

United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Flushing, NY, Employer**

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**Docket No. 09-324
Issued: August 14, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 4, 2008 nonmerit decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. Because more than one year has elapsed between the Office's last merit decision on August 17, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

The Office accepted appellant's July 31, 1990 traumatic injury claim for a tear of the Achilles tendon in the left foot. Appellant returned to full-time restricted duty on January 11, 1993. On August 16, 2002 appellant submitted a claim for a schedule award.

On June 22, 2006 appellant submitted a notice of recurrence and a claim for a right ankle condition, which he alleged developed as a consequence of his left ankle condition. In reports dated July 1 and September 20, 2004, Dr. Raymond Shebairo, a Board-certified orthopedic surgeon, opined that appellant continued to have residuals related to his accepted left Achilles tendon tear; that he had developed a right Achilles tendon tear due to favoring the left ankle; and that he had a 25 percent permanent impairment of the left lower extremity (LLE). On February 9, 2006 the district medical adviser opined that appellant had a seven percent impairment of the LLE.

The Office found a conflict in medical opinion between Dr. Shebairo and the district medical adviser as to the degree of permanent impairment to appellant's LLE. The Office referred appellant to Dr. Noah S. Finkel, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated September 28, 2006, Dr. Finkel opined that appellant had no permanent disability as a result of his accepted injury, stating that the partial tear of the left Achilles tendon had completely resolved. He found evidence of some tenosynovial thickening and focal pain in the right ankle, but he opined that there was no correlation between appellant's right ankle condition and the accepted left ankle condition.

The Office found a conflict in medical opinion between Dr. Finkel and Dr. Shebairo as to whether appellant had continuing residuals or disability resulting from his accepted left Achilles tendon tear, and whether he had a consequential injury to his right lower extremity (RLE). In order to resolve the conflict, the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. William Healy, a Board-certified orthopedic surgeon, for an impartial medical examination. In a June 13, 2007 report, Dr. Healy provided a history of injury and treatment and detailed findings on examination. He stated that appellant's accepted injury caused a temporary aggravation of tendon degeneration in his left ankle, with partial tearing, and opined that the condition had fully and successfully resolved. Dr. Healy found no significant physical findings upon examination of the left ankle. He diagnosed right Achilles tendinosis, which he explained was an intrinsic, degenerative process, and not "traumatically related." Noting that maximum medical improvement of the left ankle would have occurred long ago, and that complaints related to the right ankle developed more than six years after the accepted injury, Dr. Healy opined that the right ankle condition had no relationship to the accepted condition. He also opined that appellant had no permanent impairment of the LLE.

On July 17, 2007 the Office issued a notice of proposed termination of medical and compensation benefits, based on Dr. Healy's June 13, 2007 report. Appellant was given 30 days to submit additional evidence and argument if he objected to the proposed action. No additional evidence or argument was received by the Office within the allotted period. On August 17, 2007 the Office finalized its termination of medical and compensation benefits, on the grounds that the medical evidence established that appellant no longer had residuals, disability or consequential medical condition resulting from his accepted injury.

On June 9, 2008 appellant requested reconsideration of the Office's August 17, 2007 decision. He contended that the decision to terminate was unacceptable; that his condition deteriorated over time; and that the only difference of opinion between his treating physician and the Office's doctor concerned the degree of permanent partial impairment.

By decision dated September 4, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant merit review. The Office found that appellant had not raised a substantive legal question and had not submitted new and relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁵ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁶

ANALYSIS

Appellant's June 9, 2008 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Nor did he advance a relevant legal argument not previously considered by the Office. Rather, appellant merely contended that his termination was "unacceptable," and reargued his claim that he continued to experience residuals, as well as new conditions, related to his accepted injury.⁷ Consequently, he

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁷ Appellant also argued that the difference of opinion between his treating physician and the Office physician centered around the schedule award issue. However, appellant's observation is inaccurate. Dr. Finkel was selected by the Office to resolve the conflict in medical opinion between appellant's physician, Dr. Shebairo, and the district medical adviser as to the degree of PPI to appellant's LLE. However, the issue resolved by Dr. Healy was the conflict between Dr. Shebairo, who opined that appellant continued to have residuals related to his accepted left Achilles tendon tear and had developed a right Achilles tendon tear due to favoring the left ankle, and Dr. Finkel, who opined the accepted condition had completely resolved, that there was no correlation between appellant's right ankle condition and the accepted left ankle condition.

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)(2).

Further, appellant submitted no additional evidence in support of his reconsideration request. Therefore, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2). Because appellant failed to meet at least one of the standards under the applicable procedures, the Office properly denied the application for reconsideration without reopening the case for a review on the merits.⁸

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁸ 20 C.F.R. § 10.608. On appeal appellant contended that the Office incorrectly identified his accepted condition as a left ankle sprain, rather than a torn left Achilles tendon. The only issue before the Board is whether the Office properly denied appellant's June 9, 2008 request for merit review. Appellant's argument, made for the first time on appeal, goes to the merits of the case. As previously noted, because more than one year has elapsed between the Office's last merit decision on August 17, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim. *See supra* note 1.