

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

B.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Alexandria, VA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-1824
Issued: December 29, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 4, 2015 appellant filed a timely appeal from a March 26, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed between November 7, 2013, the date of the most recent merit decision, and 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 appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision and order issued November 7, 2013,² the Board affirmed an April 26, 2013 OWCP decision finding that appellant did not meet his burden of proof to establish total disability for work from July 27, 2009 to August 12, 2011 due to accepted bilateral foot conditions or due to a withdrawal of light-duty work. The facts of the case as set forth in the Board's prior decision and order are incorporated herein by reference.

OWCP accepted that on or before September 29, 2005 appellant, then a 42-year-old letter carrier, sustained bilateral plantar fasciitis, bilateral plantar fibromatosis, and bilateral calcaneal spurs. He returned to work on April 15, 2008 in a modified-duty position, delivering mail for four hours a day. Appellant received wage-loss compensation for intermittent work absences prior to July 24, 2009, when he stopped work and did not return.³ OWCP then accepted an aggravation of bilateral plantar fasciitis.

Appellant claimed compensation for total disability from July 27, 2009 to April 9, 2010. In support of his claim, he submitted reports from Dr. Vincent Desiderio, an attending Board-certified orthopedic surgeon. Dr. Desiderio opined on September 30, 2009 that carrying a heavy pack and walking on uneven surfaces aggravated appellant's bilateral foot conditions. He held appellant off work through April 15, 2010. On May 24, 2010 OWCP obtained a second opinion from Dr. Robert Smith, a Board-certified orthopedic surgeon, who opined that appellant was not totally disabled for any period and could perform full-duty work.

Based on Dr. Smith's opinion, OWCP issued a June 8, 2010 merit decision denying appellant's claim for wage-loss compensation for the period July 27, 2009 to April 9, 2010. Appellant requested a hearing before an OWCP hearing representative. Following the hearing, OWCP set aside the June 8, 2010 decision on November 18, 2010, finding a conflict between appellant's physicians and Dr. Smith. On remand of the case OWCP selected Dr. David C. Johnson, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Johnson submitted a March 28, 2011 report opining that appellant sustained a temporary aggravation of plantar fasciitis in 2009 that "probably ceased after the first month."⁴ In a January 31, 2012 supplemental report, Dr. Johnson opined that the 2005 and 2009 temporary aggravations resolved in one month. He noted that any work restrictions were due only to appellant's subjective complaints.

² Docket No. 13-1257 (issued November 7, 2013).

³ Appellant separated from the employing establishment effective February 25, 2011.

⁴ Based on Dr. Johnson's opinion, OWCP issued a June 16, 2011 decision denying appellant's claim for wage-loss compensation on and after July 27, 2009. By decision dated August 3, 2011, an OWCP hearing representative set aside OWCP's June 16, 2011 decision and remanded the case for further development. By decision dated August 19, 2011, OWCP found that appellant had established disability for work from July 27 to August 27, 2009, based on Dr. Johnson's opinion that the accepted July 27, 2009 aggravation of bilateral plantar fasciitis ceased one month later. In a January 9, 2012 decision, an OWCP hearing representative set aside the August 19, 2011 decision as Dr. Johnson's opinion required clarification.

By decision dated March 9, 2012, OWCP denied appellant's claim for wage loss commencing July 27, 2009, finding that Dr. Johnson's opinion established that appellant was not totally disabled for work due to the accepted foot conditions. Following a review of the written record, it issued a May 25, 2012 decision affirming the March 9, 2012 decision, based on Dr. Johnson's opinion as the weight of the medical evidence. Following a doubling of appellant's foot condition claims,⁵ OWCP issued an April 26, 2013 decision affirming its May 25, 2012 decision. Appellant then appealed to the Board, resulting in the aforementioned November 7, 2013 decision and order affirming OWCP's April 26, 2013 decision.

