

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

M.J., Appellant

and

**U.S. POSTAL SERVICE, GOLETA POST
OFFICE, Santa Barbara, CA, Employer**

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**Docket No. 20-1067
Issued: December 23, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 23, 2020 appellant filed a timely appeal from a January 3, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 5, 2019, to 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 this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 3, 2020 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.*

FACTUAL HISTORY

On November 14, 2018 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 9, 2018 he sustained a left front foot pad and toe injury when stepping out of a long life vehicle (LLV) while in the performance of duty. He did not immediately stop work.

In a November 20, 2018 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In medical status reports dated November 14 and 28, 2018, Dr. Paul L. Cisek, a Board-certified vascular surgeon, treated appellant for a work-related injury and referred him to an orthopedist for evaluation and treatment. He returned appellant to full-duty work on November 15, 2018. In a report dated November 14, 2018, Dr. Cisek diagnosed tendinitis of the left foot. Appellant reported stepping out of his vehicle and experiencing pain in the left foot front pad and toes. He recommended over-the-counter pain medication and elevation of the foot. In a report dated November 28, 2018, Dr. Cisek diagnosed left foot tendinitis.

In response to OWCP's development letter, appellant indicated that his left foot pain began on the morning of November 5, 2018, after stepping out of his LLV. He noted the pain was stinging and was located on the front pad connecting his toes. Appellant indicated that his left foot was his lead foot when he jumped in and out of his truck daily. The left foot pain persisted and he reported it to his supervisor on November 14, 2018. Appellant maintained that he did not sustain any other injuries between the date of injury and the date he reported his injury to his supervisor. He reported a spinal injury in 2013 with similar left foot pain, assigned OWCP File No. xxxxxx761.

By decision dated December 28, 2018, OWCP found that appellant had established that the November 9, 2018 incident occurred as alleged, but denied the claim finding that he had not submitted medical evidence containing a diagnosis in connection with his accepted employment incident. It concluded therefore that the requirements had not been met to establish an injury as defined under FECA.

On July 1, 2019 appellant requested reconsideration.

In support of his request, appellant submitted a report from Dr. L. Mae Chandler, a podiatrist, dated April 29, 2019, who treated appellant for pain in the ball of his left foot, which began in November when he was delivering mail and stepped out of his vehicle and twisted his foot. Findings on examination revealed edema localized to the second and third metatarsophalangeal (MTP) joint of the left foot plantarly and pain on palpation of the plantar lateral aspect of the left second metatarsal head. Dr. Chandler diagnosed contracture of joint left foot, pain in limb, edema, partial plantar plate tear of the left second MTP joint, and metatarsalgia of the left foot.

By decision dated July 5, 2019, OWCP modified the December 28, 2018 decision, finding that appellant had submitted medical evidence containing a diagnosis in connection with his

accepted employment incident, but affirmed the denial of the claim, finding that the medical evidence of record was insufficient to establish a causal relationship between his diagnosed conditions and the accepted November 9, 2018 employment incident.

On November 4, 2019 appellant requested reconsideration.

Appellant submitted an October 30, 2019 prescription note from Dr. Chandler who noted that he reported that on November 5, 2018 he was delivering mail at work and stepped out of his work vehicle and hyperextended his left second toe. He reported swelling and pain and sought treatment at a medical facility on November 14, 2018. Dr. Chandler opined that appellant's history of injury was consistent with factors that would cause a plantar plate injury. She further noted that he was a surgical candidate for repair.

By decision dated January 3, 2020, 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.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the

³ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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). *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered in his reconsideration request. He merely reiterated his previous argument that his slip and fall at work on November 9, 2018 had caused his left foot condition. Consequently, appellant was not entitled to a review of the merits based on the first or second above-noted requirements of 20 C.F.R. § 10.606(b)(3).⁸

The underlying issue on reconsideration is the medical question of whether appellant's diagnosed left foot condition was causally related to the accepted November 19, 2018 employment incident resulting from his employment duties as a city carrier. Along with the October 30, 2019 reconsideration request, appellant submitted Dr. Chandler's prescription note dated October 30, 2019, in which she specifically reiterated the factual history of injury and further addressed the causal relationship between appellant's diagnosed left foot condition and the accepted work incident on November 9, 2018. Dr. Chandler provided an opinion on causal relationship, finding that appellant's history of injury was "consistent with factors that would cause a plantar plate injury." As her October 30, 2019 note, addressed the underlying issue of causal relationship between appellant's diagnosed medical condition and the accepted employment incident, the report constitutes relevant and pertinent new evidence in support of his claim for a left foot condition. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).⁹

The Board will therefore set aside OWCP's January 3, 2020 decision and remand the case for an appropriate merit decision on appellant's claim.¹⁰

⁷ *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

⁸ 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

⁹ *See C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁰ The Board notes that appellant requested reconsideration before OWCP on February 24, 2020 and by decision dated May 20, 2020, OWCP denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a). The Board and OWCP may not exercise simultaneous jurisdiction over the same issues in a case on appeal. 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue(s) on appeal until after the Board relinquishes jurisdiction. *Id.* Therefore, the subsequent decision of OWCP dated May 20, 2020 is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. *See* 20 C.F.R. § 10.626; *see also A.C.*, Docket No. 18-1730 (issued July 23, 2019); *M.C.*, Docket No. 181278, n.1 (issued March 7, 2019); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

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).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 23, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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