United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	
U.S. POSTAL SERVICE, NORTHERN NEW JERSEY METRO PROCESSING & DISTRIBUTION CENTER, Teterboro, NJ, Employer	)	**Docket No. 16-0003** **Issued: July 5, 2016**

Appearances:
Thomas S. Harkins, Esq., for the appellant
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 October 2, 2015 appellant, through counsel, timely appealed the April 13, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated August 7, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied further merit review pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 11, 2013 appellant, then a 53-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) for a respiratory condition. He alleged that earlier that same day he had been asked to use a postal service vehicle that was "smoke filled" and/or "embedded with smoke." According to appellant, the December 11, 2013 exposure caused him to have respiratory failure, which he described as his "airway … closing down." He received treatment at the Hackensack University Medical Center emergency department and was advised that he could return to work on December 13, 2013.[2] Dr. Pejman Lavian, a Board-certified family practitioner, examined appellant on December 13, 2013 and excused him from work through December 23, 2013.

On January 7, 2014 OWCP wrote to appellant and explained the five basic elements necessary to establish his claim. Specifically, it noted that the record was deficient from both a factual and a medical standpoint. OWCP asked appellant to respond to a series of questions regarding his alleged employment exposure, including the type and extent of his exposure, and whether he had a prior smoking history or preexisting pulmonary condition(s), such as asthma or bronchitis. It also requested a medical report from a qualified physician, which included, *inter alia*, a specific diagnosis and an opinion on causal relationship. OWCP afforded appellant 30 days to submit the necessary factual and medical evidence.

OWCP subsequently received additional ER treatment records from December 11, 2013. Dr. Beverly J. Davison, Board-certified in emergency medicine, diagnosed reactive airway disease and prescribed prednisone and an albuterol inhaler. Appellant's December 11, 2013 chest x-ray revealed no acute cardiopulmonary pathology.

In a January 18, 2014 report, Dr. Lavian indicated that he had treated appellant on November 14, 19, 26, and December 13 and 23, 2013. He noted that appellant had cold -- upper respiratory infection symptoms that evolved into shortness of breath and a cough with a chronic component. Dr. Lavian further reported that appellant's symptoms worsened and he suffered from smoke inhalation at work. He noted that appellant had been exposed to smoke on December 11, 2013 with severe exasperation of upper respiratory symptoms. Dr. Lavian diagnosed cough, post-nasal drip, and smoke exposure and noted that appellant had been referred to a pulmonologist, as well as an ear, nose, and throat (ENT) specialist, and a work-up was currently in progress. He found that appellant was currently unable to work due to his symptoms.

OWCP did not receive a response to its January 7, 2014 factual questionnaire regarding appellant's occupational exposure and prior medical history.

In a February 10, 2014 decision, OWCP denied appellant's traumatic injury claim based on a failure to establish fact of injury. Specifically, it found that he had not demonstrated that the

[2] The employing establishment authorized (Form CA-16) appellant's December 11, 2013 emergency room (ER) treatment. The ER records initially submitted consisted of a one-page letter from Dawn Hammer, a registered nurse, who indicated that appellant had been seen in the ER on December 11, 2013, and was able to resume work in a couple days. Ms. Hammer did not identify a specific diagnosis.

claimed December 11, 2013 employment incident occurred as alleged. OWCP noted that appellant had failed to respond to its January 7, 2014 request for additional factual information. Additionally, it found that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the alleged December 11, 2013 employment exposure.

On March 10, 2014 appellant requested reconsideration.

In an undated statement received on March 13, 2014, appellant responded to OWCP's January 7, 2014 questionnaire. He noted that he was a nonsmoker and did not have any other pulmonary conditions or any known allergies. Appellant also stated that he had never been diagnosed with asthma or bronchitis. With respect to the December 11, 2013 incident, he stated that his supervisor instructed him to drive one of the postal service vehicles to carry out a task. Upon entering the vehicle, appellant was "exposed to contaminated air" and it became very difficult for him to breathe. He stated that his chest tightened to the point where he could not breathe. Appellant indicated the concentration level as "unknown." He further indicated that the seats, seatbelts, and vehicle headliner were darkened with smoke residue, and the steering wheel was sticky from the same residue. Appellant also stated that the air had a very heavy smell of smoke, as if someone had recently been smoking in the vehicle, but in his same statement he alleged that he "inhaled a (sic) unknown substance directly for several minutes…." Appellant stated that the December 11, 2013 exposure lasted for "approximately 10 minutes or more." He further indicated that he had no other exposure to irritants outside of his federal employment. Appellant's reported symptoms included shortness of breath and tightening in his chest. Additionally, he indicated that secondhand and third-hand smoke, as well as cold temperatures made his symptoms worse. After returning to work on February 18, 2014, appellant reportedly witnessed other employees smoking inside postal service vehicles on two separate occasions. One incident on February 28, 2014 involved the same vehicle that he claimed caused his December 11, 2013 attack.

