

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

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E.L., Appellant )  
and ) Docket No. 15-629  
DEPARTMENT OF VETERANS AFFAIRS, ) Issued: June 1, 2015  
VETERANS HEALTH ADMINISTRATION, )  
Seattle, WA, Employer )  
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)

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On January 27, 2015 appellant filed a timely application for review from a December 2, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from June 13, 2014, the date of the most recent merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On July 3, 2013 appellant, then a 50-year-old medical clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 26, 2012 she injured her left ankle and foot as a result of slipping on black ice on her way into work from a parking lot. A supervisor checked a box indicating that appellant was not injured within the performance of duty, as the incident occurred one hour before her shift started. The supervisor also noted that appellant had not reported the injury within 30 days.

By letter dated July 16, 2013, OWCP informed appellant that the evidence of record was insufficient to support her claim. It asked that she respond to a questionnaire regarding the factual elements of her claim, and noted that it had not received any medical evidence. OWCP afforded appellant 30 days to submit additional evidence. Appellant did not respond.

In a report dated January 8, 2013, Dr. Alvin T. Ngan, a podiatrist, noted, “[Appellant] has a somewhat vague h[istory] of possibly injuring her foot one week prior to onset of symptoms when she inverted her foot at work [...] I believe she is developing some posterior medial ankle tend[i]nitis which could include the PT or FHL tendon. This is unlikely related to her injury the week before.”

In a report dated July 26, 2013, Dr. Ngan noted, “[Appellant] returns today to follow up left ankle and foot L&I injury in January 2013 when she slipped on ice.”

On August 15, 2013 OWCP denied appellant’s claim for compensation. It found that she had not established that the event of October 26, 2012 had occurred as described. OWCP noted that appellant delayed filing her claim and did not provide any response or medical evidence supporting that her injury occurred as reported. It further noted that she had not provided medical evidence containing a diagnosis in connection with the event of October 26, 2012. OWCP stated, “In fact, the July 23, 2013 medical report discusses an injury of January 2013.”

In a letter received by OWCP on August 22, 2013, appellant responded to OWCP’s inquiries. She noted that she had delayed filing her claim because she thought she had only twisted her ankle and foot, so she treated it with ice for several weeks. Appellant stated that she had not sustained any injury between the incident of October 26, 2012 and the date she reported that incident to a supervisor. She noted that the injury occurred when she was dropping off a box containing booklets, pens, pencils, highlights, and handouts weighing from 10 to 20 pounds. Appellant stepped off a curb with her left foot, sliding sideways, and fell to the ground. She noted that she arrived at work 45 minutes to an hour early because her physician would like for her to lose weight.

On August 23, 2013 appellant requested an oral hearing before an OWCP hearing representative. The hearing took place on March 27, 2014. At the hearing, appellant stated that she liked to get to work early because there was no parking, and because her physician wanted her to lose weight. She stated that she walked around the area for exercise every morning. Appellant noted that at the time of the incident on October 26, 2012 she was headed to her workstation from the parking lot. She stated that she waited eight months to file a claim because she thought her injury was a mere sprain, but later came to the conclusion that she should visit a

physician. Appellant explained that Dr. Ngan was confused as to the date of her alleged injury, and that is why his report referred to a date in January 2013 rather than October 2012. She noted that she had surgery on her foot and that afterward, she was absent from work for five months and had exhausted all of her leave. Appellant stated that she had a report from Dr. Ngan containing a clear opinion as to how her condition was related to the October 26, 2012 work-related incident, and that she would submit it to the case file. The hearing representative allowed an additional 30 days to submit evidence.

In a report dated October 29, 2013, Dr. Ngan stated that appellant was three weeks' status postsurgery for an on-the-job injury. He noted that he had performed a left gastrocnemius recession, a left medializing calcaneal osteotomy, a left Evan's osteotomy with a tricortical iliac bone crest graft, a left first metatarsocuneiform fusion; a left flexor digitorum longus to navicular transfer with posterior tibial tenodesis, and a spring ligament repair. Dr. Ngan stated, "If not stated previously, I do believe her injury is job related, and my impression is her initial slipping/twisting injury caused the tendon to tear and her foot deformity to progress to the point of requiring surgical intervention." Appellant also submitted diagnostic reports and progress reports from Dr. Ngan.

