

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

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| <b>L.M., Appellant</b>                   | ) |                                 |
|  | ) |                                 |
| <b>and</b>                               | ) | <b>Docket No. 20-1185</b>       |
|  | ) | <b>Issued: January 13, 2021</b> |
| <b>U.S. POSTAL SERVICE, POST OFFICE,</b> | ) |                                 |
| <b>Sausalito, CA, Employer</b>           | ) |                                 |
|  | ) |                                 |

*Appearances:*  
*Tami S. Seastrand*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On May 20, 2020 appellant, through her representative, filed a timely appeal from a November 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 9,

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<sup>1</sup> 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.

2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### **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 November 30, 2018 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she stepped out of her mail truck and slipped and twisted her left ankle while in the performance of duty. She stopped work on November 30, 2018.

In a separate statement of even date, appellant repeated the history of injury and noted that the ground was wet and full of leaves. She continued her mail route until the pain increased.

On November 30, 2018 appellant was treated by Marissa Salinas, a physician assistant, for a ground-level fall in which she twisted her left ankle. An x-ray of the left ankle revealed no acute bone abnormality. Ms. Salinas diagnosed sprain of the left ankle, unspecified ligament, initial encounter.

On November 30, 2018 the employing establishment executed an authorization for examination and/or treatment (Form CA-16). The Form CA-16 listed the date of injury as November 30, 2018 and alleged injuries to appellant's left ankle.

In a December 12, 2018 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion to substantiate the factual elements of her claim. OWCP afforded her 30 days to respond.

OWCP subsequently received a declaration of disability note dated December 4, 2018, wherein Dr. Michael D. Halperin noted appellant was injured at work. Dr. Halperin opined that she would be temporarily totally disabled from work from November 30, 2018 through February 28, 2019.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, it was asserted that oral argument should be granted because it would allow her to more completely explain the evidence and argument submitted prior to the November 22, 2019 decision. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

By decision dated January 15, 2019, OWCP denied appellant's traumatic injury claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with her accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

OWCP subsequently received a report dated December 4, 2018, wherein Dr. Halperin noted his treatment of appellant for acute left ankle and foot pain following a twisting injury on November 30, 2018. Appellant reported delivering mail on her usual route when she stepped out of her parked LLV with mail in her hands and swung her right leg out to place her right foot on the running board and then attempted to exit the vehicle placing her left foot on the ground, but stepped on what turned out to be a pine cone with her left foot and twisted her left ankle sustaining an acute injury. He noted findings of massive left lateral malleolar effusion, limited range of motion of the left foot, and reduced sensory perception to vibration, cold, and light touch. Dr. Halperin diagnosed acute left ankle sprain, chronic left ankle sprain, acute plantar fasciitis, posterior ankle impingement syndrome, acute left ankle contusion, acute exacerbation of left plantar calcaneal spur, and mild-to-moderate depression. He opined that appellant's diagnosed medical conditions were causally related to the work injury on November 30, 2018. Dr. Halperin noted that appellant worked as a mail carrier for five years, getting in and out of her vehicle dozens of times a day, walking up to eight miles a day, climbing stairs, and walking on rough terrain. He opined that the acute left foot injury was sustained during the normal course of her duties and to a reasonable medical probability the diagnoses of acute left ankle sprain, acute plantar fasciitis, and acute left ankle contusion occurred as a proximal result of her acute left ankle injury. Dr. Halperin further opined that the diagnoses of chronic left ankle sprain and acute exacerbation of left plantar calcaneal spur were the result of prior cumulative injuries sustained to the left foot during the five years employed with the agency and were work related.

In a report dated December 18, 2018, Dr. Halperin noted his examination of appellant on December 11, 2018, at which time he observed less swelling and pain over the left posterior tibial tendon and lateral malleolus. He provided a history of injury as set forth in his prior report with clinical and diagnostic findings. Dr. Halperin diagnosed contusion of the left ankle, left plantar calcaneal spur, left foot acute plantar fasciitis, left synovial/ganglion cyst, sprain of the left anterior talofibular ligament, and posterior ankle impingement. He noted that appellant had no prior history of foot pain. Dr. Halperin reiterated the mechanism of injury as noted in his December 4, 2018 report and opined that the injury was proportional to the severity of injuries imaged by the MRI scan. He noted that in the absence of reports of prior injury to the left foot and ankle, the acute injury was entirely work related and he opined that all of the diagnoses arose acutely or were exacerbations of the work-related foot traumas over the prior five years. Dr. Halperin noted that causation was a combination of acute work-related left ankle and foot injuries along with an exacerbation of previously undiagnosed more chronic foot condition associated with the normal duties of a letter carrier.

A December 12, 2018 magnetic resonance imaging (MRI) scan of the left ankle revealed mild bone marrow edema of the fifth metatarsal and distal portion of the cuboid, mild acute plantar fasciitis, and thickening of the anterior talofibular ligament.

On January 25, 2019 appellant requested reconsideration.

By decision dated January 25, 2019, OWCP's hearing representative modified the January 15, 2019 decision, finding that Dr. Halperin provided a series of valid diagnoses. The hearing representative, however, affirmed the denial of the claim, finding that the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted November 30, 2018 employment incident. OWCP further found that Dr. Halperin provided an inaccurate history of injury, noting appellant slipped on a pine cone and injured her left ankle when appellant's statement on the Form CA-1 did not mention a pine cone rather she reported that the ground was wet with leaves. Based on an incomplete factual history, it found Dr. Halperin's report lacked probative value.

Appellant submitted a December 4, 2018 report from Dr. Halperin and a February 14, 2019 report from Dr. Elmi, both previously of record.

