

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

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**S.F., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Philadelphia, PA, Employer**

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**Docket No. 14-1587  
Issued: October 24, 2014**

*Appearances:*

*Jason S. Lomax, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 1, 2014 appellant, through counsel, timely appealed the January 6, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration.<sup>1</sup> The latest merit decision was issued January 23, 2013, which is more than 17 months prior to the filing of the instant appeal. Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

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<sup>1</sup> Under the Board's *Rules of Procedure*, if the date of delivery of the notice of appeal (in this case July 8, 2014) would result in loss of appeal rights with respect to the 180-day time limitation for filing an appeal, the appeal will be considered to be filed as of the date of postmark. 20 C.F.R. § 501.3(e) and (f). In this case, the record reflects that the appeal was postmarked July 1, 2014, which is within 180 days of January 6, 2014.

<sup>2</sup> 5 U.S.C. §§ 8101-8193 (2006).

## ISSUE

The issue is whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

Appellant, a 42-year-old licensed practical nurse (LPN), filed a claim (Form CA-1) for a left ankle injury that allegedly occurred on April 26, 2011. She reported having been injured by a resident while tending to his care. Appellant later clarified that the injury was to her right ankle. The medical evidence initially submitted did not include a specific injury-related diagnosis other than ankle/foot joint pain (ICD-9 719.47). OWCP afforded appellant an opportunity to supplement the record, but she did not timely comply with the May 25, 2011 request for additional medical evidence. Consequently, it denied his traumatic injury claim by decision dated July 1, 2011.

OWCP subsequently received medical evidence indicating that appellant was treated in the employing establishment's emergency department on April 26, 2011 for a bruised right ankle. It also received an April 26, 2011 employing establishment incident report which noted, *inter alia*, that an 81-year-old veteran-patient became agitated and "began hitting nurses, scratching, kicking and biting." The incident report identified appellant as one of the LPNs involved.

A May 4, 2011 right ankle magnetic resonance imaging (MRI) scan revealed what appeared to be a slight degree of synovitis involving the tibiotalar and subtalar joints, as well as the posterior tibial and peroneal tendons.

On May 24, 2012 appellant requested reconsideration.

Appellant submitted treatment notes from Dr. Alan Mlodzienski, a podiatrist. On July 20, 2011 Dr. Mlodzienski noted that appellant continued to recover from an ankle injury. He advised that appellant was limited to carrying 15 pounds. Dr. Mlodzienski also indicated that standing/walking should be less than one hour per day. In his September 14, 2011 treatment notes, he indicated that appellant was status post right ankle sprain. Dr. Mlodzienski also noted that appellant's MRI scan revealed mild synovitis. His October 26, 2011 treatment notes included a diagnosis of right ankle peroneal and "PT" tendinitis. In a January 18, 2012 follow-up report, Dr. Mlodzienski indicated that appellant was being treated for unspecified ankle and foot joint derangement (ICD-9 718.97).

A March 2, 2012 right ankle MRI scan revealed a small ankle and posterior subtalar effusion with minimal synovitis. There was also evidence of remote plantar fasciitis. Additionally, the MRI scan showed a small os trigonum likely of no clinical significance.

Appellant also submitted two April 19, 2012 prescription pad notes from Dr. J. Gregory Bancroft, D.P.M. One of the notes recommended physical therapy and included a history of having sustained a direct kick to the anterior lateral aspect of the right ankle. In his other

April 19, 2012 note, Dr. Bancroft diagnosed instability, right ankle contusion, bone bruise, right ankle joint effusion and ligamentous injury/sprain.

In a June 14, 2012 decision, OWCP found that appellant established fact of injury. However, the claim remained in denial status because the medical evidence was found insufficient to establish a causal relationship between the diagnosed right ankle condition(s) and the April 26, 2011 employment incident.

Appellant again requested reconsideration on October 25, 2012.

Appellant submitted an October 11, 2012 report from Dr. Mlodzienski who explained that appellant sustained a right ankle injury on April 26, 2011 while assisting another nurse with a combative patient. Dr. Mlodzienski noted that the patient kicked appellant. He also noted that appellant was seen at the VA hospital where she was diagnosed with an ankle contusion. Appellant was subsequently seen by her primary care physician, who ordered an MRI scan and referred her to Dr. Mlodzienski, who noted that appellant initially presented with a painful, edematous ankle and an MRI scan that showed fluid in the joint. Dr. Mlodzienski immobilized the ankle and prescribed Motrin. As time went on the edema subsided, but appellant continued to have pain and stiffness. Dr. Mlodzienski stated that he administered a series of two cortisone injections and prescribed physical therapy. However, the treatment provided limited relief. A follow-up MRI scan showed less fluid in the ankle joint and no other pathology, yet appellant remained in pain. She continued to undergo physical therapy and Dr. Mlodzienski recommended a neurologic evaluation. Dr. Mlodzienski reiterated that appellant suffered an ankle injury on April 26, 2011.

In a January 23, 2013 decision, OWCP reviewed the merits of appellant's claim, but again denied modification.

On December 12, 2013 appellant's counsel requested reconsideration of the January 23, 2013 decision. In support of the request, he submitted a July 24, 2013 report from Dr. Mlodzienski, who indicated that appellant sustained a "right ankle injury on April 26, 2011 while assisting ... with a combative patient." Counsel reiterated much of what he previously discussed in his October 11, 2012 report.

By decision dated January 6, 2014, OWCP denied appellant's request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> One such limitation is that the application for

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<sup>3</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

reconsideration must be sent within one year of the date of the merit decision for which review is sought.<sup>5</sup>

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

### **ANALYSIS**

The December 12, 2013 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Counsel also did not advance any relevant legal arguments not previously considered by OWCP. He merely noted that he submitted a recent narrative report from Dr. Mlodzienski in support of establishing causal relationship. The Board finds that appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(2).<sup>8</sup>

Appellant's counsel also failed to submit any "relevant and pertinent new evidence" with the December 12, 2013 request for reconsideration. Dr. Mlodzienski's July 24, 2013 report is almost a verbatim recitation of his October 11, 2012 report, which OWCP previously found deficient. On reconsideration, OWCP determined that merit review was unwarranted because the newly submitted evidence was "cumulative." Providing additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.<sup>9</sup> Because appellant's counsel did not provide any new medical evidence that might arguably impact the prior decision, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).<sup>10</sup> Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's December 12, 2013 request for reconsideration.

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<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.606(b)(2).

<sup>7</sup> *Id.* at §§ 10.607(b), 10.608(b).

<sup>8</sup> *Id.* at § 10.606(b)(2)(i) and (ii).

<sup>9</sup> *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2)(iii).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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