United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 17-1666**
	)	**Issued: August 21, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 28, 2017 appellant, through counsel, filed a timely appeal from a June 1, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated June 24, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On May 30, 2015 appellant, then a 49-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she twisted her left ankle while at work on May 26, 2015. She indicated that she was "[unsure]" as to the cause of injury. The employing establishment controverted appellant's claim, noting that she had originally stated that her injury occurred at home. It also noted that she told her supervisor on May 27, 2015 that it was an old injury.[3]

On May 27, 2015 appellant was treated in the employing establishment's personnel health unit. Florencio E. Marquinez, a physician assistant, reported that appellant twisted her left ankle the prior day at 10:30 a.m. in the hallway of the progressive care unit (PCU). Appellant did not recall encountering a wet floor or obstacle. Although she currently reported a pain level of seven, at the time of injury it did not feel bad, and she did not seek any treatment. Following her injury, appellant had taken 600 mg of Motrin and had soaked her foot in Epsom salt. Mr. Marquinez also reported that she did not recall any past injury to her left ankle. On examination, he noted full range of motion, no ecchymosis, mild edema, and tenderness of the left lateral malleolus peroneus longus. Mr. Marquinez diagnosed left ankle sprain and explained that given the mechanism of injury, history, and objective findings appellant's diagnosis was causally related to the workplace injury.[4] Appellant was referred for an ankle air cast. Mr. Marquinez also provided limited-duty work restrictions through June 3, 2015, which included no prolonged walking and no running or jumping.

The employing establishment could not accommodate appellant's work restrictions, and therefore, she received continuation of pay (COP) beginning May 27, 2015.

Appellant returned to the personnel health unit on June 1, 2015. A left ankle x-ray taken that day revealed no evidence of acute fracture/dislocation. Mr. Marquinez diagnosed healing left ankle sprain/calcaneal spur. He also adjusted appellant's air cast and extended her limited-duty work restrictions through June 15, 2015.

On June 2, 2015 Dr. Michael B. Canales, a podiatrist, examined appellant and diagnosed grade 2 ankle sprain. Dr. Canales noted that she reported having sprained her ankle last week while at work. He placed appellant in a pneumatic fracture boot and advised her to refrain from all work for two full weeks beginning June 3, 2015. Dr. Canales also completed an attending physician's report (Form CA-20) on June 4, 2015, which included a diagnosis of left ankle sprain with a May 26, 2015 date of injury. On the form report, he indicated that appellant's injury was

[3] The Form CA-1 was signed by G.M., a nurse manager.

[4] The May 27, 2015 treatment notes were acknowledged and electronically countersigned by Dr. Daniel J. Brustein, a Board-certified internist.

caused or aggravated by an employment activity, but did not elaborate or identify a specific history of injury. Dr. Canales reiterated that she was totally disabled from work through June 15, 2015.

The employing establishment submitted a June 3, 2018 e-mail from one of appellant's colleagues, M.B., who indicated that appellant told her she hurt her foot/ankle at home. Appellant reportedly stated that she twisted it while walking. M.B. indicated that appellant made the statement on approximately May 27, 2015.

In a June 4, 2015 e-mail, appellant's supervisor, G.M., indicated that at approximately 11:30 a.m. on May 27, 2015 she noticed that appellant had a slight limp and asked her why she was limping. According to G.M., appellant replied "I twisted my ankle when I was home." She then sent appellant to the personnel health unit to determine whether she could continue to work and while she was there, appellant proceeded to tell the healthcare provider(s) that she hurt her ankle at work. G.M. further stated that appellant never informed her that she was injured at work until she questioned appellant upon returning to work on either June 1 or 2, 2015.

In a June 10, 2015 claim development letter, OWCP advised appellant that the evidence received to date was insufficient to establish her claim. First, it noted that the evidence was insufficient to establish that she actually experienced the May 26, 2015 incident as alleged. OWCP attached a factual questionnaire for appellant's completion and specifically requested that appellant respond to G.M.'s allegation that appellant advised her on May 27, 2015 that she twisted her ankle at home. OWCP also indicated that the evidence submitted was insufficient to establish that appellant was injured in the performance of duty. Lastly, it advised her to submit a narrative medical report from a qualified physician explaining how the diagnosed condition was employment related. OWCP afforded appellant 30 days to submit the requested factual and medical evidence.

OWCP subsequently received additional treatment notes from appellant's podiatrist. Dr. Canales recommended physical therapy for her left ankle sprain and he extended her period of temporary total disability through June 29, 2015, at which time he released her to return to full-time, modified duty. In a June 29, 2016 follow-up report, he diagnosed rupture of the anterior talofibular ligament and calcaneal fibular ligament. Dr. Canales also diagnosed possible nondisplaced fibular fracture. He recommended a magnetic resonance imaging (MRI) scan and continued light-duty work until the MRI scan was obtained and evaluated.

