

**N.K., Appellant**

**U.S. POSTAL SERVICE, POST OFFICE,  
North Ridgeville, OH, Employer**

**Issued: April 1, 2011**

### Case Submitted on the Record

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

On December 30, 2008 appellant, a 44-year-old letter carrier, filed a traumatic injury claim alleging that she sustained a stress fracture to her left foot at work on December 2, 2008.

She stated that the injury resulted from favoring her left leg and foot over her right leg and foot since August 30, 2007.<sup>1</sup>

Appellant submitted a December 2, 2008 hospital note from Dr. Patrick Fairley, Board-certified in the field of emergency medicine, who diagnosed ankle sprain and foot strain. She also submitted semi-legible December 2, 2008 emergency room notes signed by M. Jajala, a registered nurse. The record contains December 2, 2008 reports of x-rays of the left ankle and the left foot.

In a letter dated January 20, 2009, the Office informed appellant that the information and evidence submitted was insufficient to establish her claim. The facts of injury were not clear and she failed to provide a physician's opinion addressing how her diagnosis resulted from employment factors. It advised appellant to clarify whether a specific incident occurred on December 2, 2008 which resulted in her left foot fracture and, if so, to describe the circumstances surrounding that incident. Appellant was asked to clarify whether she claimed that favoring her left leg over her right leg was done to her accepted right knee injury under claim number xxxxxx541 and, if so, to describe in more detail how she favored her left leg. If, on the other hand, she claimed that her work duties over time caused her left foot condition, she was asked to describe the specific work duties she believed led to her condition, how many days a week she performed them and how many hours a day. The Office also requested a detailed report from appellant's treating physician which included a history of how her injury/condition occurred, a diagnosis and an opinion on how the condition is causally related to the claimed injury. The letter informed her that, if she failed to respond to the Office's request within 30 days, a decision would be made based upon the current evidence of record.

In a December 12, 2008 report, Dr. William R. Bohl, a Board-certified orthopedic surgeon, advised that appellant was six weeks status post right carpal tunnel release. She told him that "the sprain in her foot that [he] saw her for last time turned out to be a fracture." Dr. Bohl noted that the original x-ray had not revealed any fracture.

By decision dated February 20, 2009, the Office denied the claim on the grounds that fact of injury could not be established. It found that appellant failed to provide details regarding a specific traumatic incident occurring on December 2, 2008 that would be competent to cause an injury, details of work activities responsible for her foot condition, or to detail activities which could be construed as a consequence of her accepted right knee injury. The Office was unable to ascertain whether she was claiming a traumatic, occupational or consequential injury.

On January 19, 2010 appellant requested reconsideration. In support of her request, she submitted records from Dr. Richard E. Hammond, a podiatrist, for the period December 9, 2008 through January 14, 2009. Dr. Hammond diagnosed stress fracture of the left metatarsal, noting that "the problem is associated with no known injury." In January 13, 2009 notes, he stated that

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<sup>1</sup> The Office accepted appellant's September 10, 2007 traumatic injury claim for a tear of the right anterior cruciate ligament, right knee sprain, abrasion and contusion (File No. xxxxxx541). Other claims filed by her include a September 4, 2003 traumatic injury claim (File No. xxxxxx659), which was accepted for open wound of the hip and thigh; a September 10, 2008 occupational disease claim (File No xxxxxx504), which was accepted for right lateral epicondylitis and bilateral carpal tunnel syndrome (CTS); and an October 2008 occupational disease claim (File No. xxxxxx939), which was accepted for bilateral CTS and right lateral epicondylitis.

appellant seemed determined “to get the left foot stress fracture included in her [workers’ compensation] claim for her right knee.” On January 14, 2009 Dr. Hammond stated that “it is thought that the stress fracture is secondary to compensation for a right knee problem consisting of chondromalacia which is an industrial injury.”

In a decision dated April 1, 2010, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>2</sup> has the burden of establishing the essential elements of her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

When an employee claims that she sustained a traumatic injury in the performance of duty, she must establish the “fact of injury,” namely, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.<sup>5</sup>

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee’s statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on a claimant’s statements. The employee has not met her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant failed to establish the fact of injury. Therefore, appellant did not meet her burden of proof to establish that she sustained a traumatic injury on December 2, 2008.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

<sup>5</sup> See *Paul Foster*, 56 ECAB 208 (2004); see also *Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002); 5 U.S.C. § 8101(5). See 20 C.F.R. § 10.5(ee).

<sup>6</sup> See *Betty J. Smith*, *supra* note 5.

