

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

D.S., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Orlando, FL,
Employer**

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**Docket No. 11-1498
Issued: February 15, 2012**

Appearances:
Joanne M. Prescott, Esq., for the appellant
No appearance, for the Director

Oral Argument January 10, 2012

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 10, 2011 appellant, through her representative, filed a timely appeal from the December 15, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.²

ISSUE

The issue is whether OWCP properly denied appellant's November 4, 2010 request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant does not appeal OWCP's May 26, 2011 nonmerit decision denying as untimely her March 18, 2011 request for reconsideration.

FACTUAL HISTORY

On June 27, 2008 appellant, a 53-year-old clerk, filed a traumatic injury claim for compensation/continuation of pay alleging that she sustained an injury in the performance of duty on January 26, 2003. She indicated that, during air travel to Norman, Oklahoma, she was exposed to irritating jet fumes and perfume, which had caused or aggravated her asthma, anxiety, panic attacks, pneumonia, sinus infection and stress. Appellant referred to OWCP File No. xxxxxx456 (date of injury May 23, 2002) and indicated that she first filed a Form CA-2a, was then advised to file a Form CA-2, then advised to file a Form CA-2a, and now was filing a Form CA-1 as instructed.³ On July 20, 2009 she offered a detailed description of what happened on January 26 and February 7, 2003.

In a merit decision dated November 12, 2009, OWCP denied appellant's injury claim as untimely. It found that she alleged an injury on January 26, 2003 but did not file her claim until June 27, 2008. OWCP acknowledged that appellant had filed a May 19, 2007 Form CA-2a under another file number that referenced an event on January 26, 2003, but that was still more than three years after the fact. Further, there was no evidence that the employing establishment received notice of the injury or had actual knowledge of a possible work injury within 30 days of January 26, 2003. In fact, OWCP noted that statements from the employing establishment were to the contrary. As appellant's representative alleged that events taking place from January 26 to February 7, 2003 and in May 2003 left appellant totally disabled, OWCP found that appellant should have been aware at that time of the relationship between the alleged exposure and her medical condition.

On November 4, 2010 appellant requested reconsideration.⁴ Her representative argued that the attachments, including a chronology, provided evidence of timely notice. Counsel alleged that appellant told her supervisor on or about February 10, 2003 that she sustained a worsening of her condition during training and would not be able to return to work. She alleged that the employing establishment health unit received medical notes dated February 10 and March 10, 2003 restricting appellant from work, and that appellant put this notice in writing on May 22, 2003 when she completed a PS Form 0-13 (routing slip) notifying the employing establishment that she was suffering from postnasal drip from a work environment exposure occurring on May 21, 2003. Counsel pointed to a manager's statement on appellant's Form CA-2a (see note 3) that she was not aware of any accommodation that could be made due to appellant's on-the-job illness. She concluded that notice was timely for the January 26, 2003 "injury/recurrence" as well as the May 21, 2003 "injury/recurrence." In addition, appellant filed a June 3, 2003 Form CA-7 indicating total disability from May 23, 2002 to January 25, 2003 and

³ The record shows a Form CA-2a dated June 9, 2003 alleging a recurrence of disability on May 23, 2002 causally related to an injury on December 3, 1996. On the claim form, appellant explained that her recurrence began in March 2002 due to turbulent air flow in the steward's booth and continued through May 2002 when air handlers were down and temperatures soared due to heat and humidity: "Fans were utilized. Dust exposure." She described her injuries as asthmatic bronchitis, chronic sinusitis, reactive airways disease, gastroesophageal reflux disease, panic attacks, anxiety, chest tightness, shortness of breath, nausea, unbalanced, light headed and depression.

⁴ Appellant mailed her October 25, 2010 appeal request form on November 4, 2010. See 20 C.F.R. § 10.607(a) (if submitted by mail, the application for reconsideration will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed).

from February 8 to May 18, 2003; partial disability from May 21 to 28, 2003; and total disability from May 29, 2003 and continuing. She argued that it took a review of all appellant's claims to appreciate her medical condition, her persistent attempts to return to work and her diligent effort to follow the directions provided by prior claims examiners, only to be given conflicting direction on how to handle her claim. Specifically, appellant was told that her claim for the January 26, 2003 injury/recurrence should be filed as a new claim and not a recurrence of a prior claim, despite the fact that each incident was the direct result of her compensable medical condition.

Counsel resubmitted appellant's statement of what happened during training, the nurses' log for medical attention sought during training, a letter from American Airlines to establish that the incident occurred as alleged and medical opinions relating appellant's medical conditions to the employment incident. She alleged that this evidence made clear that it was a combination of prior compensable conditions from the May 23, 2002 date of injury and the employment-related events taking place from January 26 to February 7, 2003 and May 21 to 28, 2003 that left appellant totally disabled and in need of continuing medical treatment. Counsel alleged that the chronology showed that all of appellant's exacerbations throughout her tenure at the employing establishment were the result of prior accepted claims.

