



## **FACTUAL HISTORY**

On May 29, 2013 appellant, then a 25-year-old security officer, filed a traumatic injury claim (Form CA-1) asserting that on May 25, 2013 she sprained her right ankle and sustained possible ligament tears when she struck her foot on the base of a stanchion pole near the L3 body scanning machine, then fell to the floor. She stopped work at the time of injury and was transported by ambulance to a hospital emergency room. Appellant remained off work through June 24, 2013.

On the claim form and in a May 31, 2013 letter, the employing establishment controverted the claim, alleging that security video from her duty station showed that she did not strike her right foot before falling. It asserted that appellant's right ankle gave way for an unknown reason while she was walking. The employing establishment provided a still photo excerpted from the video, showing that, at the moment she fell, her right foot was not in contact with any portion of the nearby stanchion pole, and that there were no persons or other obstacles in front of her.

Dr. David H. Simon, an attending podiatrist, held appellant off work from May 28 to June 11, 2013 due to a right ankle sprain. He obtained x-rays on May 28, 2013 that showed no fracture or dislocation of the right ankle. In a June 7, 2013 report, Dr. Simon diagnosed a partial tear of the tibialis anterior tendon, and a grade 2 ankle sprain with an underlying neuralgia. A magnetic resonance imaging (MRI) scan showed "fatty atrophy/edema of the muscles of the distal leg and foot." Dr. Simon opined that appellant's right foot pain and ankle weakness were of neurologic origin, noting that a neurologist was currently evaluating her condition.

In a June 13, 2013 letter, OWCP advised appellant of the type of additional evidence needed to establish her claim, including documentation of the May 25, 2013 incident, and her physician's opinion as to how that incident caused the claimed injury. It afforded her 30 days to submit such evidence.

In response, appellant submitted a May 28, 2013 report from Dr. Simon relating appellant's account that on May 25, 2013 "at 3:15 p.m. [appellant] suffered a direct blow of her right foot and then sustained an inversion twist of her ankle. She describes that she did turn back around the stanchion on her way toward the x-ray machine and suffered a fall." Appellant acknowledged a "history of nerve pain within her lower back" after left ankle surgery.

Dr. Martin H. Broker, a Board-certified radiologist, opined on June 4, 2013 that the fatty edema in the muscles of appellant's right leg and foot, as demonstrated by imaging studies, were consistent with a neuropathy. He recommended a neurological evaluation and testing.

In a June 18, 2013 report, Dr. David M. Sack, a Board-certified internist and gastroenterologist consulting to the employing establishment, reviewed medical reports. He opined that, as the security video showed no work factors causing a fall, the incident was due to a preexisting neurologic condition.

In a June 21, 2013 report, Dr. Simon noted that, based on appellant's clinical presentation, the right ankle weakness was not caused by the tendon tear. He opined, however, that her preexisting ankle weakness predisposed her to injury.

Appellant submitted an undated statement, imaged into the case record on June 26, 2013. She noted that on May 25, 2013 she was on light-duty due to a left ankle surgery. At approximately 3:15 p.m. that day, when walking to an x-ray monitor position, appellant struck her right ankle on the base of a stanchion pole when trying to avoid a passenger who abruptly moved in front of her. She attempted to catch herself by grabbing the stanchion pole as her ankle turned, but instead fell forward onto her hands and knees. Appellant remained on the floor approximately two feet from coworker R.H., until her supervisor called Port Authority police and emergency personnel were summoned to assist her and transport her to the hospital.

In an undated statement imaged into the case record on June 26, 2013, one of appellant's coworkers, asserted that at approximately 3:15 p.m. on May 25, 2013 he was manning the L3 body scanner. A passenger stepped in front of appellant, causing her to "quickly and awkwardly move out of his way, despite recently having surgery on her ankle/foot." Appellant then fell to the floor.

By decision dated July 10, 2013, OWCP denied appellant's claim, finding that causal relationship was not established. It accepted that the May 25, 2013 incident occurred as alleged. However, OWCP found that the medical evidence did not prove a connection between the May 25, 2013 trip and fall and an ankle injury or condition.

