

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

G.R., Appellant

and

**DEPARTMENT OF THE ARMY, CHEMICAL
MUNITIONS COMMAND, BLUE GRASS
ARMY DEPOT, Richmond, KY, Employer**

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**Docket No. 20-0229
Issued: October 9, 2020**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 7, 2019 appellant, through counsel, filed a timely appeal from an August 9, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated May 1, 2019, to the filing of this

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.

appeal, pursuant to the Federal Employees' Compensation Act² (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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 2018 appellant, then a 54-year-old toxic material handler/leader, filed an occupational disease claim (Form CA-2) alleging pulmonary complications from the inhalation of vapors from toxic agent "HD mustard gas." He noted that he first realized his condition on October 30, 2017, and realized its relation to his federal employment on November 2, 2017. Appellant explained that contaminated material was accidentally sent to his station without prior notification of the proper level of protective dress needed to handle the materials and prevent the inhalation of the toxic mustard gas vapors.

In a development letter dated September 18, 2018, OWCP advised appellant that additional factual and medical evidence was needed to establish his claim. Appellant was asked to submit a rationalized medical opinion which explained how a specific exposure at work caused or contributed to a diagnosed medical condition. To substantiate the factual elements of his claim, appellant was asked to complete a questionnaire. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP thereafter received an undated statement, from J.R., Field Operations Division Chief, who advised that appellant and a coworker's potential exposure may have occurred while handling hazardous waste that was contaminated with liquid mustard gas. He noted that, while preparing waste for the monitoring process in an open air area located next to the monitoring facility, appellant was not wearing personal protective equipment, except government-issued cotton undergarments. J.R. indicated that, at the start of the operation, both appellant and the coworker had recounted to him that they thought they smelled something. He further indicated that some of the double-bagged waste items were found to be contaminated, once the items were monitored inside the monitoring facility.

OWCP also received a copy of a notification of personnel action (Form SF-50), which indicated that appellant was employed as a toxic materials handler/explosive inspector leader, and a position description for appellant's toxic material handler/leader position.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the August 9, 2019 decision, OWCP received additional evidence. 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.*

By decision dated October 26, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the exposure to vapors from toxic agent HD mustard gas occurred as alleged. It noted that appellant had not submitted a statement detailing his specific exposure.

On November 12, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. He testified that he was exposed to liquid mustard gas vapors as he was not wearing a mask while handling the hazardous material, which was contaminated. Appellant testified that ordinarily when he worked with hazardous waste bags he did not need to be in a higher level of dress (*i.e.*, no self-contained breathing apparatus) as the bags were supposed to be hazard free. He testified that on October 30, 2017 he became ill and called in sick the next day as he could not breathe. When he returned to work around the first or second of November, he knew he was "bit" by the mustard agent after learning from his supervisors that "the bags and the readings were hotter than a match." Appellant testified that he was exposed to mustard agent vapors as the "igloo" where the mustard agent came from was warm and the mustard agent would not cool off by the time he moved them.

In a narrative statement dated October 16, 2018, appellant noted that, during the afternoon that the incident occurred, the outdoor temperature was near 57 degrees. Therefore, when the hazardous waste bags were removed from a warm "igloo," they did not freeze, rather the materials remained as vapor.

Following the hearing, OWCP received a November 14, 2017 Memorandum for Record from Drs. F.O. and J.B, employing establishment officials, related to the October 30, 2017 incident. Appellant indicated that while transporting a pallet, the plastic wrapping was pierced by a metal band. No mustard agent was found following testing on October 30, 2017. On October 31, 2017 senior staff reported mustard agent levels inside the plastic wrapping. He concluded that the preponderance of the evidence indicated that since temperatures were below 57 degrees on the morning of October 30, 2017, the staff moved solid phase mustard on the wooden pallet wrapped in plastic, which triggered sensors once it warmed and entered the vapor phase.

OWCP received appellant's employing establishment health unit records dating from August 5, 2008 through August 6, 2018. An August 5, 2008 note reported a finding of severe airway obstruction. In May 30, July 2, and August 6, 2018 notes, a diagnosis of chronic obstructive pulmonary disease (COPD) was indicated.