On December 15, 2010 OWCP denied appellant's request for reconsideration, finding that it did not warrant a merit review of her case. It noted no evidence confirming her allegation that on February 10, 2003 she told her supervisor that she had sustained a worsening of her condition during training. OWCP noted that medical notes on February 10 and March 10, 2003 did not mention that appellant was injured on January 26, 2003, as alleged. Instead, the written notice she provided pertained to an injury on May 21, 2003, which was unrelated to the current claim. OWCP found that the evidence submitted did not relate to whether appellant filed her claim within three years of the date of injury or whether the immediate supervisor had actual knowledge within 30 days of the date of injury.

Appellant's representative argues that the issue to be decided on appeal is whether her client's notice of injury/claim for compensation was timely. She argues that appellant's conversation with the supervisor on February 10, 2003 establishes timeliness; that submission of a PS Form 0-13 on May 22, 2003 supports continued notice; that appellant initially filed her claim on June 3, 2003 as a Form CA-7 (for continuation of disability from the 1996 claim, which was later converted to the 2002 claim); and that OWCP incorrectly advised appellant to file new traumatic injury claims each time she unsuccessfully attempted to return to work. Counsel states that appellant's claim is timely because appellant contends that her ongoing condition and need for treatment and disability are related to the 1996 and 2002 claims. She argues that appellant submitted new evidence, including CA-7 forms and a January 18, 2008 medical report, which were not previously considered.

Appellant's representative further argues that appellant would not have been approved for "limited duty" if she had not been incapacitated due to a known work-related injury. She argues that a statement from supervisors during the training class in Norman confirmed that appellant has a lot of stress and was suffering from severe anxiety, proof that her supervisors had actual knowledge of the incident and injuries sustained. Counsel argues that, even if OWCP denies any

specific evidence of knowledge, where the facts surrounding an incident are not inconsistent with fact of injury, this does not preclude the recurrence of injury.

Appellant's representative argues that the time for filing a claim did not begin to run until May 2003, when doctors definitively confirmed that the exacerbations of appellant's asthma and anxiety disorder were work related. This, she argues, was when appellant first became aware of the causal relationship of her injury to employment. Thus, completion of the PS Form 0-13 on May 22, 2003 established actual notice by the supervisor of her injury within 30 days.

Continuing, appellant's representative argues that the filing of a Form CA-7 on June 3, 2003 established timely notice of injury. Although the form listed the 1996 claim, appellant filed it upon her return from Norman to cover periods including February 8, 2003 and forward. Counsel argues that the form of the claim is not as important as its contents, in light of the chronology of events showing all her claims are related. Therefore, the CA-7 forms that appellant filed on the 1996 claim requesting payment from February 8, 2003 forward act as notice that she was, in fact, contending that she was suffering a work-related injury, and the mere fact that she filed these forms or listed the 1996 claim or did not file a Form CA-1 or CA-2 "should not dispel the notion that the employer had knowledge of her work-related disability."

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁵ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and 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.⁶

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁷ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608.

ANALYSIS

Appellant's representative argues that the issue to be decided on appeal is whether her client's notice of injury/claim for compensation was timely. Respectfully, the Board has no jurisdiction to decide that issue. That issue goes to the merits of appellant's case. OWCP issued a final decision on that issue on November 12, 2009, and as appellant did not appeal that decision to the Board within 180 days, the Board currently has no jurisdiction to review it or to rule on the timeliness of appellant's June 27, 2008 injury claim.⁹

Appellant appeals OWCP's December 15, 2010 nonmerit decision denying her request for reconsideration. The only issue before the Board, therefore, is whether OWCP properly denied her November 4, 2010 request for reconsideration. Appellant timely sent her November 4, 2010 request within one calendar year of OWCP's November 12, 2009 decision. The question thus becomes whether the request met at least one of the three standards for obtaining a merit review of her case.

The Board finds that appellant's November 4, 2010 request for reconsideration did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). It did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant's representative argued that OWCP severely prejudiced appellant by keeping her claims separate. She argued that it took a review of all the claims to appreciate appellant's medical condition, her persistent attempts to return to work and her diligent effort to follow the directions provided by prior claims examiners. Counsel stated that OWCP gave conflicting direction on how to handle the claim, but she did not show that OWCP erroneously applied or interpreted a specific statute or rule or procedure or case precedent in denying appellant's June 27, 2008 injury claim as untimely.

Appellant's November 4, 2010 request for reconsideration did not advance a relevant legal argument not previously considered by OWCP. The issue OWCP decided on November 12, 2009 was specific. Appellant filed her June 27, 2008 injury claim more than three years after the January 26, 2003 date of injury. The relevant issue, therefore, was whether the immediate superior had knowledge of a January 26, 2003 work injury within 30 days, or whether written notice of the January 26, 2003 injury, as specified in section 8119, was given within 30 days.¹⁰ OWCP previously considered this issue, of course, when it found on November 12, 2009 that the evidence was insufficient to have reasonably placed the employer on notice of a January 26, 2003 work injury within 30 days of the date of injury, and when it found that appellant should have been aware at that time of the relationship between the alleged exposure and her medical condition.