In an undated statement, appellant confirmed that Dr. Halperin was correct when stating that she stepped on a pine cone after exiting her LLV on November 30, 2018, causing her left ankle injury. She indicated that she did not provide details of the debris on the ground in her original statement, because she was in a lot of pain, but indicated that the ground was covered with debris which consisted of pine cones, rocks, and leaves.

On February 27, 2019 appellant requested reconsideration. In support of her request, she submitted a February 14, 2019 report from Dr. Eman Elmi, a podiatrist, who treated her for a foot disability and opined that she could not return to full-duty work for six to eight weeks. Dr. Elmi provided work restrictions.

By decision dated May 9, 2019, OWCP denied modification of the January 25, 2019 decision.

On August 28, 2019 appellant requested reconsideration. In a statement dated August 28, 2019, appellant's representative asserted that she provided relevant and pertinent new evidence not previously considered by OWCP in support of her claim. He referenced a new report from Dr. Halperin and submitted four black and white photographs of her LLV, as well as pictures taken from Google Maps of the street where her injury occurred.

In an amended report dated June 4, 2019, Dr. Halperin provided an explanation of the discrepancy between appellant's wording on the Form CA-1 of slipping on wet debris causing a left ankle injury and his factual presentation, which noted she stepped on a pine cone. He cited his December 4, 2018 report and indicated that on November 30, 2018 appellant was performing her usual and customary duties as a mail carrier and van driver when she stepped out of her parked LLV and slipped on wet debris of some nature as it was a rainy day and all surfaces were wet. For purposes of causation, Dr. Halperin indicated that it did not matter whether she tripped on wet debris, wet pavement, rocks or gravel as the identical injury would have occurred under any of these circumstances. He further explained that the fact that she reported to her supervisor and on the Form CA-1 that she slipped on wet debris and five days later she acknowledged that she might have seen a pine cone next to her LLV lying on wet debris, was understandable considering the amount of pain she was in at the time of her reporting the injury to her supervisor and filling out the Form CA-1 when she mentions wet debris and not pine cone. Dr. Halperin advised that causation for the claim remained work related. He explained that appellant stepped out of her LLV

with her right leg, placing her right foot on the running board, swinging her body with her mail in her left arm as she exited the vehicle, and placed her left foot on what was expected to be the ground but turned out to be wet debris, she suddenly slipped and suffered an acute left ankle and foot injury. Dr. Halperin advised that the medical data provided in this report was a reiteration of the data that was already provided in his previous reports, but cited to his new statements which provide factual clarification with regard to the mechanism of injury. He concluded that, based on appellant's history, medical records, physical examination findings, and diagnostic imaging, her left ankle condition was industrial in nature.

By decision dated November 22, 2019, OWCP denied merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>4</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.<sup>5</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>8</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.; B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>6</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

<sup>7</sup> *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

## 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).

Along with the August 28, 2019 reconsideration request, appellant submitted Dr. Halperin's June 4, 2019 supplemental report in which he specifically responded to the deficiencies of his prior report noted by OWCP in its denial of appellant's claim. In his supplemental report, Dr. Halperin provided an explanation of the discrepancy between appellant's wording on the Form CA-1 of slipping on wet debris causing a left ankle injury and his factual recitation, which noted that she stepped on a pine cone. He indicated that on November 30, 2018 appellant was performing her usual and customary duties as a mail carrier and van driver when she stepped out of her parked LLV and slipped on wet debris of some nature as it was a rainy day and all surfaces were wet. Dr. Halperin specifically reiterated his prior opinion and provided an explanation as to the factual discrepancy relied upon by OWCP to deny appellant's claim and why that was improper. He further explained that the fact that she reported to her supervisor and on the Form CA-1 that she slipped on wet debris and then five days later she acknowledged that she might have seen a pine cone next to her LLV lying on wet debris, was understandable considering the amount of pain she was in at the time of her reporting the injury to her supervisor and filling out the Form CA-1. Dr. Halperin also provided citation to his prior rationale as to how the employment factors were sufficient to support his continued opinion that they had caused or aggravated the left ankle conditions. The Board finds that Dr. Halperin's June 4, 2019 report specifically addressed the deficiencies noted in OWCP's denial of appellant's claim and provided further explanation to cure those deficiencies. As such, the report constitutes relevant and pertinent new evidence in support of appellant's claim for a left ankle condition. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).<sup>9</sup>

The Board will therefore set aside OWCP's November 22, 2019 decision and remand the case for an appropriate merit decision on appellant's claim.

## CONCLUSION

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).<sup>10</sup>

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<sup>9</sup> See *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

<sup>10</sup> The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.<sup>11</sup>

Issued: January 13, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> On June 12, 2019 appellant filed an occupational disease claim (Form CA-2) alleging that she developed a left ankle condition on November 30, 2018 as a result of constant pressure on her feet while walking her mail route, OWCP File No. xxxxxx125. OWCP accepted for sprain of the deltoid ligament of the left ankle, plantar fascial fibromatosis, and posterior ankle impingement syndrome. On May 9, 2019 appellant filed a claim for a May 6, 2019 traumatic injury to the left ankle under OWCP File No. xxxxxx711, which was accepted for sprain of the deltoid ligament of the left ankle. Appellant claimed that her left ankle buckled while walking delivering mail. OWCP's procedures provide that cases should be administratively combined when correct adjudication depends on cross-referencing between files and when two or more injuries occur to the same part of the body. As the claims in the following OWCP files all involve appellant's left ankle, OWCP File Nos. xxxxxx711, xxxxxx125, and xxxxxx453, the Board finds that they must be administratively combined for a full and fair adjudication of appellant's present claim. This will allow OWCP to consider all relevant claim files and accompanying evidence in developing appellant's current traumatic injury claim.