United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 18-0716**
	)	**Issued: December 10, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Crown Point, IN, Employer	)	

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 February 16, 2018 appellant filed a timely appeal from a September 25, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 2, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (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 25, 2017 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 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 her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 9, 2013 appellant, then a 50-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a left ankle/foot condition while in the performance of duty on or about October 15, 2013. She attributed her left tarsal tunnel syndrome and capsulitis to driving her privately-owned vehicle (POV) 4 - 5½ hours a day while delivering mail along her rural route. Appellant noted that she first became aware of her claimed condition on October 15, 2015 and first realized its relation to her federal employment on November 5, 2013. She stopped work on November 21, 2013.

After initially denying the claim on February 4, 2014, by decision dated July 2, 2014, OWCP accepted appellant's claim for left enthesopathy of the ankle and tarsus and left tarsal tunnel syndrome.[3]

On September 4, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period November 22, 2013 to August 22, 2014. OWCP paid wage-loss compensation for total disability from November 30, 2013 to January 28, 2014 and for partial disability from January 29 to April 21, 2014. Appellant continued to file claims for wage-loss compensation for continuing disability.

Appellant continued to receive medical treatment from Dr. Dennis Smith, a podiatrist. In disability notes dated August 26 to October 27, 2014, he indicated that appellant was unable to return to work.

By development letter dated September 30, 2014, OWCP advised appellant that it received her claims for wage-loss compensation and informed her that additional evidence was needed in support of her claims. It provided her a questionnaire for completion and requested medical evidence in support of her claim. OWCP afforded appellant 30 days to submit the requested information.

OWCP received reports by Dr. Smith dated November 22, 2013 to October 27, 2014 regarding treatment for increased pain in her left heel. Dr. Smith provided examination findings and diagnoses of capsulitis, tarsal tunnel syndrome, pain in limb, and unspecified fasciitis. In duty status reports (Form CA-17) dated May 5 to December 8, 2014 and disability notes dated October 27, 2014 to January 5, 2015, he indicated that appellant was unable to return to work.

Appellant was also treated by Dr. Louis Teodori, an osteopath and Board-certified neurologist. In reports dated November 11, 2014 to January 12, 2015, Dr. Teodori related

[3] The accepted employment factors included repetitive walking and standing on concrete floors for five to seven hours per day and "repetitive driving of [appellant's] personal vehicle … with [her] left foot in an awkward position…."

appellant's complaints of left foot and heel pain, swelling, and painful range of motion. He provided examination findings and diagnosed foot pain. In a December 4, 2014 note, Dr. Teodori opined that appellant could not return to work until her appointment on January 12, 2015. In a December 9, 2014 electromyography and nerve conduction velocity (EMG/NCV) study, he reported an unremarkable study.

In a December 12, 2014 addendum report, Dr. Smith related that appellant's pain in her left heel and foot was present prior to her nonwork-related surgery on April 22, 2014. He indicated that she did not reinjure the area while in her postoperative period and that she was released from her physician on June 21, 2014.

On January 24, 2015 appellant returned to work part time.

In January 5 to April 6, 2015 reports, Dr. Smith indicated that he continued to treat appellant for pain in her left ankle and heel. He provided examination findings of pain on direct palpation of the insertion of the medial band of the plantar fascia of the left heel. Dr. Smith diagnosed capsulitis, tarsal tunnel syndrome, pain in limb, and fasciitis. He recommended that appellant continue working modified duty and provided duty status reports (CA-17 forms) with specified restrictions.

Dr. Smith further elaborated in a January 14, 2015 report that appellant continued to have left enthesopathy, left tarsal tunnel syndrome, and plantar fasciitis. He opined: "This may have been caused by her altered gait due to pain and compensating for that pain created by her left enthesopathy and tarsal tunnel syndrome."

OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Alan Brecher, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she continued to have residuals and remained disabled due to her accepted left foot conditions and whether appellant's diagnosed plantar fasciitis was causally related to her employment.

In a March 17, 2015 report, Dr. Brecher reviewed appellant's history, including the SOAF, and discussed appellant's medical records. Upon physical examination of appellant's left foot, he observed some tenderness along the anterior fibular ligament and minimal tenderness with palpation in the medial cord of the plantar fascia. Dr. Brecher reported that according to an EMG appellant no longer had tarsal tunnel syndrome. He indicated that appellant had minimal signs of plantar fasciitis and still had some enthesopathy on the lateral ankle. Dr. Brecher opined that appellant was capable of returning to her job if she used a postal service vehicle that allowed her to sit on the right side. He also reported that he was unable to say with certainty whether appellant's plantar fasciitis related to her employment.

In an April 15, 2015 report, Dr. Smith related that he reviewed Dr. Brecher's March 17, 2015 second opinion report and the SOAF. He reported that it was his understanding that Dr. Brecher was in agreement with his findings so he was in agreement with Dr. Brecher's findings.

By decision dated April 29, 2015, OWCP denied appellant's claims for wage-loss compensation beginning April 22, 2014 and continuing. It found that the medical evidence

submitted was insufficient to establish that appellant was unable to work or required work restrictions due to her accepted left foot conditions. OWCP noted that both Dr. Smith, appellant's treating physician, and Dr. Brecher agreed that tarsal tunnel syndrome was no longer present.

In a May 26, 2015 duty status report (Form CA-17), Dr. Smith indicated that appellant could return to full-time work on May 30, 2015, but with no overtime. He continued to provide CA-17 forms dated July 6, 2015 indicating that appellant could work full time with no overtime.

On August 17, 2015 appellant requested reconsideration.