⁹ *Id.* at § 501.3(e).

¹⁰ 5 U.S.C. § 8122. Section 8119 provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day, and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.

Whether an incident occurred as alleged on January 26, 2003, whether the medical evidence supported that the incident caused or aggravated a diagnosed medical condition, and whether that injury required medical treatment or caused disability for work are not relevant to the grounds upon which OWCP denied appellant's claim on November 12, 2009. Arguments relating to treatment or disability or work restrictions associated with previously accepted injuries or with exposures not occurring on January 26, 2003 are irrelevant. Arguments relating to the interconnection of claims or to the progression of the initial compensable condition or the continuation of disability beginning May 23, 2002 are also irrelevant. The notice required to establish the timeliness of appellant's June 27, 2008 injury claim must be such as to put her immediate supervisor reasonably on notice, within 30 days of the date of injury, that she sustained an injury in the performance of duty when she flew to Norman for training on January 26, 2003. That is the touchstone of relevancy for appellant's November 4, 2010 request for reconsideration.

Appellant's representative did argue that appellant told her supervisor on February 10, 2003 that she sustained a worsening of her condition during training and would not be able to return to work. If appellant had implicated her exposure to jet fumes or a passenger's perfume or some other factor of employment, as opposed to some coincidental worsening, this would be relevant, but as OWCP previously considered, there was no evidence of notice.

Appellant's November 4, 2010 request for reconsideration did not contain relevant and pertinent new evidence not previously considered by OWCP. Pulmonary function studies, computerized tomography scans of the chest, and narrative medical reports from appellant's pulmonologist and psychiatrist and an OWCP referral physician are not relevant and pertinent to whether the immediate supervisor had knowledge of the January 26, 2003 injury within 30 days. Norman health unit records showing that appellant visited the clinic on January 27, 2003 for cholesterol testing information, and again on February 3, 4 and 5, 2003 for blood pressure checks, and again on February 6, 2003 for headache make no reference to work injury -- all are marked nonoccupational visits -- nor do they mention an employment injury on January 26, 2003 when appellant flew to Norman for training. Appellant's May 2003 work status calendar and her May 21, 2003 notification of absence do not relate to a January 26, 2003 work injury. The February 7, 2003 notice of rating and airline documents showing a two-hour delay on a flight from Oklahoma City on February 7, 2003, are not relevant to a January 26, 2003 work injury. Appellant's July 8, 2003 statement explaining how her medical conditions affected her activities, for purposes of a decision on possible reasonable accommodation or reassignment within her restrictions, is irrelevant as well. It does not mention a January 26, 2003 work injury, and it comes more than 30 days after the alleged injury. A July 25, 2004 statement from a classmate in Norman provides no evidence that appellant's immediate supervisor had knowledge of a January 26, 2003 work injury within 30 days, nor does a July 30, 2004 statement from a therapist confirming that appellant called her from Norman. Evidence that does not address the particular issue involved constitutes no basis for reopening a case.¹¹

¹¹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

Appellant's representative indicated that she was resubmitting some of this evidence to support the request for reconsideration. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.¹²

Appellant's representative submitted a detailed chronology to show that all of appellant's exacerbations were the result of prior accepted claims, but as the Board has tried to explain, that is not really the issue. The issue is simply whether her immediate supervisor had knowledge of a January 26, 2003 work injury within 30 days. Helpful as it is in showing how events unfolded, the chronology has no real bearing on the issue raised by OWCP's November 12, 2009 decision.

The Board has carefully reviewed appellant's November 4, 2010 request for reconsideration, including the chronology and attachments, and finds that it did not meet at least one of the three standards for obtaining a merit review of her case. The Board finds, therefore, that OWCP properly denied appellant's request pursuant to 20 C.F.R. § 10.608. The Board will affirm OWCP's December 15, 2010 decision.

At oral argument, appellant's representative provided the Board much helpful context. She explained how OWCP had overlooked the fact that appellant's several cases all involved the same problem and how appellant initially attempted to claim disability compensation under the accepted 1996 injury claim.¹³ The Board appreciates the complexities presented by the multiple injuries and various claim forms, but OWCP's November 12, 2009 decision distilled the issue in this case to whether the immediate supervisor had a particular knowledge within a particular time frame. The Board finds that appellant's November 4, 2010 request for reconsideration did not warrant a reopening of her case for a review of that decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's November 4, 2010 request for reconsideration.

¹² *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

¹³ The record contains no Form CA-7 filed on June 3, 2007. If the form simply listed continuing disability since May 23, 2002, save for the period of appellant's training in Norman and a brief period of partial disability in May 2003, it is unclear how it would put the immediate supervisor on notice of a work injury on January 26, 2003.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board