OWCP also received new medical evidence, which included additional ER treatment records from Dr. Davison, a March 8, 2014 report from Dr. Lavian, and treatment records from Dr. Daniel H. Levin, a Board-certified internist with a subspecialty in pulmonary disease.

Dr. Davison's December 11, 2013 ER treatment notes indicated that appellant complained of shortness of breath, which began earlier that day at work. She further noted that appellant was asked to go into a work vehicle that was heavily embedded with cigarette smoke, which immediately made him cough and experience shortness of breath. Dr. Davison also noted that three weeks prior, appellant had consulted with his primary care physician for shortness of breath. At that time, appellant's primary care physician reportedly placed him on antibiotics for flu-like symptoms, and a week later appellant was placed on an inhaler for asthma-like symptoms. Dr. Davison noted that appellant denied any allergies. According to appellant, his primary care physician referred him to an ENT, who found reflux-like symptoms. Dr. Davison's ER notes reflect that appellant was a nonsmoker, and had no pertinent past surgical history. The only prior diagnosis noted was gastroesophageal reflux disease (GERD). Appellant received a nebulizer treatment while in the ER and reportedly felt much better than he did earlier that morning, and better than he felt during his initial visit to his primary care physician. Dr. Davison diagnosed reactive airway disease and discharged appellant once his condition had stabilized.

Dr. Levin first examined appellant on December 18, 2013 for difficulty breathing. He saw appellant for follow-up on January 9, 2014, and again on January 23, 2014. In a March 6, 2014 report, Dr. Levin noted that he had been caring for appellant since December 18, 2013 for shortness of breath with wheezing and coughing. He explained that appellant's symptoms began one to two weeks prior to the reported incident of December 11, 2013, but became much worse on that date following his exposure to a vehicle that was filled with cigarette smoke.[3] Dr. Levin noted that since then he had been treating appellant for asthma. His prescribed medications included Symbicort, Singulair, and Albuterol. Dr. Levin reported much improvement in appellant's symptoms and clinical examination.[4] He also noted that appellant's chest x-ray was normal. Dr. Levin opined that appellant had underlying asthma or restrictive airway disease, which was severely exacerbated due to his exposure to a smoke-filled vehicle -- secondhand smoke. He further noted that appellant was much better now due to bronchodilator therapy, as well as his avoidance of inciting factors.

In a March 8, 2014 report, Dr. Lavian noted that he had seen appellant on November 14, 2013 for complaints of cough and congestion, and started him on a course of antibiotics and Albuterol with a diagnosis of post-nasal drip and bronchitis. When reevaluated on November 19 and 26, 2013, appellant's symptoms continued despite multiple medications. Dr. Lavian further noted that during the November 26, 2013 visit, appellant was referred to an ENT specialist and was subsequently placed on a course of oral steroids. Appellant reportedly felt approximately 75 percent better until December 11, 2013 when he was exposed to secondhand smoke at work. Dr. Lavian indicated that appellant reportedly entered an area with a lot of secondhand smoke, and this exposure severely exacerbated his breathing issues. When appellant returned to the office on December 13, 2013, he reported that the smoke exposure had prompted him to seek care in the ER. Dr. Lavian indicated that appellant was subsequently referred to a pulmonologist, Dr. Levin. He stated that it was clear that appellant's exposure to secondhand smoke while working on or about December 11, 2013 caused a severe exacerbation of his reactive airway symptoms, which included cough and shortness of breath.

In an August 7, 2014 decision, OWCP reviewed the merits of appellant's claim, but declined to modify its February 10, 2014 decision. It continued to find that he had failed to establish that the December 11, 2013 incident occurred as alleged. The August 7, 2014 decision identified perceived inconsistencies and/or contradictions in the record regarding appellant's alleged occupational exposure. OWCP found that, even with the current statement, it was unclear to what type of contaminant appellant was allegedly exposed on December 11, 2013. Additionally, it noted that the physicians of record appeared to have relied upon differing occupational exposure histories. OWCP concluded that appellant had not provided a clear and accurate statement as to what happened on December 11, 2013, and therefore, he failed to establish the factual component of fact of injury.

