United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION NORTHWEST MOUNTAIN REGION, Renton, WA, Employer	)	**Docket No. 20-0755** **Issued: January 4, 2021**

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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 18, 2020, appellant filed a timely appeal from an August 30, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 23, 2018, 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 to review the merits of this claim.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the August 30, 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.*

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

On April 16, 2018 appellant, then a 57-year-old air traffic control specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained toxic encephalopathy causally related to chemical and electromagnetic exposure due to factors of her federal employment. She noted that she first became aware of her condition on January 9, 2017 and of its relationship to her federal employment on March 17, 2017. On the reverse side of the claim form, a supervisor noted that appellant had last been exposed to conditions alleged to have caused disease or illness on January 1, 1995, had voluntarily resigned in 1996, and had first reported the condition to a supervisor on April 10, 2018.[3]

In support of her claim, appellant submitted a scientific paper dated April 9, 1981 by Dr. Jeremy K. Raines, Ph.D., on the subject of electromagnetic field interactions with the human body.

In a magnetic resonance imaging (MRI) scan of appellant's brain dated December 8, 2015, Dr. Omid J. Jafari, a Board-certified radiologist, observed scattered areas of T2 fluid-attenuated inversion recovery (FLAIR) hyperintensity in the supratentorial white matter, predominantly in a subcortical distribution. He noted that this finding was nonspecific and could be related to trauma, prior insult, chronic migraines, or chronic small vessel ischemic disease.

Appellant submitted a log of exposure to suspected sources of electromagnetic radiation from February 22 through May 1, 2017.

In a letter dated March 14, 2017, Dr. Gunnar Heuser, an internal medicine and neurology specialist, related that he had initially treated appellant on December 8, 2015 for complaints of intermittent headaches, cognitive and memory problems, dizziness and nausea, numbness and tingling, palpitations, and fatigue, which he attributed to electromagnetic field exposure. He explained that her complaints were characteristic of exposure to electromagnetic fields including cell phones, cell phone towers, smart meters, and electrical appliances, which occurred in her employment as an air traffic controller. Without elaboration, Dr. Heuser explained that differential diagnosis had ruled out other causes for her multi-system complaints. He noted that appellant's brain scan was abnormal and that a review of published data demonstrated that neurotoxic exposure to pesticides, mold, and a variety of chemicals can render a patient vulnerable to sensitivity to electromagnetic fields. Dr. Heuser diagnosed toxic encephalopathy and stated that appellant was totally disabled.

In a physical functional evaluation form dated May 31, 2017, Dr. Heuser diagnosed toxic encephalopathy secondary to chemical and electromagnetic field exposures. He assessed appellant

[3] The supervisor also reported, without explanation, that appellant stopped work on January 9, 2017. The supervisor added a comment "the agency would have to know the specific dates and specific exposures to respond to [injured workers'] allegations. More information will be forthcoming as so much time has elapsed since [injured worker] was employed."

as totally disabled from work. Dr. Heuser noted that appellant's exposure to electromagnetic fields began in 1996 and that her exposure to toxic chemicals began in childhood.

Appellant submitted a scientific paper dated July 5, 2017 by Dr. Heuser on the subject of functional brain MRI scan in patients complaining of electrohypersensitivity after long-term exposure to electromagnetic fields. A case study referenced appellant's medical history.

In a physician's certification form dated October 16, 2017, Dr. Heuser diagnosed toxic encephalopathy and indicated that appellant had significant impairment of cognitive, memory, and physical functions.

In a letter dated March 6, 2018, Dr. Heuser noted that appellant's case, along with nine others, had been published in a scientific journal, and that all cases had significant electrohypersensitivity and abnormal functional brain scans. He diagnosed toxic encephalopathy, secondary to chemical and electromagnetic field exposure, and stated that no treatment other than avoidance was available for her permanent disability. Dr. Heuser opined that appellant's condition was caused by her employment.

