

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

J.T., Appellant

and

**DEPARTMENT OF JUSTICE, U.S. MARSHALS
SERVICE, Oxford, MS, Employer**

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**Docket No. 14-1173
Issued: September 24, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 24, 2014 appellant filed a timely appeal from a December 17, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and a February 21, 2014 nonmerit decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established an injury in the performance of duty on September 6, 2013; and (2) whether OWCP properly denied appellant's application for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 10, 2013 appellant, then a 31-year-old deputy marshal, filed a traumatic injury claim (Form CA-1) alleging that on September 6, 2013 he sustained a left ankle injury in the performance of duty. He was jumping over a fence while chasing a fugitive and landed awkwardly on his left ankle.

In a report dated September 16, 2013, Dr. Cooper L. Terry, a Board-certified orthopedic surgeon, reported that appellant jumped a fence while chasing a fugitive and complained of left ankle pain. He stated that appellant had prior ankle symptoms since 2008 and was seen in April 2012 with similar complaints. Dr. Terry diagnosed chronic, recurrent left ankle pain with instability symptoms and a possible talar dome lesion. He advised that x-rays showed a chronic osteophyte at the lateral talar process and a possible osteochondral defect (OCD) lesion.

By letter dated October 30, 2013, OWCP advised appellant to submit additional medical evidence with an opinion, supported by medical rationale, as to how the September 6, 2013 work incident caused or aggravated the claimed left ankle injury. In a report dated October 21, 2013, Dr. Terry stated that appellant continued to complain of left ankle pain and was six and a half weeks status post injury. He noted that an October 17, 2013 magnetic resonance imaging (MRI) scan showed an OCD lesion of the lateral talar dome. Dr. Terry stated that appellant was referred for possible ankle arthroscopic surgery. Appellant submitted an October 17, 2013 MRI scan report from radiologist, Dr. William Lawrence.

In a report dated October 24, 2013, Dr. Kurre Luber, a Board-certified orthopedic surgeon, noted that appellant had ankle pain since 2008 that had been off and on with intermittent swelling. He provided results on examination, noted the MRI scan findings and diagnosed left ankle interior impingement with OCD lesion of the talus. Dr. Luber advised that appellant would have a computerized tomography (CT) scan for preoperative planning. In a report dated November 25, 2013, he stated that appellant needed left ankle arthroscopic osteophyte excision surgery. On December 10, 2013 appellant submitted a November 6, 2013 report of CT scan of the left ankle by Dr. Lawrence.

By decision dated December 17, 2013, OWCP denied appellant's claim for compensation. It found that the medical evidence was insufficient to establish a left ankle injury causally related to the September 6, 2013 employment incident.

On January 27, 2014 appellant requested reconsideration. He resubmitted the October 17, 2013 MRI scan and November 6, 2013 CT scan reports with the October 21, 2013 report from Dr. Terry.

By decision dated February 21, 2014, OWCP denied further merit review of the claim. It found that appellant's application for reconsideration was insufficient to warrant a merit review of the compensation claim.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”² The phrase “sustained while in the performance of duty” in FECA is regarded as the equivalent of the commonly found requisite in workers’ compensation law of “arising out of an in the course of employment.”³ An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.⁴ In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, “fact of injury” consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁵

Rationalized medical opinion evidence is medical evidence based on a complete factual and medical background, of reasonable medical certainty and supported by sound medical reasoning explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician’s opinion.⁶

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a left ankle injury when he jumped over a fence in the performance of duty on September 6, 2013. OWCP accepted that the incident occurred as alleged. The issue is whether appellant submitted sufficient medical evidence to establish a causal relationship between his left ankle condition and the employment incident.

Dr. Terry provided a report dated September 16, 2013, advising that appellant had prior complaints of left ankle pain. He noted that appellant had jumped a fence 10 days prior at work. However, providing a brief history of an incident and listing left ankle pain is not a rationalized medical opinion on causal relationship.⁷ Dr. Terry stated that appellant had preexisting problems with his ankle, noting pain since 2008 and treatment for similar complaints in 2012. He did not provide a factual description of appellant’s prior history or treatment. Dr. Terry diagnosed chronic, recurrent left ankle pain and noted diagnostic testing indicating an OCD lesion. The

² 5 U.S.C. § 8102(a).

³ *Valerie C. Boward*, 50 ECAB 126 (1998).

⁴ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993).

⁵ *See Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁷ *See, e.g., L.G.*, Docket No. 10-637 (issued August 5, 2010) (reports with a brief history and references to pain are not rationalized medical evidence).

report is not probative as he failed to provide a complete history, a firm diagnosis or an opinion addressing how the incident of September 6, 2013 caused or aggravated appellant's left ankle condition.

The reports from Dr. Luber do not provide a rationalized medical opinion on causal relationship. He also noted a prior history of pain since 2008 and diagnosed left ankle interior impingement with OCD lesion of the talus. Dr. Luber did not specifically discuss the September 6, 2013 incident, provide a complete medical history or offer a rationalized opinion relating the left ankle condition to the employment incident.

It is appellant's burden of proof to establish the claim for compensation. Based on a review of the evidence of record, he did not meet his burden of proof.⁸ Appellant may submit new evidence or argument with a written application for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP."¹⁰ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹¹

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on January 27, 2014. He did not contend that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. With respect to his request, appellant resubmitted medical evidence previously of record. He did not meet the requirement of submitting relevant and pertinent evidence not previously considered by OWCP.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted

⁸ The Board notes that appellant submitted additional evidence on appeal. The Board is limited to review of evidence that was before OWCP at the time of the final decision on appeal. 20 C.F.R. § 501.2(c)(1).

⁹ 5 U.S.C. § 8128(a) (providing that "[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.")

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly denied review of the merits of the claim.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a left ankle injury on September 6, 2013. The Board further finds that OWCP properly denied merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 21, 2014 and December 17, 2013 are affirmed.

Issued: September 24, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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