

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

C.H., widow of W.H., Appellant)	
)	
and)	Docket No. 19-0669
)	Issued: October 9, 2019
DEPARTMENT OF THE NAVY, ALAMEDA)	
NAVAL AIR STATION, Alameda, CA,)	
Employer)	
)	

Appearances:
Lauren Shine, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 4, 2019 appellant, through counsel, filed a timely appeal from a November 26, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last merit decision in this case was an August 3, 2017 Board decision.² As there was no merit decision issued by OWCP within 180 days to the filing of this appeal, pursuant to the Federal Employees'

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The decision of the Board became final after 30 days of issuance, and is not subject to further review. 20 C.F.R. § 501.6(d).

Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.³

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 11, 1979 the employee, then a 39-year-old sheet metal worker, sustained injuries in a work-related fall. He experienced pain in his lower back and right hip as he was climbing into the window of an aircraft and fell, landing on his right side. The employee stopped work on the date of injury and did not return. OWCP accepted the claim for cervical sprain, lumbar sprain, sacroiliac ligament sprain, lumbar radiculopathy, cervical intervertebral disc degeneration, lumbar intervertebral disc displacement without myelopathy, prolonged depressive reaction, and pain disorder related to psychological factors. The employee remained on the periodic compensation rolls until his death at age 71 on May 23, 2012.

On April 4, 2015 appellant, the employee's widow, filed a claim for compensation by surviving spouse and/or children (Form CA-5). She submitted the employee's death certificate which identified respiratory failure as the immediate cause of death. The underlying causes of death include cervical spinal cord compression and end-stage renal disease.

By decision dated August 3, 2017, the Board affirmed an August 18, 2016 OWCP hearing decision, which found that appellant had not met her burden of proof to establish her claim for survivor benefits. The Board determined that she failed to show the employee's accepted employment-related conditions either caused or contributed to his death due to respiratory failure. The Board noted that, while the death certificate identified spinal cord compression as an underlying cause of death, the physicians of record failed to provide any medical rationale as to how the spinal cord compression was work related or how an accepted employment-related condition caused or contributed to the employee's death. Additionally, a district medical adviser (DMA) had reviewed the medical evidence and opined that there was no causal relationship between the employee's death and his employment-related conditions. The Board also noted that there was no disagreement between the autopsy findings and the DMA's opinion that the employee's cervical cord compression was a consequence of hemodialysis. Therefore, the Board

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Docket No. 17-0729 (issued August 3, 2017).

concluded that appellant had not established that the accepted employment-related conditions were a contributing cause of the employee's death.

On March 5, 2018 appellant, through counsel requested for reconsideration. In a January 25, 2018 letter, counsel argued that the previously submitted medical evidence of record, as well as an attached new report, from Dr. J. Eugene Lammers, Board-certified in internal and geriatric medicine, demonstrated causal relationship between the employee's death and his employment factors. No additional evidence was submitted with the request for reconsideration.

By decision dated March 15, 2018, OWCP denied appellant's request for reconsideration. It found that she did not raise a relevant legal argument not previously considered, and no new and relevant pertinent evidence had been received.

On May 29, 2018 appellant, through counsel, again requested reconsideration. Counsel reviewed medical evidence previously of record, and also asserted that a medical report from Dr. Lammers, was attached as Exhibit A. She argued that this new report presented medical rationale establishing that the employee's cervical disease contributed to his ultimate cause of death. Counsel cited excerpts from Dr. Lammers' report and indicated that the report met the Board's legal standard as "there did not have to be a significant contribution of employment factors to establish causal relationship,' only that 'the employment contributed to the employee's death.'"

In support of the reconsideration request, OWCP received Dr. Lammers' resume and credentials. No further evidence was received.

By decision dated November 26, 2018, OWCP denied appellant's request for reconsideration, finding that the arguments raised were cumulative and repetitive and that she had failed to submit new and relevant pertinent evidence.⁵ The decisions differed in that the first decision referenced August 10, 1992 physical therapy notes, previously received by OWCP on August 24, 1992.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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.⁸

⁵ This decision is the "corrected copy" of a decision issued earlier on the same date.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). 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.

A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹

A timely application for reconsideration, including all supporting documents, 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.¹⁰ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In support of her request for reconsideration counsel asserted that under the Board's case precedent "there did not have to be a significant contribution of employment factors to establish causal relationship,' only that 'the employment contributed to the employee's death.'" The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹² Counsel's arguments on reconsideration regarding the probative value of medical evidence are duplicative of arguments previously made and considered by both OWCP and the Board.¹³ As such, appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Furthermore, appellant submitted no new relevant evidence in support of her request for reconsideration.¹⁴ While she indicated that Dr. Lammers' report was submitted as Exhibit A, and established appellant's claim, the record is devoid of any such report. Only Dr. Lammers' resume and credentials were submitted to the record. The submission of this evidence does not require reopening of his claim for review of the merits of the claim because this evidence is irrelevant to

⁹ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ 20 C.F.R. § 10.606(b)(3); *see T.M.*, Docket No. 19-0535 (issued July 25, 2019); *see J.B.*, Docket No. 18-1531 (issued April 11, 2019).

¹¹ *Id.* at § 10.608.

¹² 20 C.F.R. § 10.606(b)(3); *see T.M.*, Docket No. 19-0535 (issued July 25, 2019); *J.B.*, Docket No. 18-1531 (issued April 11, 2019).

¹³ The Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's August 18, 2016 decision because the Board considered that evidence in its August 3, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. *See J.D.*, Docket No. 18-1765 (issued June 11, 2019); *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

¹⁴ *See T.M.*, *supra* note 12.

the underlying issue of causal relationship.¹⁵ Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹⁶

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel asserts that OWCP's delay in ruling on the May 29, 2018 request for reconsideration cost appellant her appeal rights. As noted, the last merit decision of record was issued by the Board on August 3, 2017, the request for reconsideration at issue was made almost 10 months after the last merit decision. Although OWCP issued its November 26, 2018 nonmerit decision more than 90 days after counsel requested reconsideration, under the circumstances the delay did not jeopardize appellant's right to further review of the merits of the case by the Board, and did not impact appellant's ability to file a timely request for reconsideration of the merits of her case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ *L.E.*, Docket No. 19-0470 (issued August 12, 2019).

¹⁶ *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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