In a letter dated May 28, 2015, Dr. Smith indicated that regarding appellant's disability, it was his understanding that due to the limiting restrictions appellant was unable to return to work because the employing establishment could not meet those restrictions. He related that appellant's pain continued and she was unable to work. Dr. Smith reported that he continued to treat appellant for sinus tarsi syndrome, which never resolved. He noted that appellant had since been released to work on May 30, 2015 with minimal restrictions.[4] Dr. Smith further clarified that in previous disability forms he had stated "no to activities" but then listed hours per day in error. He requested that OWCP disregard those hourly notations.

Dr. Smith continued to treat appellant for her left foot condition in reports dated May 26 to October 19, 2015. He also completed duty status reports (CA-17 forms), which indicated that appellant could return to work full time with no overtime.

In an October 5, 2015 letter, Dr. Smith related that he had treated appellant for a painful entrapped nerve at the sinus tarsi area of the left foot. He discussed the options of surgical intervention and injections to treat her symptoms.

By letter dated October 19, 2015, Dr. Smith further indicated that appellant was diagnosed with sinus tarsi syndrome, capsulitis, and left foot pain. He recommended nerve sclerosing injections in order to reduce the pain and increase her hours at work pain free.

By decision dated November 12, 2015, OWCP denied modification of its April 29, 2015 decision.

OWCP subsequently received medical reports and letters from Dr. Smith dated October 20 and December 12, 2014, and January 14, May 28, August 31, September 28, and October 5, 2015 that were previously of record.

On February 8, 2016 appellant accepted a limited-duty job offer from the employing establishment as a full-time modified rural carrier.

In a February 22, 2016 report and duty status report (Form CA-17), Dr. Smith related that appellant had 100 percent relief of left foot pain and expressed interest in returning to full duty, including doing overtime. He provided examination findings and diagnosed left foot sinus tarsi

[4] Dr. Smith further indicated that appellant would be driving a regular postal vehicle, which would not be as difficult for her.

syndrome, left foot plantar fasciitis, and resolving right ankle capsulitis. Dr. Smith indicated that appellant could work a normal schedule.

By letter dated February 23, 2016, Dr. Smith reported that appellant had been under his care since November 1, 2013 for tarsal tunnel syndrome (sinus tarsi syndrome). He noted that appellant had recently undergone a series of nerve sclerosing injections to the left sinus tarsi area with much improvement to the left foot. Dr. Smith related that appellant could work full duty with no restrictions.

On May 3, 2016 appellant requested reconsideration.

By decision dated August 2, 2016, OWCP denied modification of its November 12, 2015 decision. It found that the medical evidence submitted was insufficient to establish that she was disabled from work beginning on April 22, 2014 due to her work-related left foot conditions. OWCP noted that Dr. Brecher determined in his March 17, 2015 second opinion report that appellant's left foot tarsal tunnel syndrome had resolved. It also determined that, while the medical evidence of record established that appellant had developed left foot plantar fasciitis, it was insufficient to establish that her new condition resulted from her employment.

On July 19, 2017 appellant requested reconsideration.

In a June 28, 2017 report, Dr. Smith indicated that from November 2013 to February 2016 he treated appellant for left enthesopathy, left sinus tarsi syndrome, and plantar fasciitis of the left heel. He reported that on June 17, 2014 appellant was examined at his office and complained of left heel pain and swelling. Dr. Smith explained that the "plantar fasciitis developed during her treatment for the sinus tarsi syndrome of the left foot which was the original cause of her being off work." He related that once appellant developed plantar fasciitis, he continued to treat appellant for sinus tarsi syndrome because it had never resolved and was the reason appellant was unable to work.

By decision dated September 25, 2017, OWCP denied reconsideration of the merits of appellant's claim. It found that she had not met the requirements of 5 U.S.C. § 8128(a) sufficient to warrant merit review. OWCP determined that the additional medical reports submitted were cumulative and substantially similar to medical evidence previously considered.

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 payment of compensation at any time on his own motion or on application.[5]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a

[5] 5 U.S.C. § 8128(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]

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.[7] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[8] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[9]

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

In its August 2, 2016 merit decision, OWCP again denied appellant's claim for wage-loss compensation beginning April 22, 2014, finding that the medical evidence of record failed to establish that she was unable to work as a result of her accepted left foot/ankle conditions. Appellant subsequently requested reconsideration on July 19, 2017 and submitted additional medical evidence.

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of her reconsideration request, appellant submitted a June 28, 2017 report by Dr. Smith. Dr. Smith noted that he had treated appellant for left enthesopathy, left sinus tarsi syndrome, and plantar fasciitis of the left heel from November 2013 to February 2016. He explained that the left foot plantar fasciitis developed during treatment for appellant's sinus tarsi syndrome, which was the original cause of her being off work. Dr. Smith reported that appellant's sinus tarsi syndrome had never resolved and was the reason that appellant was unable to work. The Board finds that Dr. Smith merely repeated his opinion from his previous May 28, 2015 letter that appellant continued to suffer from her left foot sinus tarsi syndrome, which prevented her from returning to work. The Board has held that the submission of evidence that duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.[10] Accordingly, the Board finds that appellant has not provided OWCP with evidence which

[6] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[7] *Id*. at § 10.607(a).

[8] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[9] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[10] *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

meets the requirements of 20 C.F.R. § 10.606(b)(3) sufficient to require further merit review of her claim.

The Board finds that as appellant has not met any of the regulatory requirements, OWCP properly declined her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).[11] Thus, OWCP did not abuse its discretion in refusing to reopen her claim for a review on the merits.

On appeal appellant contends that Dr. Smith's disability notes supported that she was unable to work. As explained, however, the Board does not have jurisdiction to review the merits of appellant's claim. The only decision properly before the Board on this appeal is the September 25, 2017 nonmerit decision, which denied appellant's July 19, 2017 request for reconsideration of the merits of her claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[11] *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2018
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