In an October 3, 2018 report, a nurse at a Veterans' Administration clinic noted that on September 7, 2018 appellant was diagnosed with chronic obstructive pulmonary disease (COPD).

In a memorandum dated November 6, 2018, S.J., an employing establishment deputy commander, noted that a mustard agent was stored at the employing establishment. On October 30, 2017, while working outdoors, appellant and another employee moved double bagged waste contaminated with small amounts of mustard agent. While one of the bags was breached, the cold temperatures that day made the likelihood of any quantity of agent vapor reaching appellant's lungs not credible.

By decision dated May 1, 2019, an OWCP hearing representative affirmed the October 26, 2018 decision. The hearing representative accepted that on October 30, 2017 appellant was required to move approximately 30 bags of liquid mustard agent from a truck to a storage shed, but found that he failed to supply sufficient factual evidence to support his actual exposure to mustard agent.

On May 20, 2019 appellant, through counsel, requested reconsideration. In support thereof, appellant submitted a November 27, 2007 abdominal computerized tomography (CT) scan; an April 17, 2019 report from Dr. John Watts, a Board-certified family practitioner; medical records from Dr. Dipti Baral, an internist and pulmonologist, dated April 18 through 22, 2019; function tests/spirometry reports dated August 5, 2009, July 28 and August 4, 2010, August 6 and 13, 2012, August 13, 2014, and March 16, 2018; a November 1, 2017 health record from Blue Grass Occupational Health Clinic pulmonary clinic; and a May 29, 2019 letter from Brian Merrick, APRN, an advanced practice registered nurse.

Also received was an undated statement from appellant addressed to his congressional representative, a June 26, 2019 privacy release form, and a July 9, 2019 congressional letter. In his undated statement addressed to his congressional representative, appellant described the events of October 30, 2017. He indicated that he and a coworker were accidentally exposed to a high concentration of HD mustard agent vapors for roughly 20 minutes on October 30, 2017 while handling hazardous waste during a leaker isolation containment at work. Appellant alleged that the waste was not properly monitored prior to coming to him to be processed. He indicated that he had no knowledge that the hazardous waste was “hot” until it was tested the next day in the monitoring shed. When appellant returned to work on November 1, 2017, he found out that the readings were “off the chart hot.” It was at that point he realized that he had been exposed to mustard agent vapors. Appellant indicated that after his exposure he experienced shortness of breath, which he never had before. He alleged that a safety report was not completed and an investigation was never conducted.⁴

By decision dated August 9, 2019, OWCP denied further merit review of appellant’s claim pursuant to 5 U.S.C. § 8128(a). It found that his request for reconsideration neither raised substantive legal questions, nor included new and relevant evidence. OWCP noted that the only evidence submitted on reconsideration was medical in nature.

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

⁴ On July 30, 2019 OWCP issued a response to the congressional letter.

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).

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 request for reconsideration, 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 request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request without reopening the case for a review on the merits.⁹

ANALYSIS

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

In the August 9, 2019 decision, OWCP noted that the only evidence submitted on reconsideration was medical in nature whereas the issue was factual. The case record indicates, however, that with his request for reconsideration, appellant submitted an undated statement that was addressed to a congressional representative, which provided a further in-depth factual description of the October 30, 2017 employment exposure to mustard agent vapors.

In the case of *William A. Couch*,¹⁰ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by it before the final decision is issued. It is crucial that OWCP address all relevant evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.¹¹

The Board thus finds that this case is not in posture for decision, as OWCP did not review the factual undated statement submitted on reconsideration. On remand OWCP shall review all evidence of record and, following any further development as it deems necessary, it shall issue an appropriate decision.

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* § 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.

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* § 10.608(a)(b).

¹⁰ 41 ECAB 548 (1990); *see also O.G.*, Docket No. 19-1777 (issued March 25, 2020).

¹¹ *See G.T.*, Docket No. 19-1619 (issued May 22, 2020).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: October 9, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board