Appellant's CA-1 form contains inconsistent allegations which create doubt as to whether she is making a claim for a traumatic injury, which occurred on a specific date, or a claim for an occupational disease or consequential injury, which occurred over a longer period of time. She stated that she sustained a stress fracture of the left foot on December 2, 2008. Appellant also indicated, however, that she favored her left leg and foot over her right side since August 30, 2007 and the "stress fracture happened as cause of that." In either event, she provided no detailed account of the alleged injury or supporting evidence, such as witness statements. Appellant presented no evidence regarding the specific mechanism of injury, as required in a claim for traumatic injury, or alleged that she experienced a specific event, incident or exposure at a definite time, place and manner.<sup>7</sup> Her vague recitation of the facts does not support her allegation that a specific event occurred which caused an injury.<sup>8</sup> Appellant did not provide information as to those employment activities she believed competent to cause a stress fracture, or details as to how she favored her left leg and foot, or how this activity caused a stress fracture on December 2, 2008.

The Office informed appellant that the information initially provided was insufficient to establish her claim and to provide factual details which would clarify the nature of her claim. Appellant was asked to respond to specific questions designed to address whether she was claiming a traumatic injury, occupational disease or consequential injury, and to assist the Office in determining the sufficiency of her claim. Subsequent to the January 20, 2009 development letter, she submitted a December 12, 2008 progress report from Dr. Bohl, which did not address when or how she sustained a left foot fracture. Appellant provided no response, however, to the Office's request for information regarding the circumstances of her injury or the nature of her claim.

The contemporaneous medical evidence of record is insufficient to establish appellant's claim. The record contains December 2, 2008 notes from Dr. Fairley, who diagnosed ankle sprain and foot strain, December 2, 2008 emergency room notes from M. Jajala, a registered nurse, and December 2, 2008 x-ray reports. None of these reports contained a detailed history of injury, describing the time, place and the manner in which the alleged injury occurred, nor do they identify a specific causative event. Therefore, they are insufficient to establish that the incident occurred as alleged.

In *Tracey P. Spillane*,<sup>9</sup> an employee filed a claim alleging that she sustained an allergic reaction at work. However, she did not clearly identify the aspect of her employment which she believed caused the claimed condition, but only made vague references to "possibly having a reaction to magazines or latex gloves." The Board held that the employee did not adequately specify the employment factors which caused her need for medical treatment, or specify details such as the extent and duration of exposure to any given employment factors. The medical record reflected that she did not clearly report to her physicians that she felt her claimed condition was due to a specific and identifiable employment factor. In this case, appellant's allegations are similarly vague and do not relate with specificity the cause of the injury or how she injured her left foot while performing her duties on December 2, 2008. She did not address

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<sup>7</sup> See *Betty J. Smith*, *supra* note 6; see also *Tracey P. Spillane*, *supra* note 5.

<sup>8</sup> See *Dennis M. Mascarena*, *supra* note 9.

<sup>9</sup> See *Tracey P. Spillane*, *supra* note 5.

the immediate consequence of the injury, such as whether she experienced immediate pain, or what actions she took immediately following the alleged incident (*e.g.*, whether she fell, stumbled or had to sit down.)

Appellant did not establish that she actually experienced an employment incident at the time, place and in the manner alleged, or that the alleged incident caused an injury. As she has not met her burden of proof to establish the fact of injury, it is not necessary to discuss the probative value of the medical reports.<sup>10</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The Federal Employees' Compensation Act<sup>11</sup> provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>12</sup>

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.<sup>14</sup> Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's January 19, 2010 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by the Office which denied her claim on the grounds that she failed to sufficiently allege, or provide evidence to establish that she actually experienced a specific incident on

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<sup>10</sup> See *Tracey P. Spillane*, *supra* note 5.

<sup>11</sup> 5 U.S.C. § 8101 *et seq.*

<sup>12</sup> 20 C.F.R. § 10.605.

<sup>13</sup> *Id.* at § 10.606.

<sup>14</sup> *Donna L. Shahin*, 55 ECAB 192 (2003).

<sup>15</sup> 20 C.F.R. § 10.608.

December 2, 2008 that caused an injury. The Office's February 20, 2009 merit decision, therefore, turned on a factual issue. When appellant requested reconsideration, she did not submit a narrative statement addressing the circumstances surrounding the alleged incident. She did not clarify the mechanics of the alleged injury or the nature of her claim. Rather, appellant submitted medical notes and reports, which did not address the issue decided by the Office in its February 20, 2009 decision, namely, whether she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. Therefore, they are irrelevant to the issue at hand not constitute a basis for reopening the case for a merit review.<sup>16</sup>

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her request for reconsideration.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained a traumatic injury to her left foot in the performance of duty on December 2, 2008. The Board further finds that the Office properly refused to reopen her claim for merit review.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 1, 2010 and February 20, 2009 are affirmed.

Issued: April 1, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> *D. Wayne Avila*, 57 ECAB 642 (2006).