In an August 6, 2013 letter, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She submitted additional evidence.<sup>2</sup>

May 25, 2013 hospital emergency room reports show that appellant arrived at 4:08 p.m. by ambulance, with right ankle pain and swelling after a fall at work. Appellant provided a history of "walking by a stanchion when she rolled her ankle on its base and fell on her knees." X-rays were negative for fracture. Appellant was assessed for amyotrophic lateral sclerosis (ALS). These forms do not contain a physician's legible signature.

In a July 11, 2013 report, Dr. Simon opined that appellant's continuing right ankle weakness was due to underlying neurological pathology and not a tendon tear. On July 18, 2013 he noted appellant's history of a resolved left ankle fracture at age 12, quiescent until 2012. Appellant underwent "arthrodesis insertion within her sinus tarsi in June 2012," with removal of the implant in December 2012. Dr. Simon diagnosed status post implant and removal with residual sinus tarsi syndrome of the left foot "with plantar flexed first metatarsal bone and left lower extremity drop foot."

In a July 30, 2013 report and letter, Dr. Simon related that appellant's neurologist advised appellant that she could have a variant of ALS. He diagnosed a partial tear of the right tibialis tendon with a grade 2 ankle sprain, "underlying neuralgia, and muscle atrophy of unknown etiology." Dr. Simon provided August 13 and 14, 2013 progress notes relating an improvement

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<sup>2</sup> Appellant also provided duplicate copies of medical reports previously of record.

in appellant's right ankle pain, and noting that she had begun to wear a right ankle brace he prescribed.

By decision dated and finalized October 21, 2013, an OWCP hearing representative reversed OWCP's July 10, 2013 decision, and accepted that appellant sustained a right ankle sprain and contusion on May 25, 2013 as alleged. She found that appellant's "move to avoid the passenger was a compensable factor of her employment and that incident clearly contributed to the cause of the fall, regardless of any preexisting conditions or whether her foot hit the stanchion."

In an October 31, 2013 letter, the employing establishment asserted that the evidence of record did not support fact of injury. It noted that appellant provided three divergent accounts of the May 25, 2013 injury, including that she fell when trying to avoid a passenger, that she struck her ankle on the base of a stanchion pole, and that she struck her foot on the base of a stanchion pole. The employing establishment provided a still photograph excerpted from a May 25, 2013 security video showing that, immediately before appellant fell, her right foot "did not contact the base of the stanchion." The photograph also showed that appellant's coworker (who had provided the statement) had his back turned to appellant moments before the incident. The employing establishment alleged that when it showed the security video to the coworker on October 30, 2013, he "admitted that his back was turned to the entire event." It enclosed an October 30, 2013 statement from the coworker, in which he asserted that "portions of [his] original statement were and are mistakenly false" as he did not see appellant try to avoid a passenger or "step on the stanchion separating the L3 scanner from the metal detector" walkway.

By decision dated and finalized October 31, 2013, another OWCP hearing representative set aside the October 21, 2013 decision, finding that the security video did "not show that [appellant] fell while attempting to get out of the way of a passenger as claimed." He instead found that the recording showed that she "fell without any inciting employment incident and supported the employing establishment's contention that [appellant] fell when her ankle gave way." The hearing representative noted that appellant would be "afforded a review of the written record by a hearing representative of the Branch of Hearings and Review to address" the July 10, 2013 decision.

Appellant continued to submit medical evidence. In an October 23, 2013 report, Dr. Simon noted that a neurologic workup indicated a diagnosis of progressive muscular atrophy, a variant of ALS. He diagnosed "drop foot likely secondary to progressive muscular atrophy." Appellant also submitted copies of medical evidence previously of record.

