

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 March 23, 2016 appellant, then a 51-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on March 18, 2016, she injured her right shoulder, right lower back, and right ankle/foot. She attributed her injury to an overcrowded room, which reportedly included a patient's electric wheelchair, bed, reclining chair, and intravenous (IV) poles. On the reverse side of the Form CA-1, the employing establishment indicated that appellant was injured in the performance of duty and that she had been seen by a nurse at its facility on March 18, 2016.

A March 23, 2016 note from Barry J. Wanninger, a certified physician assistant, indicated that appellant was treated earlier that day in the emergency department at Mercy Hospital of Fairfield. He advised that appellant could return to work on March 26, 2016. The accompanying emergency department treatment notes indicated that appellant worked as a nurse and reported having tripped and fell five days ago. Appellant stated that she fell backwards and believed she tripped over an IV pole. Right shoulder and right ankle x-rays obtained on March 23, 2016 revealed no evidence of an acute injury. Mr. Wanninger placed appellant in an air cast, prescribed a muscle relaxant (Robaxin), and discharged her with a clinical impression of right shoulder and right ankle pain.

A May 5, 2016 right ankle magnetic resonance imaging (MRI) scan revealed, *inter alia*, tendinopathy, tenosynovitis, degenerative changes, and a thickened anterior talofibular ligament, consistent with a prior sprain. Appellant was reportedly injured in March 2016 when an IV pole fell on her right ankle.

In an October 4, 2016 development letter, OWCP informed appellant of the evidence necessary to establish her claim and requested that she submit additional factual and medical evidence. It noted that she had not clearly specified how her injury occurred and, as such, the evidence of record was insufficient to establish that she actually experienced the incident alleged to have caused her injury. OWCP requested that appellant explain how the "crowded room" caused her March 18, 2016 alleged employment injury. It further noted that it had not received sufficient medical evidence to support her claim. OWCP afforded appellant 30 days to submit additional evidence and to respond to its inquiries. It did not receive additional evidence within the allotted time.

By decision dated November 7, 2016, OWCP denied appellant's claim, finding that she had not submitted a statement clearly explaining how she was injured on March 18, 2016. It also noted that she had not submitted medical evidence containing a diagnosis in connection with her alleged employment injury.

OWCP subsequently received a September 7, 2016 physical therapy treatment note with a diagnosis of right posterior tibialis tendinitis.³

On October 3, 2017 counsel timely requested reconsideration of OWCP's November 7, 2016 decision. He also submitted various treatment records from appellant's podiatrists, Dr. Cynthia Miller and Dr. Michael C. Doran, which covered the period April 17, 2013 through March 11, 2014, January 5 through February 3, 2015, and April 19, 2016 through June 1, 2017.

Dr. Miller began treating appellant on April 17, 2013 for a right ankle injury that reportedly occurred three weeks prior when appellant fell off a treadmill. Appellant followed up with Dr. Miller regularly through March 11, 2014.

In a report dated January 5, 2015, Dr. Miller examined appellant for complaints of bilateral heel pain. She diagnosed calcaneal spur, plantar fascial fibromatosis, enthesopathy, and bursitis. Appellant continued to follow up with Dr. Miller through February 3, 2015.

In a report dated April 19, 2016, Dr. Miller examined appellant for complaints of right foot pain of a "few weeks" duration. Appellant told Dr. Miller that, while at work, she tripped over some cords and fell. She noted that when she fell, "everything came on top of her." Dr. Miller diagnosed foot and ankle arthritis, edema, tendon rupture, posterior tibial tendinitis, and plantar fasciitis. Appellant continued to follow up with Dr. Miller through June 1, 2017.

By decision dated February 15, 2018, OWCP denied appellant's request for reconsideration without reviewing the merits of her claim. It explained that the medical evidence submitted on reconsideration was not relevant to the issue of whether appellant established that the March 18, 2016 employment incident occurred 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.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or

³ The physical therapy treatment note was accompanied by a request for authorization for medical services provided on September 7, 2016.

⁴ 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/her] own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 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.

interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ 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.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

In his correspondence received on October 3, 2017, counsel noted that he was submitting various medical records on reconsideration. However, he did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).⁹

Counsel also failed to submit relevant and pertinent new evidence with the October 3, 2017 request for reconsideration. As noted, he submitted various medical records from appellant's podiatrists, some of which predated the alleged March 18, 2016 employment incident. The underlying issue in this case is whether appellant established that the employment incident of March 18, 2016 occurred as alleged. A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not do so in this case.¹⁰ While Dr. Miller's April 19, 2016 treatment notes contained a history of injury as communicated by appellant, she has yet to provide OWCP her own personal statement or any witness statements regarding the circumstances of the alleged March 18, 2016 employment incident.¹¹ The Board has held that the submission of evidence that does not address the particular issue in the case does not constitute a basis for reopening the claim.¹² Because appellant did not provide relevant and pertinent new evidence she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹³ Accordingly, OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

⁹ 20 C.F.R. § 10.606(b)(3)(i) and (ii).

¹⁰ *Id.* at § 10.606(b)(3)(iii).

¹¹ *See B.P.*, Docket No. 16-1549 (issued January 18, 2017).

¹² *See David J. McDonald*, 50 ECAB 185 (1998).

¹³ 20 C.F.R. § 10.606(b)(3)(iii).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2019
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