

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

W.P., claiming as widow of E.P., Appellant

and

**U.S. CUSTOMS SERVICE, Elk Grove, IL,
Employer**

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**Docket No. 13-2092
Issued: March 24, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 9, 2013 appellant filed a timely appeal of an August 7, 2013 decision of the Office of Workers' Compensation Programs (OWCP), denying his application for reconsideration without merit review of the claim. Since more than 180 days elapsed between the last OWCP merit decision on December 20, 2012 and the filing of this appeal,¹ the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

¹ As noted in the factual history of the case, the Board reviewed the December 20, 2012 OWCP decision in a June 19, 2013 decision. *Infra* note 3.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on two prior appeals. In a decision dated January 26, 2012, the Board found that the employee was exposed to mold spores on May 23, 1993 in the performance of duty.³ The accepted conditions included aggravations of bronchial asthma, chronic obstructive pulmonary disease (COPD), arrhythmia, ventricular tachycardia and aphasia, as well as a consequential stroke on October 19, 1994. The Board found a conflict in medical opinion under 5 U.S.C. § 8123(a) of FECA with respect to whether the employee's death on December 8, 2009 was causally related to her federal employment. The case was remanded for referral to a referee physician.

In a decision dated June 19, 2013, the Board affirmed an OWCP December 20, 2012 hearing representative's denial of appellant's claim. The Board found the weight of the medical evidence rested with the referee physician, Dr. Ofelia Alvarez-Willis, a Board-certified internist. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

By letter dated July 30, 2013, appellant, through his representative, requested reconsideration. He submitted a June 13, 2013 brief with respect to the claim.⁴ In the June 13, 2013 brief, appellant reviewed in detail the evidence of record and argued that the statement of accepted facts (hereinafter SOAF) provided to Dr. Alvarez-Willis did not provide a complete and accurate background. He specifically argued that the conditions of coronary atherosclerosis and aortic stenosis were accepted conditions that were not identified as accepted conditions in the SOAF. In addition, appellant argued that the SOAF was deficient in failing to adequately discuss the extensive medical documentation in the file.

By decision dated August 7, 2013, OWCP determined that the application for reconsideration was insufficient to warrant a review of the merits of the claim. It indicated that the Board had previously reviewed the SOAF issue.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁶ 20

³ Docket No. 11-1479 (issued January 26, 2012).

⁴ The June 13, 2013 document is addressed to the Board, but this brief was not received and considered by the Board prior to the June 19, 2013 decision.

⁵ 5 U.S.C. § 8128(a) (providing that "[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").

⁶ 20 C.F.R. § 10.606(b)(2).

C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁷

ANALYSIS

In the present case, appellant submitted an application for reconsideration and argued that the SOAF provided to the referee physician was not sufficient. As noted above, a claimant that advances a relevant legal argument not previously considered by OWCP is entitled to a merit review of the claim. In the August 7, 2013 decision, OWCP indicated that the argument regarding the SOAF was not a new argument as the Board had considered the issue in its June 19, 2013 decision

The Board's consideration of the issue in the prior decision was limited to appellant's argument that the SOAF did not include a stroke as a consequential injury. As the Board noted, the SOAF did refer to a consequential stroke. In the current application for reconsideration, appellant raised a new legal argument regarding the SOAF. He advanced the argument that specific conditions of coronary atherosclerosis and aortic stenosis were accepted conditions that were not identified in the SOAF. This is a new and relevant legal argument, as it is well established that a SOAF should state the conditions claimed and accepted by OWCP, so that the physician can properly assess the issue presented.⁸ OWCP procedures indicate that an essential element of the SOAF is to identify the conditions accepted by OWCP.⁹

The Board finds appellant has advanced a relevant legal argument not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.606(b)(2), appellant is entitled to a merit review of the claim. The case will be remanded for a decision by OWCP on the merits of the claim.

CONCLUSION

The Board finds appellant is entitled to a merit review of the claim.

⁷ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *Gwendolyn Merriweather*, 50 ECAB 411 (1999).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.5 (September 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 24, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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