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

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| **B.S., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1521** |
| | ) | **Issued: October 19, 2007** |
| **DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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 May 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 21, 2007 decision denying her claim for compensation and a March 26, 2007 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

### *ISSUES*

The issues are: (1) whether appellant sustained an injury in the performance of duty on January 5, 2007, as alleged; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

### *FACTUAL HISTORY*

On January 9, 2007 appellant, then a 43-year-old tax examining technician, filed a traumatic injury claim alleging that on January 5, 2007 she stepped up on a curb but slipped off due to snow and ice. She fell forward, hitting her right forearm and the right side of her rib cage.

Appellant noted that the incident occurred while she was walking into work from the parking lot. The employing establishment controverted the claim, contending that appellant was not in the performance of duty at the time of the incident.

By letter dated January 16, 2007, the Office asked appellant to explain whether the parking lot where she fell was on government property and if not, whether the Federal Government maintained the parking area. It also asked appellant to submit further information, including medical evidence, in support of her claim. In response appellant submitted a January 5, 2005 report by a physician's assistant from Westside Medical. The physician's assistant noted that appellant reported slipping off a curb that morning and diagnosed a contusion of ribs and prescribed Diclofenac and Zanaflex. He checked a box indicating that the diagnosis was a result of the described industrial injury. Appellant also submitted answers to the Office's questions, noting that the property where the incident occurred was managed by the Federal Government.

By decision dated February 21, 2007, the Office denied appellant's claim. The Office found that the claimed event occurred as alleged and while appellant was in the performance of duty. It denied the claim as the medical evidence was not sufficient to establish any injury.

On March 5, 2007 appellant requested reconsideration. No new evidence was submitted with the request.

By decision dated March 26, 2007, appellant's request for reconsideration was denied without merit review.

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

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.[3] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[4]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

[4] *Shirley A. Temple*, 48 ECAB 404 (1997).

An employee may establish that the employment incident occurred as alleged, but fail to show that her disability and/or condition related to the employment incident.

In order to satisfy the burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[5] An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[6] Neither the fact that the condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated her condition is sufficient to establish causal relationship.[7]

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

Appellant alleged that on January 5, 2007 she slipped on snow and ice and fell up a curb thereby hurting her forearm and rib cage. The Office found that the incident occurred at the time, place and manner alleged. The issue is whether appellant sustained an injury caused by the accepted employment incident.

Appellant submitted reports from a physician's assistant dated January 5, 2005. The physician's assistant diagnosed contusion of ribs and indicated that this condition was the result of her work-related accident. However, this report is of no probative medical value as a physician's assistant is not a "physician" as defined under the Act and is not competent to provide medical evidence.[8] As appellant submitted no other medical evidence, the Office properly found that she failed to meet her burden of proof in establishing causal relationship.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, 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.[9]

Section 8128(b) provides that when an application for reconsideration 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 review on the merits.[10] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary

[5] *Gary L. Fowler*, 45 ECAB 365 (1994).

[6] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 567 (1979).

[7] *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

[8] 5 U.S.C. § 8101(2); *see Ricky S. Storms*, 52 ECAB 349 (2001).

[9] 20 C.F.R. § 10.606(b)(2)(i-iii).

[10] *Id*. at § 10.606(b)(2).

value and does not constitute a basis for reopening a case.[11] Likewise, evidence that does not address a particular issue involved does not constitute a basis for reopening a case.[12]

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

Appellant did not submit any new legal argument, nor did she allege that the Office erroneously applied or interpreted a specific point of law. She did not submit any relevant or pertinent new medical evidence in support of her claim. Accordingly, 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.[13]

## ***CONCLUSION***

The Board finds that the Office properly found that appellant did not establish that she sustained an injury in the performance of duty on January 5, 2007, as alleged. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).[14]

[11] *Helen E. Paglinawan*, 51 ECAB 407, 591 (2000).

[12] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[13] *Id.*

[14] Appellant submitted new evidence on appeal before the Board. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 5 and February 21, 2007 are affirmed.

Issued: October 19, 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