

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

M.L., Executor of the Estate of E.L., Appellant)	
)	
and)	Docket No. 20-0605
)	Issued: January 27, 2021
U.S. POSTAL SERVICE, MOSS POINT)	
BRANCH POST OFFICE, Moss Point, MS,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 21, 2020 appellant filed a timely appeal from an August 2, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days have elapsed from OWCP's last merit decision, dated July 12, 2018, to the filing of this 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 the claim.

¹ Appellant submitted a timely request for oral argument. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because OWCP ignored legal arguments and evidence submitted on reconsideration which supported his claim for survivor's benefits. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

² 5 U.S.C. § 8101 *et seq.*

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 February 24, 2000 the employee, then a 36-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a cervical condition due to factors of her federal employment including lifting heavy trays of mail. She first noticed her condition and that it was related to factors of her federal employment on May 4, 1998. OWCP assigned OWCP File No. xxxxxx845 and initially accepted the claim for aggravation of cervical strain. On July 24, 2006 it expanded acceptance of the claim to include: chronic tension headaches, cerviogenic in nature; postlaminectomy syndrome, arising from anterior cervical discectomy surgery to C5-6 with anterior arthrodesis on July 10, 2000; cervical torticollis, cervical dystonia to the right; and depression.

On May 2, 2000 the employee filed a separate Form CA-2 under OWCP File No. xxxxxx847 for cervical conditions causally related to factors of her federal employment resulting from twisting motions performed while in the performance of duty. OWCP accepted the claim for herniated cervical disc. On September 28, 2004 it expanded acceptance of the claim to include postlaminectomy syndrome cervical region, and mechanical complications of implant nervous system device and graft.³ OWCP files have been administratively combined with OWCP File No. xxxxxx845 serving as the master file. The employee stopped work in 2000 and did not return. The record reflects that OWCP paid her wage-loss compensation benefits on the periodic rolls as of June 16, 2002.

On May 31, 2013 the employee was admitted to her local hospital emergency room with complaints of chest pain. She underwent cardiac catheterization on June 2, 2013 and was discharged on June 3, 2013. The catheterization report related no angiographic evidence of coronary artery disease. The employee passed away on June 4, 2013.

On May 18, 2015 appellant the employee's widower, filed a claim for compensation by surviving spouse and/or children (Form CA-5). The employee's death certificate identified hemorrhagic lungs as the immediate cause of death. The underlying causes of death included respiratory impairment and recent intake of drugs. The death was identified as accidental due to intake of prescribed medication.

A provisional autopsy report dated June 5, 2013, noted diagnoses *inter alia* of recent intake of drugs: multiple venipunctures of right forearm and antecubital fossa; hemorrhagic atelectatic lungs with aspirated gastric contents; dilated heart hypoxic myocardium, congested cyanotic brain and viscera; small bloody pleural effusions; and autolytic changes in the brain.

By letter dated April 25, 2014 to OWCP, Coroner Vicki L. Broadus, RN related that the employee's cause of death was the intake of her prescription medication which was required for

³ On July 5, 2002 the employee had surgery to implant a Genesis Pulse Generator. On March 9, 2006 the spinal neurostimulator was removed.

pain management related to a job-related injury. Ms. Broadus noted that the employee had been hospitalized up to 12 hours prior to her death and that her medication count was correct at the death scene. She concluded that the employee's long-term narcotic use was the underlying cause of the employee's hemorrhagic lungs and respiratory impairment.

In an April 29, 2015 letter, Dr. Terry Millette, a Board-certified neurologist, related that he had been the employee's physician of record for the last nine years of her life. He noted that her medical history related to her cervical condition and also noted that she had been released from a hospital the evening before her death. Dr. Millette indicated that the employee had taken medications approved for her employment injury.