OWCP did not receive a response to its June 10, 2015 factual questionnaire within the time allotted.

By decision dated July 17, 2015, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that the employment incident occurred, as alleged. It noted that on her Form CA-1 she expressed uncertainty as to the cause of her injury and that she had failed to respond to the provided factual questionnaire. Consequently, OWCP found that appellant failed to establish that she sustained an injury as defined under FECA.

On July 28, 2015 counsel timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 15, 2016. At the hearing, appellant testified that at approximately 10:30 a.m. on May 26, 2015, she was walking in the

hallway at work with an electrocardiogram (EKG) machine when she twisted her left ankle. She did not immediately report her injury because the pain was not that severe and she believed that her ankle would be alright. Appellant continued working, but when she went home that evening her ankle swelled up a lot. She further stated that she reported her injury to G.M. when she returned to work the following day, May 27, 2015. Appellant denied telling G.M. that she had been injured at home. As to why she wrote "[unsure]" on her Form CA-1 regarding the cause of injury, appellant explained that she was unfamiliar with that particular form and asked a coworker for assistance. She also provided an April 15, 2016 post-hearing statement reiterating how she injured her left ankle at work on May 26, 2015. Appellant also described her medical treatment beginning May 27, 2015, which included an October 29, 2015 left ankle surgical procedure.

OWCP also received a May 26, 2015 report of contact and appellant's August 5, 2015 response to its factual questionnaire. In both documents, appellant similarly stated that she was in the PCU hallway walking to a patient room with a portable EKG machine when she twisted her left ankle. In her response to the factual questionnaire, she indicated that there were no witnesses to the incident. Appellant further indicated that the next day, May 27, 2015, she told her supervisor, G.M., that she twisted her ankle in PCU while going to a patient room to perform an EKG. She then went to the personnel health unit where she was treated by Mr. Marquinez.

OWCP received additional medical records, including follow-up treatment records from the employing establishment's personnel health unit, as well as diagnostic studies and additional progress notes from appellant's podiatrist, Dr. Canales. On October 29, 2015 Dr. Canales performed a left ankle arthroscopy with Brostrom lateral ankle stabilization. Appellant's postoperative diagnosis was ruptured anterior talofibular ligament.

Appellant returned to work on January 28, 2016. In a March 7, 2016 report, Dr. Canales indicated that she should continue with the same work restrictions for an additional two months. Appellant's restrictions included that she work in a seated position, with no more than 30 minutes of standing in an 8-hour shift.

By decision dated June 24, 2016, OWCP's hearing representative affirmed the June 17, 2015 decision. He explained that the inconsistencies in the factual evidence had not been resolved. The hearing representative noted that contemporaneous statements from appellant's supervisor and a coworker indicated that she initially reported having injured her foot/ankle at home. This evidence, coupled with appellant's reported uncertainty about the cause of injury as noted on her Form CA-1 continued to cast doubt on her claim to have been injured at work on May 26, 2015. The hearing representative further noted that while she attempted to refute statements made by coworkers, she had not produced any convincing evidence, such as her own witness statements, to corroborate that her account was accurate.

On December 5, 2016 counsel requested reconsideration and submitted additional factual and medical evidence.

In an undated statement, S.B., one of appellant's coworkers in the PCU, indicated that she remembered the day of the injury, "May 29, 2015," which was a very busy shift. Appellant told her it felt like she had twisted her left ankle while walking to do an EKG. S.B. indicated that she had advised appellant to go to the emergency room, but appellant stated that she would try and

walk on it. She also noted that appellant continued that day and worked through the pain because it was very busy. The following day when she saw appellant at work, S.B. noted that appellant's ankle had swollen and appellant told her she had been putting ice on it. Appellant stated that her ankle was feeling a little better, but S.B. noted that appellant was limping. Another nurse suggested that appellant use a wrap on her ankle, which she did and it appeared to make it better.

Another nurse, A.W., provided an undated statement indicating that appellant went to the personnel health unit on May 27, 2015 to get her ankle checked out. She also stated that on May 30, 2015 she helped appellant file for a work-related injury on the computer. Appellant reportedly asked several other people for assistance with filing her claim, but no one else helped her. A.W. indicated that, at the time, she and appellant were unsure it would become this serious of an injury.