By decision dated and finalized January 16, 2014, the first OWCP hearing representative affirmed as modified OWCP's July 10, 2013 decision, finding that appellant did not meet her burden of proof to establish an injury in the performance of duty. She found that the evidence demonstrated that appellant fell on May 25, 2013 due to a personal pathology, "without any inciting employment incident and that there was no employment circumstance or condition that contributed to her fall of her right ankle injury." The hearing representative further found that the "video recording does not show that [appellant] fell while attempting to get out of the way of a passenger or that she fell after her right foot hit the base of a stanchion pole as claimed." Also,

the coworker withdrew his witness statement, as “he did not witness any part of the claimed incident.”

In a January 9, 2015 letter, counsel requested reconsideration. He contended that according to the Federal (FECA) Procedure Manual at Chapter 2.400(3)(a),(b)<sup>3</sup> concerning OWCP obtaining, copying, and returning materials from other federal agencies, appellant was “wrongfully denied a copy of the video recording reviewed by” OWCP in denying the claim. “If not copied and retained in the file, the material must not be used in reaching a decision on a claim.” Counsel also argued that under Chapter 2.402(4) of the procedure manual,<sup>4</sup> regarding compensation fraud, OWCP wrongfully failed to investigate the facts and circumstances surrounding the coworker’s repudiation and withdrawal of his witness statement. He submitted a police report of the May 25, 2013 incident, asserting that this new evidence was directly relevant to the claim and was strongly supportive of fact of injury.

Counsel submitted a May 25, 2013 report from the employing establishment’s law enforcement unit, relating appellant’s account that at 3:15 p.m. that day, while “walking through the screening point she tripped over the base of the stanchion that was located by the L3 body scan machine, causing her to fall to the floor and injur[e] her right ankle and both knees.” There were “no witnesses” to the incident.

Appellant also provided a December 9, 2013 report from Dr. Simon, noting continued pain and instability of the right ankle. She also submitted copies of the May 25, 2013 emergency room reports, and Dr. Simon’s reports from May 28 to October 23, 2013 previously of record.

In a January 15, 2015 letter, counsel requested a complete copy of the claim file, as well as “the investigative video recording at issue in the claim of [appellant].”

By decision dated January 18, 2015, OWCP denied counsel’s January 8, 2015 request for a merit review, finding that the argument and evidence counsel submitted in support of his request did not warrant reconsideration of the merits of the claim. It found that he proceeded “from an inaccurate understanding of the event in question,” as he believed that appellant tripped over a stanchion pole base. OWCP explained that the security video showed “this to be false, in that [appellant’s] foot was about one foot away from the base of the stanchion, contrary to [her] claims in this case.” It further found that contrary to counsel’s argument, that there was no indication of record that appellant had called or written OWCP to request a copy of the security video prior to January 15, 2015. Additionally, OWCP found that the May 25, 2013 police report was irrelevant as it merely related her inaccurate account of events. It noted that it was then providing appellant a copy of the security video on a compact disc. Counsel “requested a copy of the case file, and the video will be provided to him when [OWCP] responds to his request.”

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400(3)(a),(b) (February 2000).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Security and Prevention of Fraud and Abuse*, Chapter 2.402(4) (March 1991).

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>8</sup> The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>9</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>10</sup>

## ANALYSIS

Appellant claimed that she sustained a right ankle injury in the performance of duty on May 25, 2013, when she either struck her right foot or ankle on a stanchion pole, or moved awkwardly to avoid colliding with a passenger, causing her to fall forward. OWCP initially accepted the claim, then denied it as surveillance video of appellant's duty station did not support any of the scenarios she described.

In a January 9, 2015 letter, counsel requested reconsideration. He contended that under the Federal (FECA) Procedure Manual Chapter 2.400(3)(a),(b), concerning OWCP's protocols for obtaining, copying, and returning evidence from other federal agencies, OWCP was barred from relying on the security video as it did not provide a copy to appellant. Counsel also contended that under Chapter 2.402(4) of the Federal (FECA) Procedure Manual, regarding prevention of fraud and abuse in receiving compensation, OWCP wrongfully failed to investigate the facts and circumstances surrounding the coworker's repudiation and withdrawal of his witness statement. He argued that the May 25, 2013 police report was directly relevant to the claim and was strongly supportive of fact of injury. Counsel submitted the police report, which recounted appellant's assertion that she tripped and fell on the base on a stanchion pole and that there were no witnesses to the incident. Appellant provided a December 9, 2013 report from

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>8</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>9</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>10</sup> *Annette Louise*, 54 ECAB 783 (2003).