On June 17, 2015 Dr. Eric Puestow, an OWCP district medical adviser (DMA), Board-certified in internal medicine, reviewed the case record. He noted that the employee had been treated with chronic narcotics for years and had passed all drug screen studies and had no history of drug-seeking behavior. Dr. Puestow also noted that a pathologist had opined that she died of cardiopulmonary failure consequential to ingestion of prescribed narcotics. However, he disagreed, explaining that the employee had been on narcotics for years with no severe consequences. Death would not have occurred if the employee had taken her medications as prescribed. It was much more likely that she died of an overdose of prescribed narcotics after leaving the hospital. Dr. Puestow concluded that there was no causal relationship between the employee's death and her work-related conditions.

OWCP referred the medical record for further review by a second opinion physician. On August 3, 2015 Dr. Alan Heldman, a Board-certified internist, specializing in cardiovascular disease and interventional cardiology, noted the employee's history of injury and extensive medical treatment. He reviewed in detail medical records dating back to 2000. Dr. Heldman related that the medical records suggested a broad list of possible causes of unexplained death including: seizure with aspiration of gastric contents, as the employee had a history of seizure disorder; cardiac arrhythmia as the employee had electrocardiographic (EKG) findings of left bundle branch block; and delayed adverse drug reaction to a treatment or diagnostic agent administered during hospitalization. He concluded that he had not found evidence that narcotics or other medication used for chronic pain was the cause of the employee's unexpected sudden death.

By decision dated August 11, 2015, OWCP denied appellant's claim for survivor benefits. The weight of the medical evidence was attributed to OWCP's DMA and Dr. Heldman, who found that the evidence did not establish that the employee's death was directly related to the narcotic medications prescribed for her employment-related injuries.

On July 28, 2016 appellant requested reconsideration. He also submitted additional evidence.

In a report dated July 15, 2016, Dr. John McCloskey, a neurosurgeon, related that he had performed the employee's anterior cervical fusion two years after her employment injury. He thereafter explained that sudden death was known to occur as a result of chronic opioid usage when on a stable long-term dose. Dr. McCloskey also noted that the employee's EKG tests had shown a stable left branch block since 2009 and that she had been taking medication for her chronic pain, which was known to cause heart problems including heart block. He further noted that he believed

that her seizure disorder was work related. Dr. McCloskey concluded that the employee's employment injury and subsequent severe chronic pain resulted in her death, caused by her long-term use of opioids.

In a report dated July 20, 2016, Dr. Jaswinder Singh Kandola, a Board-certified cardiologist, related that he had reviewed medical records relating to the employee's cardiac condition as of 2006. He related that all EKG studies made available to him showed normal findings. Dr. Kandola concluded that it was his impression that the employee did not die from chronic heart disease.

Dr. Millette reported on July 22, 2016 that additional information was now available which indicated that the amount of drugs in the employee's system at autopsy were within the prescribed range. He also noted that serious, life-threatening fatal respiratory depression had been reported with the use of modified-release opioids, even when used as recommended.

OWCP determined that a conflict in medical opinion existed as to whether the employee's death was causally related to her employment injuries and/or treatment/sequelae. The case record, along with a statement of accepted facts (SOAF) was sent to Dr. Robert E. Percy, a Board-certified internist serving as an impartial medical examiner (IME), to resolve the conflict in medical opinion.⁴ In a January 18, 2017 report, Dr. Percy opined that the employee's death was not caused, aggravated, precipitated, or accelerated by the employment injury or sequelae of her treatment. He opined that her death was likely related to a seizure, noting that the autopsy report indicated vomit in and around her nares and mouth, which suggested aspiration. Dr. Percy indicated that this could be due to seizure, noting that the SOAF noted a seizure disorder and the medical records supported that appellant's medications of Tegretol (Carbamazepine) and Keppra (Levetiracetam) were for seizures. He opined that there was no connection to a seizure diagnosis and the employment injuries. Dr. Percy also advised that while an overdose of opioid medications, intentional or unintentional may result in a life-threatening hypoventilation event, there was no evidence to support that occurred. He also reviewed the cardiac records from the employee's last hospitalization for chest pain prior to her death. Dr. Percy discussed how she might have suffered a cardiac arrhythmic event, which may stimulate a seizure or aspiration.

