

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

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**S.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Carmel, IN, Employer**

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**Docket No. 07-1392  
Issued: November 15, 2007**

*Appearances:*  
*Joseph E. Allman, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 26, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions dated January 23 and April 5, 2007 which denied his requests for reconsideration. Because more than one year has elapsed from the most recent merit decision dated March 16, 2006 to the filing of this appeal on April 26, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly denied appellant's requests for reconsideration without conducting a merit review.

**FACTUAL HISTORY**

On October 31, 1991 appellant, then a 41-year-old maintenance worker, filed an occupational disease claim stating that he developed bilateral heel spurs in the performance of duty. He did not initially stop work. Appellant submitted an undated report from

Dr. Jordan Ross, a podiatrist, diagnosing bilateral heel spurs. The Office accepted appellant's claim for bilateral aggravation of heel spurs and paid appropriate compensation. On May 4, 1992 the Office authorized surgery for appellant's accepted bilateral heel spurs.

In a June 8, 1992 report, Dr. Ross performed a bilateral resection of heel spurs and bilateral plantar fasciotomy. On August 14, 1992 he advised that appellant had postsurgery complications. Appellant began a light-duty job on November 9, 1992. In an April 4, 1995 report, Dr. Frank Throop, an orthopedic surgeon and second opinion physician, concluded that appellant had permanent work restrictions and could stand for two hours per day nonconsecutively due to his accepted condition.

On January 26, 2005 appellant requested a schedule award.

In an August 2, 2005 report, Dr. Ross noted appellant's persistent complaints of bilateral arch and heel pain. He advised that appellant had not experienced lasting relief from his treatment but had reached maximum medical improvement. Dr. Ross concluded that appellant had 10 percent lower extremity impairment for rocker bottom foot, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed. 2001), Table 17-33,<sup>1</sup> 10 percent lower extremity impairment for roentgenographically determined cartilage interval, based on Table 17-31<sup>2</sup> two percent lower extremity impairment for sural nerve sensory damage, based on Table 17-37<sup>3</sup> and five percent lower extremity impairment for posterior tibial motor neuropathy, based on Table 17-37.<sup>4</sup> He found that appellant had a total 27 percent lower extremity impairment.

In a November 2, 2005 report, Dr. Richard A. Hutson, a Board-certified orthopedic surgeon and an Office referral physician, determined that appellant had no impairment or residuals from his work-related condition. He explained that appellant's surgical scars were well healed and that appellant was not tender to palpation on the plantar surface of either heel where the surgery was performed. Dr. Hutson noted that appellant had congenital flat feet and nonwork-related degenerative changes and was morbidly obese, all of which contributed to his current symptoms. However, he determined, appellant's impairment, if any, was not related to his accepted heel spur or plantar fasciitis surgery, as examination suggested those conditions had resolved.

In a December 15, 2005 addendum to the statement of accepted facts, the Office noted that appellant's medical history was significant for "rocker bottom" flat feet, obesity and diabetic neuropathy.

In a December 28, 2005 report, an Office medical adviser noted that Dr. Hutson's physical examination revealed that appellant had zero percent impairment of his lower

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<sup>1</sup> A.M.A., *Guides* 546-547, Table 17-33 (5<sup>th</sup> ed. 2001).

<sup>2</sup> *Id.* at 544, Table 17-31.

<sup>3</sup> *Id.* at 552, Table 17-37.

<sup>4</sup> *Id.*

extremities, as related to his accepted conditions. He indicated that Dr. Hutson had diagnosed rocker bottom flat foot deformity, which was a congenital condition and not caused by his federal employment. Therefore, the Office medical adviser concluded that appellant had no ratable impairment.

On February 3, 2006 the Office proposed termination of appellant's compensation on the grounds that his work-related condition had resolved. By decision dated March 8, 2006, the Office denied appellant's schedule award claim. On March 16, 2006 the Office finalized termination of appellant's compensation, effective that day.<sup>5</sup>

In a June 5, 2006 report, Dr. Ross explained that appellant's June 8, 1992 surgery had failed to relieve his symptoms and that he continued to experience chronic pain. He indicated that appellant had continuing chronic plantar fasciitis and neuritis of the left heel, which was related to his original injury. Dr. Ross also advised that appellant's work restrictions had not changed. In a January 21, 2005 form report, he stated that he had reached maximum medical improvement as of April 5, 1995 and that all residuals of the original work injury had not resolved.

By request postmarked December 7, 2006, appellant requested reconsideration of the Office's March 8, 2006 decision denying his schedule award. He asserted that the Office erred in finding that he did not have permanent partial impairment, that Dr. Ross' opinion represented the weight of the medical evidence. Appellant contended that the Office should recognize his plantar fasciitis as chronic, that he was entitled to a schedule award for permanent partial impairment to both lower extremities. On December 7, 2006 he also requested reconsideration of the Office's March 16, 2006 decision terminating his entitlement to compensation benefits. Appellant asserted that his permanent restrictions were caused by his employment and the fact that he had congenital flat feet did not imply that his work-related condition had resolved. He stated that he submitted a sworn statement from Dr. Ross.<sup>6</sup> In a July 26, 1994 report, Dr. Ross, noted that his surgery had failed and that his symptoms continued to persist due to "periods of excessive standing or walking required by his job." Appellant also provided Dr. Ross' January 21, 2005 form report and August 2, 2005 impairment rating, which were previously received of record.

By decision dated January 23, 2007, the Office denied appellant's request for reconsideration of the March 8, 2006 decision denying a schedule award, without conducting a merit review.

