United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 14-579**
	)	**Issued: March 18, 2015**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Tucson, AR, Employer	)	

Appearances:
David E. Alexander, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 17, 2014 appellant, through counsel, filed a timely appeal from a July 23, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Because more than 180 days elapsed from the last merit decision dated April 24, 2012 to the filing of this appeal and, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of her claim.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred eight days from July 23, 2013, the date of OWCP's last decision, was January 21, 2014. Since using January 23, 2014, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 17, 2014, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. §§ 8101-8193.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for reconsideration of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 4, 2004 appellant, a 45-year-old archive technician, filed a claim for benefits, alleging that she developed a chronic cough and lung condition as a result of reviewing 50-year-old, foul-smelling case files on July 19, 2004. She asserted that another employee noticed the smell from the files and told her that she had burst a blood vessel in her right eye.

In an August 3, 2004 report, Dr. William E. Armour, a specialist in pulmonary and critical care medicine, advised that on July 19, 2004, appellant was reviewing a series of folders that had been boxed since 1945 when she noticed a very unusual and strong odor that was repulsive but not enough to make her stop working on the files. He reported that the odor was strong enough that the odor emanated into the hallway and was noticed by other coworkers, who would stop by and comment on it. Dr. Armour reported that three days later appellant developed a dry, nonproductive cough, which has persisted since that time and was severe enough to be somewhat disabling. Appellant also had chest wall muscle soreness exacerbated by coughing.

Dr. Armour advised that appellant probably had a respiratory viral illness producing her cough, which also produced her chest wall pain. He opined that this was probably contracted on a flight she recently took from Ketchikan, Alaska to Pocatello, Idaho. Dr. Armour stated that he could not rule out exposure to something in the files that she opened on July 19, 2004. He noted that in spite of the obnoxious smell she was still able to work around the smell for three hours. Dr. Armour speculated that a sporulating organism could not survive that long except maybe anthrax. He did not believe that appellant had an inhalation disorder, such as organic dust toxic syndrome, which typically resolved quickly. Dr. Armour advised that infections usually take longer than three days to develop and stated that her laboratory data, blood count, and sedimentation blood rate were all normal.

In an October 21, 2004 report, Dr. Armour advised that the results of appellant's spirometry tests were normal.

In a July 26, 2005 report, Dr. J. Richard Baringer, a Board-certified neurosurgeon, related appellant's account of events which occurred on July 19, 2004. Appellant stated that her coworkers stopped by her office to comment on the odor and one of them observed that the blood vessels in the conjunctiva of her right eye were bright red. Dr. Baringer stated that appellant had developed a severe and persistent cough three days later, which lasted for several months. Appellant subsequently experienced a persistent loss of energy, weight loss, blurred vision, a skin rash, hot flashes, and headaches. Dr. Baringer stated that it was difficult to issue a unifying diagnosis which would encompass or explain the large and diverse number of symptoms from which appellant was suffering. He opined that, while it might be useful to understand whether any toxins were involved in the file that she inspected in July 2004, he doubted that a toxin would have such long-lasting or profound effects a year after a relatively brief exposure.

In a memorandum dated September 22, 2005, the employing establishment stated that the U.S. Public Health Service had conducted testing on the files in question and the results were negative. The employing establishment stated that "since initial testing did not substantiate significant microbial or bacterial growth coupled with the fact that the file in question is indistinguishable from other files, it is difficult to form a medically plausible hypothesis which would explain the file as the cause for [appellant's] continuing medical problems." It stated, however, that chemical residues were not part of the testing protocol.

By decision dated September 21, 2006, OWCP denied the claim, finding that appellant failed to establish fact of injury. It stated that the employing establishment's September 22, 2005 memorandum indicated that the files to which appellant was exposed in July 2004 had been subjected to testing which did not substantiate the presence of any significant toxic elements.

In a letter to OWCP dated June 22, 2006 and received on July 3, 2007, appellant stated that she had obtained statements from witnesses attesting that the files to which she was exposed on July 19, 2004 had an odor that was different from any to which she had ever been exposed in her office. She asserted that management told her that these files had been sprayed with an insecticide to eradicate termite infestation shortly before the file was sent to her office in July 2004. Appellant stated that she intended to submit medical evidence which would establish a causal connection between her claimed condition and her July 2004 exposure to toxic chemicals. She stated:

> "In an effort to force the FBI to make this information available, to have this file tested for volatile chemicals as requested previously, or to provide the file to us so we can have it tested, I have retained an attorney, David Alexander, 201 East Center Street, Pocatello, Idaho 83204, telephone number (208) 232-6101, who has begun taking legal action."