By decision dated May 3, 2017, OWCP denied modification of its August 11, 2015 decision. Special weight was afforded to the opinion of Dr. Percy, the IME, who opined that the employee's death was likely the result of a seizure, which may have been precipitated by a cardiac arrhythmic event. He specifically denied a causal relationship between the side effects of her opioid pain medication and her death.

On April 17, 2018 appellant requested reconsideration.

In a July 24, 2016 report, Dr. Thomas L. Yearwood, a Board-certified pain management anesthesiologist, opined that the employee's requirement for long-term opioid analgesics and their untoward side-effects was "completely related" to her death. He opined that her autopsy and the findings of the coroner were completely in line with opioid-induced central sleep apnea as the

⁴ The June 23, 2015 SOAFs noted that nonemployment-related conditions included: dilated bile duct; retained food in stomach; seizure; tongue swelling; left breast cancer with mastectomy and implant; abdominal bloating; hiatal hernia; acute arthritis, cholelithiasis; and cardiac infarction and internal hemorrhoids.

cause of her death. Dr. Yearwood explained that the other potential diagnoses “paled by comparison” to the overwhelming evidence of central sleep apnea with concomitant aspiration of gastric contents compounding pulmonary function due to loss of airway control as a result of central nervous system depression.

By decision dated July 12, 2018, OWCP denied modification of its May 3, 2017 decision. It found that Dr. Yearwood’s July 24, 2015 report was insufficient to overcome the special weight of the medical evidence accorded to Dr. Percy’s IME opinion.

On July 2, 2019 appellant requested reconsideration. He contended that the employee’s death was accidental due to long term use of opioid pain medications as a result of her employment injuries, as supported by the medical evidence. Alternatively, appellant contended that, if in fact Dr. Percy, the IME, was correct and that her death was due to a seizure, then it was still an employment-related death as her anti-seizure medications were approved by OWCP and prescribed to her for many years. In support of his argument, he submitted a listing of the employee’s medications for the period June 1 to July 1, 2013, which included two anti-seizure medications.

In an April 11, 2019 statement, the Jackson County Sheriff, concurred that the employee’s death was related to her long-term narcotic use in order to control pain, which resulted from an employment-related injury. He indicated that the medication count was correct at the death scene. The Jackson County Sheriff opined that the drug use was the underlying cause of the hemorrhagic lungs and respiratory impairment.

By decision dated August 2, 2019, OWCP denied reconsideration of the merits of the claim. It found that appellant failed to submit new and relevant legal argument or evidence in support of the request for reconsideration.

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 request 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;

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 *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 its 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.

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 for reconsideration 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 his reconsideration request, appellant contended that the employee's death was due to long-term use of opioid pain medications prescribed for her employment injuries. He also asserted that, if in fact Dr. Percy, the IME, was correct and that her death was due to a seizure, then it was still an employment-related death as her anti-seizure medications were approved by OWCP and prescribed to her for many years.

In support of his argument, appellant submitted a listing of the employee's medications for the period June 1 to July 1, 2013, which included two anti-seizure medications, and he indicated that OWCP was paying for this medication.¹⁰ The Board finds that his legal arguments are new and relevant to the underlying issue in this case of whether there is a new conflict of medical opinion with Dr. Percy, the IME, that her death was caused or aggravated by, precipitated or accelerated by the employment injury or sequelae of her treatment. While the record does not document that, seizure was an accepted diagnosis, whether the employee suffered a seizure which led to her death, and whether such seizure was causally related to the accepted employment injury presents a relevant question, pertinent to the underlying medical issue. Consequently, he is entitled to further merit review of his claim based on the first and second requirements under 20 C.F.R. § 10.606(b)(3).

As appellant has advanced a new and relevant legal argument, he is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹¹ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision regarding his survivor claim.

CONCLUSION

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).

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (b).

¹⁰ See *T.V.*, Docket No. 19-1504 (issued January 23, 2020); *S.P.*, Docket No. 18-1419 (issued February 27, 2019); *L.F.*, Docket No. 17-0243 (issued June 20, 2017); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ See *D.T.*, (*L.S.*), Docket No. 19-1060 (issued October 20, 2020); *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). See *L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 27, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board