Dr. Simon, an attending podiatrist, noting continued pain and instability of the right ankle. She also submitted copies of the May 25, 2013 emergency room reports, and Dr. Simon's reports from May 28 to October 23, 2013 previously of record.

By decision dated January 18, 2015, OWCP denied counsel's request for a review of the claim on the merits, as the evidence and argument provided were irrelevant or immaterial. The Board will therefore analyze whether this determination was correct regarding each argument and document provided.

The May 25, 2013 employing establishment police report, although new, is cumulative of appellant's explanation of her injury as provided in her claim and in the emergency room reports previously of record. Similarly, appellant submitted copies of medical reports previously of record, as well as a December 9, 2013 report from Dr. Smith reiterating previous findings. Evidence which is duplicative or cumulative or repetitive in nature is insufficient to warrant reopening a claim for merit review.<sup>11</sup> Therefore, these documents are insufficient to warrant consideration of the merits of the claim.

Counsel argued that OWCP violated its procedures under Chapter 2.400(3)(a),(b) by failing to provide appellant a copy of the security video. The Board finds, however, that the cited provision does not address any obligation by OWCP to provide evidence to claimants. Instead, it describes protocols for OWCP obtaining, copying, and returning evidence from other administrative agencies. This argument is therefore of little relevance to the claim, and does not comprise a basis for reviewing its merits.<sup>12</sup>

Counsel also asserted that, under Chapter 2.402(4) of the procedure manual, OWCP violated its procedures by failing to investigate why the coworker of appellant repudiated and withdrew his witness statement. OWCP found this contention without merit as it overlooked the coworker's clear, detailed October 20, 2013 statement explaining precisely why he withdrew his initial witness statement. The Board concurs that counsel's argument in this regard was irrelevant to the claim as it was not based on an accurate reading of the evidence.

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel asserts that OWCP's denial of merit review despite the submission of new, relevant evidence and argument violates appellant's due process rights. As stated above, OWCP properly denied a review of the merits of the claim as the evidence and arguments submitted in support of counsel's request were irrelevant or immaterial to the claim.

Counsel's appellate argument also contends that OWCP is barred from relying on the security video under the Federal (FECA) Procedure Manual at Chapter 2.400(3)(a) and (b) as it did not provide a copy to appellant prior to denying the claim on July 10, 2013 and

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<sup>11</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>12</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

January 16, 2014. Counsel acknowledges, however, that he did not request a copy of the video until January 15, 2015. The Board notes that a still photograph of the most relevant moment in the security video was included in the case record as of May 13, 2013. Appellant was thus aware of the existence of the video, and of the type of information it contained, well before OWCP denied the claim. Yet, no request was made for a copy of the video until January 15, 2015. Also, appellant and counsel had ample access to the critical photograph from the video, and thus the opportunity to examine and respond to it. This is in comport with the Board's holding in *Frederick Nightengale*,<sup>13</sup> finding that a claimant should be apprised of the conflicts and inconsistencies in the evidence, and of the general adverse nature of the evidence developed, in order that he or she might know the nature of the issues to be met and have an opportunity to present such rebuttal or explanation as was available.

Counsel also argues that OWCP should have accepted appellant's account of events as controlling. Alternatively, he asserts that it is immaterial whether her foot hit the stanchion pole, and that OWCP adopted an adversarial posture by relying on the security video showing that her foot did not hit the stanchion. Counsel also contends that OWCP should have investigated the circumstances under which the coworker repudiated and withdrew his witness statement. The Board notes that these arguments pertain to the merits of the claim, which are not before the Board on the present appeal. Therefore, the Board will not address these contentions.

### CONCLUSION

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

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<sup>13</sup> 6 ECAB 268 (1953).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 18, 2015 is affirmed.

Issued: August 5, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board