In an affidavit dated September 12, 2007, Dr. Gayl H. Wiegand, Ph.D in chemistry, reiterated appellant's July 19, 2004 account that when she opened a file it released a strong, nauseating and unfamiliar odor that spread throughout her area of the building and lingered in the file for several days. Appellant stated that, after working with the file over a two-day period, she developed severe respiratory problems, headaches, burst blood vessel in her eye, listlessness, and other symptoms and eventually experienced serious neurological problems. Dr. Wiegand opined that, based on his experience, these descriptions and symptoms are consistent with hydrogen selenide exposure, a toxic gas that can be released as a product of a chemical reaction between selenium compounds. This has been known to cause severe respiratory distress and skin and eye irritation in short-term exposure. Dr. Wiegand stated that the strong odor that appellant described indicated the presence of a volatile chemical of some sort. He noted that hydrogen selenide is a volatile chemical and was therefore a possible cause of the odor, along with other low-molecular weight selenium compounds such as dimethyl selenide.

Dr. Wiegand was skeptical regarding the reliability of the test conducted by the employing establishment in September 2005, as well as additional tests undertaken in November 2006. The employing establishment took an air sample from inside the files, swabbed three locations in the interior of the box, and swabbed the exterior of some of the files. Dr. Wiegand stated that, because the box was not sealed, the air inside the box had been allowed

to exchange with outside air for at least six months prior to the testing. He, therefore, concluded that it was unlikely that any detectable traces of the hydrogen selenide gas would have remained in the air by November 2006. He did not believe that the air was tested for selenium compounds. Dr. Wiegand opined that it was doubtful that these tests would have been capable of identifying whether hydrogen selenide gas had been present in July 2004. He further stated that because it was unsealed and inadequately preserved, the test results were questionable. Dr. Wiegand could not rule out the presence of hydrogen selenide gas at the time of appellant's exposure. He believed that there were no other likely possible sources for the smell. Dr. Wiegand opined that it was likely that appellant was exposed to hydrogen selenide as she worked with the FBI file in 2004.

In an affidavit dated September 13, 2007, Dr. Frederick Berman, Ph.D in toxology, stated that appellant's descriptions and symptoms were consistent with chemical exposure and would be consistent with exposure to toxic levels of hydrogen selenide. He advised that the strong odor suggested the presence of a volatile chemical in gaseous form, and the fact that symptoms began concurrently with her exposure to this chemical was proof of its toxicity. Dr. Berman opined that it was unlikely that the testing performed would have been capable of determining whether hydrogen selenide gas had been present at the time when appellant was working with the old files. He believed that there were no other likely, possible sources of the smell, or causes of appellant's symptoms, given the contents of the file and the lack of any chemical or biological residues. Dr. Berman reiterated his opinion that hydrogen selenide was the most likely cause of appellant's illness and that her exposure to hydrogen selenide in 2004 was the cause of all or some of her current illnesses and conditions.

On September 21, 2007 appellant's counsel requested reconsideration and submitted numerous medical reports and affidavits.

By letter dated January 31, 2008, OWCP informed appellant that, although her counsel had submitted a request for reconsideration on September 21, 2007 (which was within one year of the September 21, 2006 decision), Mr. Alexander was not an authorized representative. It therefore found that, as Mr. Alexander was not authorized to represent her in her claim before OWCP, the request for reconsideration dated September 21, 2007 was not a valid reconsideration.

By decision dated June 13, 2008, OWCP denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant would have to present evidence establishing error in OWCP's decision. No evidence was submitted to establish error in its final merit decision.

In a July 2, 2009 decision,[3] the Board reversed OWCP's June 13, 2008 decision, finding that it erred in finding that appellant failed to file a timely application for review under section 10.607. It stated that, contrary to OWCP's finding, Mr. Alexander was an authorized representative for appellant pursuant to 20 C.F.R. § 501.11 and 20 C.F.R. § 10.700(a) at the time he timely requested reconsideration on September 21, 2007. The Board remanded the case for

[3] Docket No. 08-2430 (issued July 2, 2009).

