

FACTUAL HISTORY

On January 21, 2014 appellant, then a 52-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that, while walking to her car immediately after leaving work at 5:00 p.m. that day, she tripped on an uneven sidewalk, falling, and striking both knees. On the reverse of the form, the employing establishment noted that her regular work shift varied between the hours of 7:30 a.m. and 8:00 p.m.

In a February 5, 2014 letter, OWCP advised appellant of the type of evidence needed to establish her claim, including factual evidence corroborating that the January 21, 2014 incident occurred as alleged, that she was in the performance of duty at the time of the incident, and medical evidence explaining how and why that incident would cause the claimed knee injuries. It afforded appellant 30 days to submit such evidence. Appellant did not submit additional evidence as requested.

By decision dated March 18, 2014, OWCP denied the claim, finding that, although appellant established that the January 21, 2014 fall occurred at the time, place, and in the manner alleged, she did not establish fact of injury as she failed to submit any medical evidence.

On January 21, 2015 appellant requested reconsideration and submitted additional evidence.² Dr. Ed Wolski, an attending Board-certified family practitioner, opined on May 6, 2014 that the January 21, 2014 fall caused a right ankle sprain and acute right lower extremity pain. On May 21, 2014 he limited appellant to working four hours a day through June 21, 2014.³ Dr. Wolski renewed this restriction in periodic reports through January 7, 2015.

In a January 28, 2015 e-mail, the employing establishment noted that on January 21, 2014, appellant's scheduled work shift was 7:30 a.m. to 4:00 p.m.

By decision dated January 29, 2015, OWCP denied modification of its prior decision, finding that appellant was not in the performance of duty at the time of the claimed January 21, 2014 incident. Appellant's work shift ended at 4:00 p.m. She fell at 5:00 p.m., beyond the standard 30-minute allowance for coming and going from work.

In February 14 and March 11, 2015 letters, received on March 19, 2015, appellant again requested reconsideration. She submitted additional evidence which included a January 21, 2014 letter, in which she asserted that she often worked from 30 minutes to 3 hours past the end of her scheduled work shift to "finish her job duties or do documentation." Appellant noted that the employing establishment did not utilize time clocks. She provided January 21, 2014 letters from two coworkers asserting that they and other nurses routinely left 30 minutes to 2 hours after the end of their assigned work shifts to complete charting and other documentation. One coworker noted that nurses did not check in or out, as the employing establishment operated on an "honor

² This evidence included physical therapy notes and records from a physician assistant.

³ July 8, 2014 right foot x-rays demonstrated a heel spur, small ossified density at the tip of the lateral malleolus consistent with a remote avulsion injury, and a small amount of periarticular calcification adjacent to the first metatarsophalangeal joint. Appellant underwent a functional capacity evaluation (FCE) on September 15, 2014.

system.” A third coworker submitted a witness statement confirming appellant’s fall on January 21, 2014.

Appellant also submitted medical history forms dated August 5 and October 1, 2014, and January 7 and February 6, 2015, signed by a physician assistant. Dr. Wolski renewed prior work restrictions on February 6, 2015.⁴

By decision dated April 20, 2015, OWCP again denied modification of its prior decision, finding that appellant was not in the performance of duty at the time of the January 21, 2014 incident. It found that she had not submitted evidence establishing that she still remained in the performance of duty at 5:00 p.m. on January 21, 2014, more than 30 minutes after her scheduled work shift ended at 4:00 p.m.

In a June 29, 2015 letter received on July 6, 2015, appellant again requested reconsideration. She submitted periodic medical history forms signed by a physician assistant from April 20, 2015 through January 28, 2016, accompanied by duty status reports (Form CA-17) signed by Dr. Wolski, renewing prior work restrictions from April 20, 2015 through January 28, 2016.⁵

An April 17, 2015 computerized tomography (CT) scan of appellant’s right foot showed osteoarthritis, posterior and plantar calcaneal spurs, possible plantar fasciitis, moderate distal forefoot muscle atrophy, and a chronic ossification distal to the medial malleolus, possibly due to remote trauma.

By decision dated February 26, 2016, OWCP denied modification, finding that appellant had established that she was not in the performance of duty at the time of the claimed January 21, 2014 incident. It again found that the factual evidence established that she fell at 5:00 p.m., more than 30 minutes after her tour of duty ended at 4:00 p.m.

In an April 28, 2016 letter, received on May 2, 2016 appellant again requested reconsideration. She described continued problems with her right foot. Appellant submitted duty status reports (Form CA-17) from Dr. Wolski dated from February 29 to May 11, 2016, restricting her to working four hours a day with lifting limited to 10 pounds. The reports were accompanied by medical history forms from a physician assistant.

By decision dated July 29, 2016, OWCP denied modification, finding that appellant had not established that she was in the performance of duty at the time of the claimed January 21, 2014 incident as it occurred more than 30 minutes after the end of her work shift.

On August 8 and 22, 2016 appellant again requested reconsideration. She submitted additional duty status reports (Form CA-17) from Dr. Wolski dated August 26 and November 28, 2016, and medical history forms from a physician assistant. Appellant also submitted copies of

⁴ Appellant also submitted additional physical therapy notes.

⁵ Appellant underwent an FCE on August 31, 2015.

an April 17, 2015 CT scan, Dr. Wolski's June 20, 2016 report, and medical history forms previously of record.

By decision dated January 4, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the additional evidence submitted was irrelevant, and therefore did not warrant merit review. It found that the appeal request forms, medical history forms, imaging study, and Dr. Wolski's duty status reports, were irrelevant to the claim as they did not address the critical issue of performance of duty.

LEGAL PRECEDENT

To require the office to reopen a case for merit review under section 8128(a) of FECA,⁶ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that 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.⁷ 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.⁸

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁹ Appellant need only submit relevant, pertinent new evidence not previously considered by OWCP.¹⁰ 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.¹¹

ANALYSIS

The Board finds that OWCP appropriately denied reconsideration. The critical issue in the July 29, 2016 merit decision was whether appellant had established that she was in the performance of duty at the time she fell on January 21, 2014. To be relevant, the evidence submitted on reconsideration must address that specific issue.

In support of her reconsideration request, appellant submitted additional duty status CA-17 form from Dr. Wolski dated August 26 and November 28, 2016, medical history forms from a physician assistant, and duplicate copies of reports and an imaging study previously of record.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ *See supra* note 7. *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹¹ *Annette Louise*, 54 ECAB 783 (2003).

None of this evidence addresses the critical issue of whether appellant was in the performance of duty when she fell at 5:00 p.m. on January 21, 2014. As these documents are irrelevant to establishing whether appellant was in the performance of duty, they do not comprise a basis for reopening the case.¹² Additionally, evidence which is duplicative in nature is insufficient to warrant reopening a claim for merit review.¹³ The duplicate copies of medical forms and reports previously of record are therefore insufficient to warrant consideration on the merit.

A claimant may be entitled to a merit review by submitting pertinent 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, appellant contends that she was in the performance of duty when she fell, as she was required to stay at work until 4:45 p.m. to provide responsible care to the ill veterans in her charge. This argument pertains to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

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

¹² *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹³ *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 4, 2017 is affirmed.

Issued: September 18, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board