

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

D.F., Appellant)	
)	
and)	Docket No. 19-1759
)	Issued: April 3, 2020
DEPARTMENT OF THE INTERIOR,)	
COLORADO RIVER AGENCY, Parker, AZ,)	
Employer)	
)	

Appearances:
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 19, 2019 appellant, through counsel, filed a timely appeal from a May 28, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated March 9, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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 5 U.S.C. § 8101 *et seq.*

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 January 18, 2018 appellant, then a 44-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on November 30, 2017 he was working around debris including boards with nails and screws when he stepped on a nail while in the performance of duty.³ He indicated that he had neuropathy in his feet and did not notice that the nail pierced his left shoe and foot. Appellant noted that he started running a fever and believed that he had the flu. He indicated that he woke up on December 6, 2017 with extreme pain in his left foot and underwent emergency surgery. Appellant reported that, two of his toes were amputated, the skin was removed off the top of his left foot, and half of the bottom of his left foot was stitched. On the reverse side of the claim form appellant's supervisor controverted appellant's claim noting that he was not informed of the incident until December 6, 2017 and that medical reports were not submitted until January 5, 2018. Appellant stopped work on December 6, 2017.

A December 6, 2017 note from Parker Indian Health Center Emergency Department included a diagnosis of gangrene of the toe of the left foot, cellulitis of the left lower leg, peripheral vascular disease, and Type 2 diabetes mellitus. It noted that appellant was transferred for emergency treatment.

OWCP received a number of reports from Banner University Medical Center Phoenix. In a December 15, 2017 note, Dr. Samar Kubba, a specialist in internal medicine, indicated that appellant had left foot necrotizing fasciitis due to a puncture wound from a nail. He noted that appellant had amputation of the third and fourth toes of the left foot. In a December 16, 2017 note, Dr. Glenn Silverstein, a podiatrist, diagnosed necrotizing fasciitis, diabetic neuropathy, Type 2 diabetes mellitus with foot ulcer, cellulitis of the left lower limb, and nonpressure chronic ulcer of the left foot with necrosis of muscle. The records also reflected that appellant underwent toe amputation on December 6, 2017, lower extremity irrigation and debridement of the left foot on December 8, 2017, lower extremity irrigation and debridement of the left foot on December 15, 2017, and lower extremity irrigation and debridement of the left foot including a split-thickness skin graft of the left foot on January 19, 2018.

In a January 25, 2018 attending physician's report (Form CA-20), Dr. Silverstein noted appellant's history of injury as stepping on a nail. He checked a box marked "yes" in response to whether appellant's condition was caused or aggravated by the employment activity and noted that appellant had neuropathy which limited feeling in his foot.

In a February 2, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical

³ The Board notes that appellant submitted three separate Forms CA-1 all dated January 18, 2018. In each form he described the November 30, 2017 incident of working in an area cluttered with debris including boards with nails and screws.

evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a December 6, 2017 report, Dr. Silverstein noted that appellant developed an ulcer on the bottom of his left foot “probably a couple of weeks ago and maybe even at work.” He indicated that appellant did not have much feeling in his foot and was unsure if he stepped on something. Dr. Silverstein diagnosed Type 2 diabetes mellitus with foot ulcer, necrotizing fasciitis, cellulitis of the left lower limb, acute hematogenous osteomyelitis, diabetic neuropathy, and nonpressure chronic ulcer of the left foot with necrosis of muscle.

In a December 6, 2017 report, Dr. Patrick Shayegan, a Board-certified specialist in internal medicine, noted that appellant “likely stepped on a large nail that went through [appellant’s] boot and through the bottom of his foot.” He reported that appellant did not feel it at the time because he had neuropathy. Dr. Shayegan diagnosed necrotizing fasciitis and Type 2 diabetes.

In a December 28, 2017 certification form, Dr. Silverstein indicated that appellant experienced an injury at work and would not be able to perform his job functions until February 20, 2018 or longer.

In a February 1, 2018 report, Dr. Silverstein reported that appellant’s left foot showed continued take of the split-thickness skin graft. He noted that there was no inflammation or clinical signs of infection and that the plantar aspect was healed.