On December 6, 2013 appellant filed a petition for reconsideration of the Board's November 7, 2013 decision and order. By order issued March 21, 2014,⁶ the Board denied appellant's petition for reconsideration, finding that he did not assert or establish any error of fact or law warranting further consideration.

In an October 29, 2014 letter, received by OWCP on November 18, 2014, appellant requested reconsideration of the Board's November 7, 2013 decision and order and the March 21, 2014 order. He contended that the employing establishment and OWCP's July 24, 2009 decision withdrew the light-duty position given to him in 2008. Appellant provided a fragment of an August 26, 2010 employing establishment form noting appellant's unsatisfactory conduct beginning in November 2007. A supervisor asserted that appellant did not deliver his complete route, bringing back mail and causing unauthorized overtime. He noted that appellant was "offered modified assignment over and above his date back to full duty."

By nonmerit decision dated March 26, 2015, OWCP denied reconsideration under 20 C.F.R. § 10.606,⁷ finding that the evidence and argument presented were repetitive of documents previously of record. It characterized appellant's reconsideration request as timely filed.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁹ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three

⁵ Appellant appealed the March 9, 2012 decision to the Board. By order issued December 21, 2012 under Docket No. 12-1476, the Board remanded the case to OWCP to double File No. xxxxxx781, accepted for bilateral plantar fasciitis, with File No. xxxxxx366, to be followed by issuance of an appropriate merit decision. OWCP also accepted a claim for bilateral plantar fibromatosis under File No. xxxxxx936.

⁶ Docket No. 13-1257.

⁷ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(3).

requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹¹ Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.¹² When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹³

ANALYSIS

OWCP accepted that appellant sustained bilateral foot conditions on or before September 29, 2005. He worked in a modified-duty position through July 24, 2009, when he again stopped work and did not return. Appellant claimed wage-loss compensation from July 27, 2009 to August 12, 2011, asserting that the accepted conditions totally disabled him for work. OWCP denied appellant's wage-loss claim on March 9, 2012, based on the opinion of Dr. Johnson, a Board-certified orthopedic surgeon, who found that appellant was not disabled for work for the claimed period. OWCP affirmed the March 9, 2012 decision on May 25, 2012 and April 26, 2013.

In the prior appeal, the Board issued a November 7, 2013 decision and order affirming OWCP's April 26, 2013 decision, finding that appellant did not establish disability for work for the claimed period due either to a worsening of the accepted conditions or a withdrawal of light-duty work. Appellant filed a petition for reconsideration, which the Board denied by order issued March 21, 2014.

Appellant requested reconsideration by October 29, 2014 letter, received by OWCP on November 18, 2014. He asserted that he stopped work in July 2009 because the employing establishment withdrew his light-duty position. OWCP denied reconsideration by March 26, 2015 decision, finding that appellant's request did not contain new, relevant evidence, or argument.

The Board finds that OWCP appropriately denied reconsideration as appellant's argument and evidence were duplicative of documents previously submitted. Evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹⁴ Therefore, these documents are insufficient to warrant consideration on the merits.

¹⁰ *Id.* at § 10.608(b). See also *D.E.*, 59 ECAB 438 (2008).

¹¹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹² See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

¹³ *Annette Louise*, 54 ECAB 783 (2003).

¹⁴ *Denis M. Dupor*, 51 ECAB 482 (2000).

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal appellant contends that OWCP denied reconsideration because his request was untimely filed. He also contends that OWCP received his request on November 6, 2014. However, the Board notes that OWCP exercised its discretion to adjudicate appellant's reconsideration request as timely. Appellant also asserts that the employing establishment failed to provide or withdraw light-duty work. This argument pertains to the merits of the claim, which are not before the Board on the present appeal. Appellant also submitted new evidence. He contends that additional medical evidence accompanying his appeal request is sufficient to meet his burden of proof. The Board notes that it may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case.¹⁵ Therefore, the Board cannot review the evidence accompanying appellant's appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review pursuant to 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2015 is affirmed.

Issued: December 29, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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