By decision dated June 13, 2014, the hearing representative affirmed OWCP's decision of August 15, 2013. He found that appellant had failed to provide a convincing explanation for the significant delay between the dates of injury, the filing of the claim, and the first date she sought medical treatment, and had not provided factual evidence to corroborate that the work incident occurred. The hearing representative noted that "The medical evidence in the file reports a different history of injury and date of injury than that reported by the claimant. The attending physician indicated in his initial report of January 8, 2013 that the claimant did not have any symptoms until one week after the work incident, and that her condition was not due to the work incident. He also reported the date of injury as January 2013 in several reports. These inconsistencies in the medical evidence cast serious doubt upon the validity of the claim, and remain unexplained at this date."

By letter dated September 24, 2014, appellant requested reconsideration of her claim. She noted that she was submitting a witness statement from a coworker who did not initially want to submit a statement due to fear of retaliation.<sup>2</sup> Appellant further noted that she had previously assumed she was at work performing an "Outreach" on October 23, 2012, but that in fact she was there early for moving, and that she had previously forgotten this fact.

Appellant submitted a timesheet noting that she was scheduled for "moving offices" on October 23, 2012.

In a letter dated September 12, 2014, Dr. Nkeiruka C. Duze, a Board-certified internist, stated that appellant was under his care, and that she saw a colleague, Dr. Sarah K. Toner, a Board-certified internist, on November 28, 2012. Dr. Toner's report stated, "[A]nkle/foot pain -- gotten bad in the past couple of weeks, one month ago patient was moving boxes and she hit her ankle/foot against a box." She assessed appellant with left foot pain of "unknown etiology."

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<sup>2</sup> This witness statement does not appear in the case record.

By decision dated December 2, 2014, OWCP denied appellant's request for reconsideration of her claim and did not review the merits of her case. It found that the timesheet and report from Dr. Toner dated November 28, 2012 were not relevant to the issue concerning its prior decision and raised no substantive legal questions.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>3</sup> Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.<sup>5</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>6</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>7</sup>

### **ANALYSIS**

OWCP issued a June 13, 2014 decision denying appellant's claim for traumatic injury, as the evidence of record failed to establish a factual basis for her claim. On September 24, 2014 appellant requested reconsideration of this decision.

As noted above, the Board does not have jurisdiction over the merits of the June 13, 2014 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. In her September 24, 2014 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

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<sup>3</sup> 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

<sup>4</sup> *Id.* at § 10.608(b); see *K.H.*, 59 ECAB 495, 499 (2008).

<sup>5</sup> See *Daniel Deparini*, 44 ECAB 657, 659 (1993).

<sup>6</sup> *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

<sup>7</sup> *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

The underlying issue in this case is whether appellant has submitted sufficient factual evidence to substantiate that the incident of October 26, 2012 occurred as alleged. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant evidence in this case. With her request, appellant submitted a statement, noting that the incident of October 26, 2012 had occurred while moving offices, rather than while performing “Outreach” as previously described, and a timesheet confirming that she was scheduled to move offices on that date. While these pieces of evidence concern the date of the incident, they are irrelevant to the issue of whether the incident itself occurred as alleged. They do not address the actual manner in which her alleged injury was sustained. As to the report of Dr. Toner, it describes yet another mechanism of injury that is inconsistent with appellant’s own statement on the matter. Dr. Toner stated that she injured her ankle and foot when she hit it against a box. Appellant had previously described her mechanism of injury as slipping on black ice.

While these documents were not previously of record, they are irrelevant to the grounds upon which OWCP denied appellant’s claim. Appellant’s claim was denied because she had not submitted sufficient evidence to substantiate that the incident of October 26, 2012 occurred as described. The evidence submitted to the record on reconsideration does not substantiate the factual elements of appellant’s claim. Rather it fails to describe exactly how the injury occurred, and raises further inconsistencies with appellant’s earlier description of the alleged injury. As such, these documents were not relevant and insufficient to require a merit review of her claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted 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, OWCP properly denied merit review.

### **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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 2, 2014 is affirmed.

Issued: June 1, 2015  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board