In a February 16, 2018 statement, appellant responded to OWCP’s development questionnaire. He stated that, while working on November 30, 2017, he received a call from his wife who informed him that he needed to take his daughter to the emergency room. Appellant noted that, while cleaning up his work area, he lost his balance and stepped on a wooden board embedded with 16D penny nails. He reported that he “did not feel any pain, or any wetness on [his] left foot,” and that there were “no signs of blood or pain at the time.” Appellant indicated that he only wore his Red Wing Steel Toe Boots at work and that at the time of the incident he assumed that he stepped on the nail, but it did not go through his boot. He related that he worked on December 4, 2017, but did not work the following day because he began experiencing nausea, shivers, and fever. Appellant stated that he noticed discoloration and swelling in his toes and left foot on December 6, 2017 and went to the emergency room. He noted that he was diagnosed with gangrene and reported that his mother notified his supervisor about the injury.

In an accompanying statement, appellant’s wife asserted that she received a telephone call from appellant’s supervisor at 1:23 p.m. on December 6, 2017. She confirmed that she had notified the supervisor of appellant’s workers’ compensation claim due to stepping on a nail.

In an undated statement, appellant’s mother indicated that she informed appellant’s supervisor of his injury on December 6, 2017. She noted that appellant’s supervisor stated that he would provide her with OWCP paperwork, but never did. Appellant’s mother attached telephone records with her statement.

By decision dated March 9, 2018, OWCP denied appellant’s claim finding that the factual evidence of record was insufficient to establish that the employment incident occurred as alleged.

It further noted that he had not submitted medical evidence establishing a diagnosed medical condition causally related to the alleged employment incident.

Thereafter, OWCP received hospital progress notes dated December 7, 2017 through December 6, 2018. The notes showed the evaluation and management of appellant's left foot conditions following his surgical operations. OWCP also received x-rays of his left foot and ankle dated December 6, 2017 through November 2, 2018 which revealed the status of his left foot conditions.

In a May 10, 2018 report, Dr. Silverstein reported that appellant was nearly completely healed. He indicated that appellant fractured his second toe since the last time he was seen and was seeing a podiatrist for the fracture. Dr. Silverstein discharged appellant and recommended light-duty work until the wound completely healed.

On March 8, 2019 appellant, through counsel, requested reconsideration. Counsel submitted new factual and medical evidence that he argued established appellant's claim. He further contended that appellant's narrative statement explained the facts and circumstances surrounding the employment incident and appellant's subsequent course of action such that there were no inconsistencies which would cast serious doubt on the validity of the claim.

In support of his request, appellant submitted statements from his wife and parents. In a January 24, 2019 statement, appellant's wife noted that she had observed him at his work on November 29, 2017 and observed him pulling things off the walls. She indicated that there were boards with nails, splintered wood, and other debris scattered around the floor. Appellant's wife related that on the morning of December 6, 2017 appellant woke her up complaining of severe foot pain. She reported that she noticed he was sweating and seemed feverish. Appellant's wife observed that appellant had a perfectly round hole on the pad of his left foot that was producing a secretion. She related that she knew he had diabetes, but was unaware that he had diabetic neuropathy until the trip to the emergency room. Appellant's wife noted that she checked appellant's work boots and observed a hole on the bottom of his left boot approximately where his wound was located on his foot. She indicated that she put her hand in the boot and felt a bump and a hole where something had pushed up through the sole of the boot.

In a January 29, 2019 statement, appellant's mother provided additional information to expand and clarify on her previous statement. She noted that on December 6, 2017 she met appellant at the emergency room. Appellant's mother stated that both the medical staff and appellant had told her that he had stepped on a nail causing a puncture wound. She indicated that she observed the puncture wound and noticed that it was dark and oozing. Appellant's mother also reported that she went to appellant's house a few weeks after he was hospitalized and asked to look at his work boots. She stated that she found a hole toward the front, middle of the left boot at what appeared to be the same location that he had suffered the puncture wound.

In a January 29, 2019 statement, appellant's father noted that on December 6, 2017 he met appellant at the emergency room. He reported that both the medical staff and appellant had told him that appellant had stepped on a nail causing a puncture wound. Appellant's father indicated that appellant was transferred to another medical facility for treatment. He stated that the surgeon

met with him and explained that the infection was caused by a nail that went between two bones in appellant's foot.

