan M. Grant, Board-certified in orthopedic surgery, reviewed Dr. Suleiman's report and provided examination findings. He explained that he disagreed with Dr. Suleiman regarding the recommended surgery. Dr. Grant related that his recommendation for possible excision of the peroneal nerves was based on appellant's continued significant peroneal tendon problems due to the original injury. He also opined that appellant was disabled for any position which required standing or walking.

On July 30, 2020 OWCP referred appellant, a SOAF, and a series of questions to Dr. Jeffrey Lawley, an osteopathic Board-certified orthopedic surgeon, serving as the impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence between Dr. Grant and Dr. Suleiman regarding appellant's work capacity and whether additional surgery was necessary.

In a report dated September 30, 2020, Dr. Lawley provided an extensive history of appellant's injury and medical treatment. He related that on physical examination of appellant's right foot and ankle there was absence of swelling, bruising, or discoloration that would be indicative of an active inflammatory condition. The circumstance of appellant's right midfoot and ankle measured equal to his left foot and ankle. Appellant had no evidence of motor weakness or atrophy and demonstrated full active range of motion of the ankle and subtalar joint, with no clinical instability. Dr. Lawley opined that appellant was not manifesting any orthopedic

impairment or pathology which may have been caused or aggravated by appellant's work injury on August 2, 2016. He also indicated that he could not explain appellant's current pain complaints. As appellant had a normal clinical examination, he did not require further treatment and could return to full duty.

On January 20, 2021 OWCP advised appellant of its notice of proposed termination of his wage-loss compensation and medical benefits as he no longer had disability or residuals due to his accepted August 2, 2016 employment injury.

OWCP continued to receive medical reports from Dr. Grant dated November 16, 2020, January 18 and February 8, 2021. Dr. Grant continued to opine that appellant had chronic peroneal tendon issues and should be limited to sedentary work. He also continued to recommend peroneal tendon revision surgery, which he noted was not a typical procedure and was used on rare occasions.

By decision dated February 22, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Lawley, the IME represented the special weight of the evidence and established that appellant no longer had disability or residuals due to his accepted employment injury.

On March 2, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 27, 2021.

Subsequent to the hearing, OWCP received another report from Dr. Grant, dated June 7, 2021, wherein he repeated his opinion that appellant should undergo further right ankle tendon surgery.

By decision dated August 9, 2021, an OWCP hearing representative affirmed the February 22, 2021 termination decision based on Dr. Lawley's report as the special weight of the medical evidence.

Subsequent to the August 9, 2021 decision, OWCP received an additional report from Dr. Grant dated August 4, 2021, and an August 23, 2021 medical information and restriction assessment. In these reports Dr. Grant noted appellant's diagnoses as peroneal tendon rupture, and right ankle nerve entrapment. He also reiterated appellant's work restrictions.

On September 10, 2021 appellant requested reconsideration.

By decision dated December 8, 2021, OWCP denied modification of the August 9, 2021 decision.

On January 26, 2022 appellant, through counsel, requested reconsideration. In support of his request he submitted January 13, 2022 reports from Dr. Grant.

In a January 13, 2022 medical information and restriction assessment form, Dr. Grant indicated diagnoses of unspecified ankle and foot joint pain. He checked "yes" to the question of whether appellant had a physical or mental impairment. Dr. Grant reported that appellant was medically limited to weightbearing as tolerated. He noted that appellant was placed in an off-work status from February 8, 2021 to April 1, 2022 due to pain, and he also noted previously on November 16, 2020 appellant had been given permanent work restrictions of sedentary work only with no walking, standing, or driving.

In an attending physician's report (Form CA-20) dated January 13, 2022, Dr. Grant noted that appellant sustained a right ankle twisting injury in 2016, which was followed by a second injury. He noted August 2, 2016 as the date of injury. Dr. Grant diagnosed unspecified ankle and foot joint pain and checked "no" to the question of whether the diagnosed conditions were caused or aggravated by the employment incident. He noted that effective February 8, 2021 appellant was placed in an off-work status until April 1, 2022 due to pain and that as of November 16, 2020 he had permanent work restrictions.

OWCP, by decision dated April 26, 2022, 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 does not entitle a claimant the review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷

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.⁸ 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.⁹

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 did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *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). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

⁹ *Id.* at § 10.608.

Accordingly, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁰

In support of his reconsideration request, appellant submitted a Form CA-20 and medical information and restriction assessment form from Dr. Grant, dated January 13, 2022. In these reports Dr. Grant noted appellant's continued right ankle pain and his work restrictions. As these reports repeated evidence already in the case record, they are cumulative in nature 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.¹¹ Therefore, appellant is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

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.

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).

¹⁰ *Id.* at § 10.606(b)(3); *see also T.D.*, Docket No. 21-1264 (issued April 4, 2022); *C.C.*, Docket No. 19-1622 (issued May 28, 2020); *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹¹ *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, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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