On October 1, 2014 appellant timely requested reconsideration. He submitted information from the American Cancer Society and various federal publications on the effects of

[3] Dr. Levin's January 9 and 23, 2014 treatment notes indicate that appellant stated the car was "full of smoke."

[4] Dr. Levin noted that pulmonary function test had been attempted, but could not be completed due to appellant's constant coughing.

secondhand smoke, including an Executive Order banning smoking inside federal facilities. Appellant also provided a copy of the employing establishment's current smoking policy dated May 20, 2014, which included a prohibition on smoking in any General Service Administration interagency fleet management system vehicles. He also claimed that the employing establishment had been pressuring him into dropping his workers' compensation claim.

In his latest request for reconsideration, appellant described the condition of the postal service vehicle he used on December 11, 2013 as follows: "The vehicle was littered with cigarette butts, tobacco ash was all over everything and the residue from long-term smoking in the vehicle was sticky on the staring (sic) wheel. Tar from tobacco smoke was on the windshield as well as the entire … interior making it challenging to see through the windshield."

In a nonmerit decision dated April 13, 2015, OWCP denied appellant's request for reconsideration. The senior claims examiner found that the evidence submitted regarding secondhand smoke and the prohibition regarding smoking in federal facilities was irrelevant to the issue of appellant's alleged occupational exposure. OWCP further found that appellant's latest statement regarding the condition of the postal service vehicle he used on December 11, 2013 was cumulative and substantially similar to evidence already in the case file, and previously considered. It found that he had not provided any new evidence to clearly establish whether he was claiming exposure to actual smoke, the general smell of smoke, the general condition of the vehicle, or some other type of exposure. Consequently, OWCP denied merit review of its August 7, 2014 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[5] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[6] One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.[7] A timely application for reconsideration, including all supporting documents, must set forth arguments and contain 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 new evidence not previously considered by OWCP.[8] When a timely application for reconsideration does not meet at least one

[5] This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.607.

[7] 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. 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. For decisions issued on or after June 1, 1987 through August 28, 2011, the request for reconsideration must be "mailed" to OWCP within one year of OWCP's decision for which review is sought. *Id.* at Chapter 2.1602.4e.

[8] 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[9]

ANALYSIS

Appellant's October 1, 2014 timely request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP.

Appellant also failed to submit any "relevant and pertinent new evidence" with his request for reconsideration. First, the Board finds that the general information appellant submitted regarding the effects of secondhand smoke is not relevant to the issue on reconsideration. OWCP has repeatedly denied appellant's claim because he failed to establish fact of injury. The above-referenced evidence does not specifically address appellant's alleged exposure on December 11, 2013. Moreover, the information appellant submitted regarding federal policy precluding smoking on government property, as well as information regarding the employing establishment's current smoking policy, is not relevant to the issue on reconsideration. Consequently, OWCP properly found this newly submitted evidence insufficient to warrant reopening appellant's claim for further merit review.

Accordingly, the Board finds that appellant is not entitled to a review of the merits under section 10.606(b)(3).[10]

On appeal, counsel argues that appellant's latest statement regarding the condition of the postal service vehicle constituted relevant and pertinent new evidence not previously considered by OWCP. He specifically referenced appellant's statement that the vehicle he used was "littered with cigarette butts" and there was "tobacco ash … all over everything," as well as a sticky residue on the steering wheel and "tar … on the windshield." Although appellant's prior statements did not specifically mention the presence of cigarette butts, tobacco ash, and tar on the vehicle windshield, he previously reported having observed smoke residue in the vehicle. The issue on reconsideration is not what appellant observed in the vehicle, but what type of exposure allegedly caused or contributed to his claimed pulmonary condition. As OWCP noted, appellant's latest statement did not clarify whether he was attributing his diagnosed asthma/reactive airway disease to actual cigarette smoke exposure, a lingering smoke odor, the general condition of the vehicle, or some combination of factors. It properly found that the latest evidence was substantially similar to evidence previously considered, and thus, cumulative. Providing additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.[11] Because appellant did not provide OWCP with any "relevant and pertinent new evidence," he is not entitled to a review of the merits based on

[9] *Id.* at § 10.608(a), (b).

[10] *Id.* at § 10.606(b)(3)(i) and (ii).

[11] *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

the third requirement under section 10.606(b)(3).[12] Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied appellant's October 1, 2014 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2016
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

[12] 20 C.F.R. § 10.606(b)(3)(iii).