

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

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**V.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Glenwood, MI, Employer**

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**Docket No. 10-1931  
Issued: April 5, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On July 10, 2010 appellant filed a timely appeal from a March 22, 2010 decision of the Office of Workers' Compensation Programs denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has met her burden of proof in establishing that she sustained a traumatic injury to her right third toe on December 17, 2009 while on a temporary-duty assignment.

On appeal, appellant asserted that new evidence accompanying her appeal request established that she was in the performance of duty at the time of the December 17, 2009 injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 15, 2010 appellant, then a 60-year-old markup clerk, filed a traumatic injury claim (Form CA-1) asserting that at 3:00 a.m. on December 17, 2009, while on a temporary-duty assignment in Norman, Oklahoma, she stubbed her right third toe on the bed frame in her hotel room, causing an open contusion. She stated that she was on travel from December 6 to 19, 2009 to attend training and that the claimed injury occurred in the training center's housing unit. Appellant explained that, because she had diabetic neuropathy in both feet, the contusion progressed into osteomyelitis, necessitating surgical amputation of the right third toe on January 8, 2010. She asserted that she informed her supervisor of the injury on December 19, 2009 when she returned to her regular-duty station. On the claim form, appellant's supervisor indicated that appellant's account of events was truthful, but did not specify if appellant was in the performance of duty at the time of the claimed injury.

In a December 28, 2009 report, Dr. Charles G. Kissel, an attending podiatrist, diagnosed osteomyelitis of the right foot, noting that appellant was diabetic. In a January 28, 2010 report, Dr. Timothy P. Baessler, an attending podiatrist, also diagnosed osteomyelitis of the right foot. The physicians held appellant off work through February 14, 2010.

In a December 9, 2010 letter, the Office advised appellant of the additional evidence needed to establish her claim. It noted that she had not yet submitted factual evidence corroborating that she was in the performance of duty at the time of the claimed injury. The Office emphasized the importance of providing a medical report from appellant's attending physician explaining how and why the identified work factors would cause the claimed condition.

In response, appellant submitted a March 17, 2010 statement asserting that gait alterations due to the third toe amputation caused lesions on her right second toe and pain in her right fourth toe. She provided a January 28, 2010 form report from Dr. Baessler, stating that appellant sustained a right foot injury at work on December 17, 2009. Dr. Baessler diagnosed osteomyelitis of the right foot resulting in amputation of the right third toe. He checked a box "yes" indicating his support for causal relationship.

By decision dated March 22, 2010, the Office denied appellant's claim on the grounds that she had not established that the December 17, 2009 injury did not occur in the performance of duty.

## **LEGAL PRECEDENT**

An employee seeking benefits under the Act<sup>2</sup> has the burden of establishing the essential elements of his or 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 filed within the applicable time limitation; that an injury was sustained while 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

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<sup>2</sup> *Id.* at §§ 8101-8193.

employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>4</sup>

Section 8102(a) of the Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>5</sup> This phrase is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws; namely, arising out of and in the course of employment.<sup>6</sup> Whereas arising out of the employment addresses the causal connection between the employment and the injury, arising in the course of employment pertains to work connection as to time, place and activity.<sup>7</sup>

Under the Act, an employee on travel status or a temporary-duty assignment or special mission for his employer is in the performance of duty and, therefore, under the protection of the Act 24 hours a day with respect to any injury that results from activities essential or incidental to his special duties.<sup>8</sup> Examples of such activities are eating,<sup>9</sup> returning to a hotel after eating dinner<sup>10</sup> and engaging in reasonable activities within a short distance of the hotel where the employee is staying.<sup>11</sup> However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his temporary assignment, he ceases to be under the protection of the Act.<sup>12</sup>

### ANALYSIS

Appellant asserted that, while on a temporary-duty assignment on December 17, 2009, she sustained an injury to her right third toe, leading to its surgical amputation. Her supervisor indicated that appellant's account of how and where the incident occurred was truthful. There is no factual evidence of record implying that appellant did not sustain the claimed injury at 3:00 a.m. on December 17, 2009 in a hotel room in Norman, Oklahoma. The Board therefore finds that the claimed incident occurred at the time, place and in the manner alleged. It must now be determined whether that incident occurred in the performance of duty.

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<sup>3</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *See Bernard E. Blum*, 1 ECAB 1 (1947).

<sup>7</sup> *See Robert J. Eglinton*, 40 ECAB 195 (1988).

<sup>8</sup> *Ann P. Drennan*, 47 ECAB 750 (1996); *Janet Kidd (James Kidd)*, 47 ECAB 670 (1996); *William K. O'Connor*, 4 ECAB 21 (1950).

<sup>9</sup> *Michael J. Koll, Jr.*, 37 ECAB 340 (1986); *Carmen Sharp*, 5 ECAB 13 (1952).

<sup>10</sup> *Supra* note 8.

<sup>11</sup> *Ann P. Drennan*; *Janet Kidd (James Kidd)*, *supra* note 8; *Theresa B.L. Grissom*, 18 ECAB 193 (1966).

<sup>12</sup> *Karl Kuykendall*, 31 ECAB 163 (1979).

Appellant asserts that the December 17, 2009 incident occurred during a temporary-duty assignment, thus affording her coverage under the Act.<sup>13</sup> However, there is no evidence of record confirming this assignment. On the claim form, appellant's supervisor did not indicate whether or not appellant was in the performance of duty at 3:00 a.m. on December 17, 2009. He did not corroborate that appellant was on authorized travel at the time of the claimed incident. Appellant did not submit a training authorization, course registration, travel orders, travel voucher, per diem authorization or housing authorization demonstrating that her employment required her to be in a hotel room in Norman, Oklahoma at 3:00 a.m. on December 17, 2009. Therefore, there is insufficient evidence that appellant was in the performance of duty at the time she injured her right third toe. The Board finds that the Office properly denied her claim.

On appeal, appellant asserts that new evidence accompanying her request for appeal establishes that she was on authorized travel on December 17, 2009 and therefore in the performance of duty when injured. However, the Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case.<sup>14</sup> In other words, the Board cannot review the documents appellant submitted with her appeal request. Appellant may submit such evidence to the Office accompanying a valid request for reconsideration.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof in establishing that she sustained a right third toe injury in the performance of duty.

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<sup>13</sup> *Ann P. Drennan, supra* note 8.

<sup>14</sup> 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 22, 2010 is affirmed.

Issued: April 5, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board