



numbness, burning and tingling sensations in both of her feet, left leg and ankle and swelling in the left ankle were caused by factors of her federal employment.

By letter dated September 15, 2003, the Office advised appellant that she did not submit any evidence sufficient to establish her claim. The Office notified her about the type of factual and medical evidence she needed to submit to establish her claim. By letter of the same date, the Office requested that the employing establishment respond to appellant's claim and provide information about her work duties and precautions taken to minimize the effects of her work activities.

In response, appellant submitted medical reports dated August 26, 2003 and an August 22, 2003 treatment note of Dr. David A. Traub, her treating internist. He indicated that she experienced pain in her feet, right wrist, lower back and knee. She also submitted a narrative statement dated August 11, 2003 in which she described her work duties and ankle injuries she sustained in 1982 and 1989, left leg and neck injuries she sustained in 1993 and a back injury she sustained in 2001. Appellant stated that, following these injuries, she performed modified work on a mounted route. She was off work from February 17 through April 21, 2003 due to knee surgery. Appellant listed her treating physicians and noted that she could not walk and she needed to use a wheelchair.

In response to the Office's September 15, 2003 letter, Sally Rowe, an employing establishment supervisor, stated that appellant complained about pain in her feet, toes and left ankle. Ms. Rowe further stated that appellant had not carried mail since at least November 1999. She noted that appellant stated that she must use a wheelchair and that she could not stand for any period of time. Ms. Rowe indicated that the only time she saw appellant use a wheelchair was when an acting station manager arrived at the employing establishment. She further indicated that, on a few occasions, appellant was in a wheelchair when visitors arrived. Ms. Rowe stated that appellant had a limp which appeared to be more pronounced after sitting for a period of time. The employing establishment submitted Dr. Traub's August 13, 2003 treatment note which revealed that appellant experienced foot pain. The employing establishment also submitted its November 9, 1999 offer for the modified position of city carrier which was based on the physical restrictions set forth by Dr. Debra L. Montgomery, a treating physician specializing in occupational medicine. This position was accepted by appellant on November 28, 1999. An October 17, 2003 investigative report revealed that appellant did not use a wheelchair while conducting personal errands.

In an undated narrative statement, appellant provided a history that she carried mail on a variety of walking routes from May 1978 until November 1988. She described shoulder, knee, back and neck injuries she sustained while performing her work duties.

By decision dated November 26, 2003, the Office found that appellant did not sustain an injury while in the performance of duty. The Office found that she failed to submit sufficient medical evidence to establish that her claimed medical conditions were caused by factors of her employment.

In a letter dated October 12, 2004, appellant, through her attorney, requested reconsideration. She submitted Dr. Traub's October 6, 2003 report in which he diagnosed

bilateral metatarsalgia that was most likely Morton's neuroma with nerve entrapment affecting digits four and five of both the left and right foot. Dr. Traub opined that this condition arose from repetitive trauma that occurred during the normal course of appellant's work duties. He further opined that her condition was being aggravated and worsened by prolonged walking and standing.

Appellant also submitted Dr. Traub's report dated January 5, 2004 in which he stated that a December 4, 2002 opinion of Dr. Allen S. Lewis, an orthopedic surgeon, was consistent with his opinion that appellant's right foot pain resulted from repetitive stress that occurred from walking and prolonged standing while working at the employing establishment. He diagnosed metatarsal phalangeal joint pain, toe pain, painful feet syndrome and Morton's neuroma. Dr. Lewis stated that it was known that repetitive walking and standing could cause the aforementioned diagnoses. Dr. Traub concluded that appellant's diagnosed conditions resulted from working at the employing establishment.

By decision dated March 30, 2005, the Office denied modification of the November 26, 2003 decision, finding the medical evidence lacked sufficient probative value.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,<sup>1</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>3</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

### **ANALYSIS**

In a November 26, 2003 decision, the Office found stated appellant did not submit sufficient medical evidence to establish that she sustained an injury while in the performance of duty. Appellant disagreed with this decision and requested reconsideration on October 12, 2004. Thus, the relevant underlying issue in this case is whether appellant sustained a medical condition causally related to factors of her employment.

The October 6, 2003 and January 5, 2004 reports from Dr. Traub stated that appellant suffered from bilateral metatarsalgia, Morton's neuroma, toe pain and painful feet syndrome.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>3</sup> *Id.* at § 10.607(a).

Dr. Traub opined that appellant's conditions arose from repetitive trauma during the course of her normal work duties and that her conditions were being aggravated and worsened by prolonged walking and standing. In the January 5, 2004 report, Dr. Traub explained that it was known that repetitive walking and standing can cause the diagnosed conditions.

The Board finds that Dr. Traub's October 6, 2003 and January 5, 2004 reports constitute relevant and pertinent new medical evidence sufficient to reopen the case as to the issue of whether appellant sustained an injury while in the performance of duty. As this evidence was not previously of record or reviewed by the Office and pertained directly to the issue of the case, the Board finds that appellant met the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(2)(iii).<sup>4</sup>

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof, but only that it be relevant and new evidence. Accordingly, the Board finds that the Office's denial of appellant's request for review of the merits of her claim constituted an abuse of discretion. Consequently, the case must be remanded for the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

### **CONCLUSION**

The Board finds that the Office improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>4</sup> See *Claudio Vazquez*, 52 ECAB 496 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: August 12, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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