In a July 27, 2016 statement, J.C., a registered nurse, noted that on May 26, 2015 she observed appellant at work "walking with difficulty." She also indicated that appellant complained of pain in her ankle, and as the day progressed she continued to complain about her ankle pain. J.C. observed that appellant's ankle was swollen, and indicated that she helped her with a bandage. She further stated that she and other coworkers advised appellant to see her physician or go to the emergency room. Appellant told J.C. that she would go see a physician at personnel health the next day, May 27, 2015.

In a July 29, 2016 statement, R.W., appellant's coworker, noted that appellant injured her ankle last year, requiring surgery. R.W. indicated that the next day at work appellant spoke with her coworkers concerning the incident and noted that her ankle was swollen and she could barely bear weight on it. R.W. further stated that over the course of time appellant's ankle progressively worsened and she could hardly walk. Appellant continued to try to work on her ankle and unfortunately she had to have surgery.

Counsel also resubmitted appellant's previous response to OWCP's June 10, 2015 factual development questionnaire.

In a September 9, 2016 report, Dr. Canales noted that appellant had been in his care after sustaining a work-related injury to her left ankle that required operative intervention for repair of her lateral collateral ligaments. He explained that she injured herself on the job while walking and carrying a piece of equipment. This resulted in an inversion ankle sprain and eventual need for surgical intervention. Dr. Canales noted that, after surgery and exhausting physical therapy, appellant had progressed well.

By decision dated June 1, 2017, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was cumulative, repetitious, and insufficient to warrant review of its prior decision. It explained that the evidence was cumulative, and thus, substantially similar to evidence or documentation already contained in the case file and previously considered. OWCP specifically noted that the statements from her coworkers and physician loosely discussed the after effects of the claimed injury. It explained that the statements failed to identify the same date of injury as reported by appellant and did not indicate that they directly witnessed the claimed workplace events of May 26, 2015. OWCP found that the statements did not establish the factual

basis of appellant's claim as they did not support that a workplace injury occurred on May 26, 2015, as alleged.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[5] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[6] One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.[7] A timely application for reconsideration, including all supporting documents, must set forth arguments and contain 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 new evidence not previously considered by OWCP.[8] 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.[9]

ANALYSIS

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

Counsel filed a timely request for reconsideration on December 5, 2016 and provided newly submitted factual and medical evidence. OWCP previously denied appellant's traumatic injury claim because she failed to establish that the claimed May 26, 2015 employment incident occurred, as alleged.

By its decision dated June 1, 2017, OWCP denied further merit review finding that the newly submitted evidence was cumulative, and thus, substantially similar to evidence previously considered. Specifically, it found that the various statements from appellant's coworkers did not support that a workplace injury occurred on May 26, 2015, as alleged.

OWCP previously denied appellant's claim based primarily on the representations by her supervisor, G.M., and a coworker, M.B., that she initially reported having injured herself at home.

[5] 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).

[6] 20 C.F.R. § 10.607.

[7] *Id.* § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the OWCP decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[8] *Id*. at § 10.606(b)(3).

[9] *Id*. at § 10.608(a), (b).

Appellant refuted these assertions, but the hearing representative was unpersuaded noting that appellant had not produced any convincing evidence, such as her own witness statements, to corroborate that her account was accurate. She previously indicated that no one witnessed her twist her ankle while walking in the PCU hallway on May 26, 2015 and neither G.M. nor M.B. reported having observed appellant's gait at work on May 26, 2015.

On reconsideration counsel submitted a July 27, 2016 statement from J.C., a registered nurse, who indicated that on May 26, 2015 she observed appellant at work "walking with difficulty." She also indicated that appellant complained of pain in her ankle, and as the day progressed she continued to complain about her ankle pain. J.C. observed that appellant's ankle was swollen, and indicated that she helped her with a bandage. She further stated that she and other coworkers advised appellant to see her physician or go to the emergency room. Appellant told her that J.C. would go see a physician at personnel health the next day, May 27, 2015.

Although J.C. did not witness the alleged May 26, 2015 employment incident, her reported observations of appellant on the date in question lend support to appellant's claimed left ankle injury. The Board finds that OWCP improperly refused to reopen appellant's case for further review of the merits, as the evidence submitted by her in support of her December 5, 2016 reconsideration request is relevant and pertinent new evidence not previously considered.[10] Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge her burden of proof.[11] If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[12]

The Board finds that the new witness statements and medical report from Dr. Canales constitute relevant and pertinent new evidence not previously considered by OWCP. Therefore, they are sufficient to require further review of the case on its merits. The case shall be remanded to OWCP for consideration of the witness statements, together with the previously submitted evidence of record, and a decision on the merits as to whether appellant sustained an injury in the performance of duty on or about May 26, 2015.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

[10] *Id.* at § 10.606(b)(2).

[11] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[12] *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: August 21, 2018
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