OWCP to review the merits of appellant's September 21, 2007 reconsideration request.[4] The relevant facts are set forth in the Board's July 2, 2009 decision and are incorporated herein by reference.

By decision dated October 15, 2009, OWCP reviewed the merits of the case, but denied modification of the September 21, 2006 decision.

By letter dated October 14, 2010, appellant, through counsel, requested reconsideration and submitted additional medical evidence and research material. By decision dated April 24, 2012, OWCP reviewed the voluminous documentary evidence, but denied modification of the September 21, 2006 decision for failure to establish fact of injury.

By letter dated April 23, 2013, appellant's counsel requested reconsideration. Appellant submitted 461 pages of letters, witness statements, statements from management, interagency memoranda and e-mails, congressional correspondence, and medical literature. The evidence submitted also included the results of 2005 and 2006 testing of the noxious FBI files.

By decision dated July 23, 2013, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision. It determined that the evidence was either not relevant to the underlying issue, duplicative, or not disposition of whether appellant had experience a workplace exposure to a chemical agent.

LEGAL PRECEDENT

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not considered by OWCP; or by constituting relevant and pertinent evidence not previously considered by OWCP.[5] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6]

ANALYSIS

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by OWCP. On appeal counsel argues that OWCP erred in failing to consider new factual and medical evidence that appellant's exposure to hydrogen selenide gas over a two-day period in July 2004 resulted in her respiratory and pulmonary symptoms. He contends, as he did below, that appellant was sickened and disabled by chronic exposure to hydrogen selenide gas created by the decay of photographic negatives and prints within an old investigative file she was reviewing pursuant to her duties as an archivist with the FBI. Counsel asserts that the specific

[4] *See* 5 U.S.C. § 8128.

[5] 20 C.F.R. § 10.606(b)(1); *see generally id.*

[6] *Howard A. Williams*, 45 ECAB 853 (1994).

tests the FBI conducted were not capable of identifying the presence of the toxic gas that injured appellant. He further argues that the reports from Drs. Berman and Wiegand establish that she was exposed to a volatile chemical, which was manifested by the intense smell that she experienced and which was noted by almost every other employee in her office. Counsel asserts that, when appellant was able to examine her file in August 2007, her expert witnesses found dozens of heavily-decayed photographic prints and negatives, proving that nitric oxide, a toxic gas, was present in the file due to this long-term decay.

The Board has held that the submission of evidence, which does not address the particular issue involved in the case, does not constitute a basis for reopening the claim.[7] The evidence appellant submitted in connection with her April 23, 2013 reconsideration request is not pertinent to the issue on appeal; *i.e.*, whether she sustained an injury due to work-related chemical exposure on July 19, 2004. The evidence appellant submitted with her request is cumulative and repetitive of evidence she provided previously. This evidence, consisting of 461 pages, consists of: (a) letters, witness statements, statements from management, interagency memoranda and e-mails, congressional correspondence, medical literature, diagnostic tests and physicians' reports, most of which were considered in prior OWCP decisions; and (b) results of 2005 and 2006 testing of the noxious FBI files, which were previously considered. Contrary to the assertion from counsel, there is no conclusive proof or documentation contained in any of the evidence submitted with the request for reconsideration that appellant was exposed to hydrogen selenide and any other toxic chemical. Counsel has argued that OWCP did not accord sufficient weight to the September 2007 affidavits from Drs. Wiegand and Berman. As OWCP found, however, these reports were previously considered in its April 24, 2012 decision and thus not new evidence warranting a merit review. Additionally, the reports from Drs. Baringer, Allen, Kennedy, and West, submitted previously are not new and do not warrant a merit review.

While appellant has submitted witness statements from coworkers who note their belief that she sustained toxic exposure on July 19, 2004, these statements are not sufficient to establish that appellant was in fact exposed to a specific chemical element on July 19, 2004, which caused injury. Thus, their submission does not warrant a merit review.

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by it. OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits in its July 23, 2013 decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

[7] *See David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2013 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 18, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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