On March 6, 2007 appellant again requested reconsideration of the Office's March 8 and 16, 2006 decisions. He provided a March 5, 2007 report from Dr. Travis Montgomery, a podiatrist, who diagnosed diabetes mellitus and peripheral neuropathy, standing calcaneal valgus, posterior tibialis neuritis, Baxter's neuritis and plantar fasciitis. Dr. Montgomery

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<sup>5</sup> The record reflects that the Office initially finalized its termination of appellant's compensation on March 6, 2006. However, the decision was mailed to appellant without appeal rights. Consequently, the Office reissued its decision terminating appellant's compensation on March 16, 2006.

<sup>6</sup> The record reflects that the Office did not receive the statement.

concluded that appellant was “significantly immobilize[ed]” by a combination of his plantar fasciitis and a “nerve component ... secondary to diabetes.” He explained that appellant’s “combination of pathologies” caused his impairment but that “this could be a contributing cause for work in regards to his chronic pain on both of his extremities. To reinforce, I do feel that his work related pain is more consistent with his plantar fasciitis ... rather than his diabetes.”

By decision dated April 5, 2007, the Office denied appellant’s request for reconsideration of the March 16, 2006 decision terminating his compensation benefits without conducting a merit review. On the same day, the Office also denied appellant’s request for reconsideration of the March 8, 2006 decision denying his schedule award claim, without conducting a merit review.

### **LEGAL PRECEDENT**

Under section 8128 of the Federal Employees’ Compensation Act, the Office has discretion to grant a claimant’s request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.<sup>7</sup> The regulations provide that the Office should grant a claimant merit review when the claimant’s request for reconsideration and all documents in support thereof:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”<sup>8</sup>

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 requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant’s application for reconsideration and any evidence submitted in support thereof.<sup>10</sup>

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<sup>7</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>10</sup> *Annette Louise*, 54 ECAB 783 (2003).

## ANALYSIS

The Board finds that the Office properly denied appellant's December 7, 2006 and March 6, 2007 requests for reconsideration of its March 8, 2006 decision denying his schedule award claim. In support of his December 7, 2006 request for reconsideration, appellant submitted numerous arguments concerning both the termination decision and the denial of his schedule award claim. However, his arguments were essentially repetitious and cumulative.<sup>11</sup> Specifically, appellant asserted that his condition was chronic, that his residuals had not resolved and that Dr. Ross' opinion should represent the weight of the medical evidence. The Office had considered appellant's evidentiary submissions on the nature of his condition and had already weighed the evidence. Accordingly, his submissions neither established that the Office misapplied or misinterpreted a specific point of law nor advanced a new and relevant legal argument. The Board also finds that appellant's new evidentiary submission, Dr. Ross' July 26, 1994 report, was not relevant as it did not address the issue of appellant's permanent impairment due to the employment conditions. Therefore, the Board finds that appellant did not submit new and relevant medical evidence. Accordingly, he did not meet any of the above-listed three criteria warranting a merit review.

Appellant submitted a second request for reconsideration on March 6, 2007. He based his reconsideration request on Dr. Montgomery's March 5, 2007 report. The Board notes that appellant had not previously submitted any reports from Dr. Montgomery, who supported that appellant's condition was continuing and that his work was a contributing cause. However, Dr. Montgomery did not address the schedule award issue. The Board has held that evidence which does not address the particular issue involved does not constitute a basis for reopening a claim for a merit review.<sup>12</sup> Accordingly, the Board finds that Dr. Montgomery's March 5, 2007 report is insufficient to require the Office to reopen appellant's schedule award claim.<sup>13</sup>

However, with regard to appellant's December 7, 2006 request for reconsideration of the Office's March 16, 2006 decision terminating his entitlement to benefits, the Board finds that the Office improperly denied the request without conducting further merit review. The Office's procedure manual states that, if a decision on a request for reconsideration is delayed more than 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the Office should grant a merit review to preserve appellant's appeal rights.<sup>14</sup> The record reflects that appellant requested reconsideration of the Office's March 16, 2006 decision on

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<sup>11</sup> See *Richard Yadron*, 57 ECAB \_\_\_\_ (Docket No. 05-1738, issued November 8, 2005) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

<sup>12</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>13</sup> To the extent that the Office's April 5, 2007 decision may have declined to conduct a merit review of the termination issue, it is not necessary for the Board to address whether Dr. Montgomery's report would be sufficient to warrant a merit review of this issue in view of the Board's findings with regard to the April 5, 2007 Office decision that denied merit review of the Office's March 16, 2006 termination decision.

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (October 1992). See *Geoma R. Munn*, 50 ECAB 242 (1999).

December 7, 2006. However, the Office delayed adjudication of the reconsideration request until April 5, 2007, well beyond the 90-day period allotted by the Office's procedures. This delay compromised appellant's ability to seek a merit review before the Board. Therefore, the Office should have issued a decision on the merits of appellant's claim with regard to the termination issue. Accordingly, the Board finds that the Office erred in refusing to reopen appellant's case for further review of the merits of his claim and the case should be remanded to the Office for merit review.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's December 7, 2006 and March 6, 2007 requests for reconsideration of the March 8, 2006 schedule award decision. However, the Board finds that the Office acted improperly in denying appellant's December 7, 2006 request for reconsideration of the March 16, 2006 termination decision without conducting a merit review.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 5 and January 23 2007 decisions of the Office of Workers' Compensation Programs denying appellant's request for reconsideration of the Office's March 8, 2006 decision are affirmed. The April 5, 2007 decision denying appellant's request for reconsideration of the Office's March 16, 2006 decision is set aside and the case remanded for further action consistent with this decision.

Issued: November 15, 2007  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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