

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

M.F., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY CORP
OF ENGINEERS, Washington, DC, Employer**

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**Docket No. 15-397
Issued: April 23, 2015**

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 December 10, 2014 appellant filed a timely appeal of a July 15, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because over 180 days elapsed between the most recent merit decision dated June 7, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

On appeal appellant argues that the medical evidence initially submitted was sufficient to meet her burden of proof to establish an occupational disease claim. She further argues that if it received a portion of the attachments included with her request for reconsideration, then OWCP should have received all of the attachments which were included in the same package. Appellant

¹ 5 U.S.C. § 8101 *et seq.*

noted that she had received additional medical treatment and experienced pain due to her diagnosed conditions.

FACTUAL HISTORY

On February 14, 2013 appellant, then a 40-year-old program manager, filed an occupational disease claim alleging that she developed acute otitis media, acute mastoiditis, chronic middle ear disease, and right mastoid air cells disease while working in Baghdad, Iraq. She stated that she first became aware of her condition on January 11, 2010 and first related it to her employment on January 13, 2010. Appellant stated that she lived and worked at Forward Operating Base Property in Baghdad, Iraq. She sought medical treatment at the base for severe earache and dizziness and received a diagnosis of acute otitis media serous in the right ear. Appellant stated that her physician discussed the substandard environmental hygiene. On the reverse of the form, appellant's supervisor indicated that appellant first reported her condition on January 13, 2010.

In a letter dated March 21, 2013, OWCP requested that appellant provide additional factual and medical evidence in support of her claim. Appellant submitted medical records from the employing establishment. In a note dated January 13, 2010, Dr. Kenneth West, a Board-certified internist and employing establishment physician, noted that appellant had an earache for two days with ringing and pain in both ears as well as dizziness. On January 15, 2010 Dr. West again reported that appellant's condition was an earache on the right. He found a dull tympanic membrane with an area of oval opacity, but no erythema or discharge. Dr. West diagnosed otitis media acute serous right ear.

In a note dated January 23, 2010, Dr. Paul Pasquina, a physician Board-certified in physical medicine and rehabilitation and an employing establishment physician, reported that appellant experienced right ear pressure, tinnitus and muffled sounds from the right ear. He diagnosed otitis media acute serous in the right ear. Dr. Pasquina found that there was fluid collection behind the tympanic membrane.

Appellant sought treatment on March 29, 2010 from Dr. Leslie Foster, an employing establishment physician Board-certified in physical medicine and rehabilitation, who diagnosed otitis media acute serous right ear. She reported vertigo, pain, pressure, constant ringing in the ear, and loss of hearing. On May 17, 2010 Dr. Stephen H. Cooper, a Board-certified otolaryngologist, diagnosed right ear infection beginning in January 2010.

On September 7, 2010 appellant underwent a magnetic resonance imaging scan which demonstrated fluid or thickening in the right mastoid air cells. An audiogram dated September 13, 2010 demonstrated high frequency hearing loss in the right ear and significant negative pressure on tympanometry. She also submitted a surgical report dated December 21, 2010 from Dr. Jerome D. Vener, a Board-certified otolaryngologist, indicating that appellant underwent a tympanostomy with a tube in the right ear. Appellant submitted treatment notes from Dr. Vener dated September 3 and 13 and December 17, 2010, and January 4, 2011.

On January 26, 2011 appellant reported earache on the right and headache. Dr. Ahmad Slim, a Board-certified internist and employing establishment physician, found erythematous tympanic membrane and diagnosed otitis media acute.

Appellant submitted a narrative statement and stated that she lived and worked at Forward Operating Base Property, Baghdad, Iraq from November 2009 through February 2011. She indicated that her condition developed on January 11, 2010 and that she sought medical attention on January 13, 2010. Appellant experienced severe earache and dizziness and received a diagnosis of otitis media acute serous in the right ear. She stated that the treating physician discussed the substandard living and hygiene conditions including nonpotable shower water and chronically unhygienic ablution units in her living and working quarters. Appellant stated that, in the shower units, the employing establishment posted a sign “Please do not defecate in shower.” She continued to receive medical treatment for her condition throughout her deployment. During visits to the United States, appellant sought treatment from her personal doctor. She last received medical treatment in Iraq on January 26, 2011.

By decision dated June 7, 2013, OWCP denied appellant’s occupational disease claim as the medical evidence did not provide an opinion on the causal relationship between her diagnosed ear conditions and her employment.

Appellant underwent a brain computerized tomography angiography (CAT) scan on May 30, 2013. This scan report noted right mastoid air cells that were partially opacified and mildly sclerotic.

Appellant requested reconsideration on May 29, 2014 and claimed to be submitting additional medical evidence to establish a causal relationship between her diagnosed condition and her employment. Appellant listed six documents as attachments including four new medical reports, her form request for reconsideration, and documents relating to her name change. The record contains the sixth listed attachment containing evidence of her name change. There is a single page with a copy of appellant’s driver’s license and social security card as well as an April 3, 2014 letter from the Social Security Administration (SSA). No other documents were in the record.

On June 9, 2013 OWCP informed appellant that the medical evidence listed was not received with her reconsideration request. It allowed her 15 days to submit the additional evidence. No response was received.

By decision dated July 15, 2014, OWCP denied appellant’s request for reconsideration because the request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.² Section 10.606(b)(3) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or constitutes relevant and pertinent new evidence not previously considered by

² 5 U.S.C. §§ 8101-8193, 8128(a).

OWCP.³ Section 10.608(b) of OWCP's regulations provide that, when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁴

ANALYSIS

Appellant's May 29, 2014 request for reconsideration indicated that she was submitting additional medical evidence and that this evidence addressed the deficiency of her claim previously identified by OWCP, the lack of medical evidence establishing a causal relationship between her diagnosed condition and her employment. She provided a list of attachments including four new medical reports as well as evidence of a name change from the SSA.

Appellant's reconsideration request does not show that OWCP erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered by OWCP. Instead the reconsideration request asserted that evidence establishing appellant's claim was attached. The Board finds that appellant did not submit pertinent new and relevant evidence with her reconsideration request. The underlying issue of her occupational disease claim is medical in nature and should be addressed by the submission of pertinent new medical evidence. However, no pertinent new medical evidence was submitted with the reconsideration request. The test results of appellant's CAT scan received approximately one year prior to her reconsideration request do not address the issue of whether appellant's condition was causally related to her employment. They are, therefore, not relevant to the issue for which OWCP denied her claim.

OWCP allowed appellant an additional 15-day period to submit the remainder of the evidence which she stated was attached to her reconsideration request. Appellant did not do so. OWCP was not required to provide her with this time as supporting documents should be submitted with the reconsideration request.⁵ Although appellant argued on appeal that all of the evidence accompanying her reconsideration request should have reached OWCP, as the record before the Board does not contain the evidence she asserted she submitted, there is no basis to require OWCP to reopen her claim for review of the merits. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision.⁶ The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant's May 29, 2014 request for reconsideration did not contain relevant and pertinent new evidence not previously considered by OWCP as alleged and that OWCP therefore properly declined to reopen appellant's claim for consideration of the merits.

³ 20 C.F.R. § 10.606.

⁴ *Id.* at § 10.608.

⁵ *J.M.*, Docket No. 09-218 (issued July 24, 2009).

⁶ 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 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