In a March 6, 2019 statement, appellant provided additional information to clarify and expand on his previous statement. He noted that he had been diagnosed with diabetes and was aware of his diabetic condition prior to November 30, 2017. However, appellant indicated that he was unaware of his diabetic neuropathy and loss of sensation in his feet until the events of December 6, 2017. He clarified that on November 30, 2017 he was in a rush to leave work to take his daughter to the emergency room. Appellant asserted that he stepped on a wooden board with a penny nail in it and that he had to kick the board off and away from him to remove it from his boot. He related that he originally stated that he "assumed he] stepped on it and it did not go thru [his] boot." Appellant explained that the nail definitely punctured the sole of his boot as it was stuck in such a way that he had to kick the board off of his boot. He indicated that he "assumed" that the nail did not puncture his foot because he did not feel pain as a result of his diabetic neuropathy. Appellant stated that he was never confused about stepping on a nail on November 30, 2017 and that he definitely stepped on a nail that day. He alleged that, in his pained and medicated state, he had difficulty understanding that diabetic neuropathy caused loss of sensation and that he could not feel the nail puncture in his foot. Appellant asserted that any expressions he made suggesting that he "might" have stepped on a nail "were expressions of [him] attempting to wrap [his] head around the fact that [he] could not feel a nail enter [his] foot." He reported that the location where he discovered the wound in his foot was in the same place that the nail had punctured the sole of his boot on November 30, 2017.

In a March 8, 2019 narrative report, Dr. Roland Palmquist, a podiatrist, noted that he had been treating appellant since April 18, 2018. He indicated that appellant presented to his clinic with amputation of the third and fourth toes of the left foot after surgery on December 6, 2017. Dr. Palmquist noted that appellant had stepped on a nail at work on November 30, 2017, but had not realized that his foot had been punctured because he had diabetic neuropathy. He explained that diabetic patients commonly injure themselves and are unaware of the injury until the infection spreads far enough to reach unaffected nerves, often above the knee. Dr. Palmquist opined that the nail puncture caused appellant's bone infection in the third and fourth metatarsals which resulted in appellant's amputation and skin graft. He reviewed April 19, 2018 x-rays of appellant's left foot and diagnosed a broken base of the second metatarsal bone and holes in the head of the second metatarsal. Dr. Palmquist reported that he saw appellant regularly for follow-up appointments and recommended that he obtain custom-molded work boots. He found that appellant's surgical wounds were healed, but his second metatarsal fractures were not showing any evidence of healing. Dr. Palmquist noted that further surgery or amputation might be necessary if appellant experienced an additional injury to his left foot.

Appellant submitted a series of medical reports from Dr. Silverstein dated January 11 through May 10, 2018. The reports detailed his recovery from his surgical wounds.

By decision dated May 28, 2019, 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 own motion or on application.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.⁸

ANALYSIS

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

In his timely request for reconsideration, appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law. Accordingly, he is not entitled to a review of the merits of his claim based on the first criterion under 20 C.F.R. § 10.606(b)(3).

The underlying issue in this case is whether appellant submitted sufficient evidence to establish that the employment incident occurred as alleged. This is a factual issue which must be addressed by relevant new factual evidence.⁹

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

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

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 (February 2016). 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). Chapter 2.1602.4b.

⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *I.J.*, Docket No. 19-1278 (issued December 30, 2019).

In support of his request for reconsideration, appellant submitted a March 6, 2019 narrative statement and statements from his wife and parents. These statements provided new details regarding the November 30, 2017 incident and attempted to offer explanations and clarification regarding alleged inconsistencies. Appellant explained that he definitely stepped on a nail on November 30, 2017 and that the nail definitely punctured the sole of his boot as it was stuck in such a way that he had to kick a board off of his boot. He alleged that, in his pained and medicated state, he had difficulty understanding that he could not feel the nail puncture in his foot because of his diabetic neuropathy. Appellant asserted that any expressions he made suggesting that he “might” have stepped on a nail “were expressions of [him] attempting to wrap [his] head around the fact that [he] could not feel a nail enter [his] foot.” The statements from appellant’s wife and parents provided additional information surrounding the events of November 30, 2017 and December 6, 2017. Furthermore, the statements from appellant’s wife and mother indicated that they had observed a puncture mark on appellant’s left boot around the same location as appellant’s puncture wound.

While appellant, appellant’s wife, and appellant’s mother had previously provided narrative statements, they were different in content to the newly submitted statements. Additionally, the statement from appellant’s father was altogether new. As such, the newly submitted narrative statements were not repetitious or cumulative.

As appellant has submitted new and relevant factual evidence, he is entitled to a review of the merits of his claim under the second and third criteria of 20 C.F.R. § 10.606(b)(3).¹⁰

The Board will therefore set aside OWCP’s May 28, 2019 decision and remand the case for a merit review of appellant’s claim. After such further development of the evidence as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

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

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2019 nonmerit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: April 3, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board