In an April 16, 2018 development letter, OWCP informed appellant that additional medical evidence was needed to establish her claim. It advised her of the type of factual and medical evidence needed, including medical evidence from a qualified physician which provided a diagnosis and a rationalized explanation as to how the employment incident caused the diagnosed condition. Appellant was provided a questionnaire to complete regarding the factual elements of her claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In a separate letter dated April 16, 2018, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's statements, what tasks she performed, what precautions were taken to minimize exposure and a copy of appellant's position description. The employing establishment was afforded 30 days to respond.

In a statement dated March 29, 2018, appellant attributed her diagnosed toxic encephalopathy to exposure to toxic chemical agents including jet fumes and exposure to electromagnetic radiation in the course of her employment as an air traffic controller beginning in 1981, as well as exposure during her employment by the military. She noted that prior to her resignation as an air traffic controller in 1996, she had experienced high levels of stress and problems with memory, decision-making, and concentration, which were of such severity that she was placed on part-time administrative duties in 1995. Appellant became aware of her condition on January 9, 2017 when Dr. Heuser diagnosed toxic encephalopathy secondary to chemical and electromagnetic field exposure.

Appellant submitted a position description for an air traffic control specialist dated October 1, 2000.

In airman medical certificates dated December 10, 1993; December 9, 1994; and December 11, 1995, Dr. Eric S. Smith, Board-certified in occupational medicine, conducted physical examinations, observing no abnormal physical findings.

In a medical note dated March 15, 1995, Katie Walther, a registered nurse, noted that appellant had been diagnosed with gestational diabetes and that she recommended work restrictions.

By letter dated May 10, 2018, the employing establishment challenged appellant's claim. It objected to the contention that electromagnetic exposure could result in toxic encephalopathy. The employing establishment denied the allegation that appellant's federal employment involved hazardous chemical exposure, noting that appellant had only vaguely referenced exposure to jet fuel, over 20 years after her employment ended, without any specific date or incident alleged. It noted that in her position as air traffic controller, appellant was subject to agency medical oversight, and that review of the detailed medical files from this medical oversight found no complaints by appellant of alleged chemical exposure during her employment. The employing establishment claimed that Dr. Heuser had ignored the general proliferation of electronic technology over the past 22 years in rendering his conclusion that appellant's exposure to electromagnetism in federal employment had caused her condition, arguing that it was impossible that his diagnostic study could accurately pinpoint an exposure alleged to have occurred decades prior. It noted that, contrary to appellant's statement that she had been placed on administrative duty prior to 1996 due to stress and difficulty with memory, decision-making, and concentration, agency medical records demonstrated that she was placed on modified duty due to gestational diabetes. The employing establishment enclosed appellant's notification of personnel action (Form SF-50), which recorded her resignation in lieu of involuntary action effective August 1, 1996, and her stated reason that she was "uncomfortable returning to a work environment that has proven to be hostile and harassing." It argued that Dr. Heuser's medical opinion appeared to be exclusively based on his research study, in which appellant was one of the small sample size of 10 subjects involved, half of which had previously suffered head injuries, and which did not render any conclusion about a causal relationship between appellant's claimed exposure and her diagnosed condition.

By decision dated May 23, 2018, OWCP denied the claim, finding that appellant had not established that her diagnosis of toxic encephalopathy was causally related to the accepted employment exposure.

On August 27, 2019 OWCP received appellant's May 20, 2019 request for reconsideration of its May 23, 2018 decision. Appellant related that she had submitted two packages of 54 pages of content to the employing establishment. She argued that OWCP's decision was in error as it did not note that appellant was a study participant in Dr. Heuser's July 2017 publication.[4] Appellant submitted attachments to her reconsideration request.

By decision dated August 30, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim.

[4] With her request for reconsideration appellant submitted USPS tracking receipts which documented that an item had been received by the Department of Labor in London, KY on May 23, 2019, and a second tracking receipt which indicated that an item was delivered to the Department of Labor in London, KY on August 19, 2019. Appellant also submitted an August 9, 2019 letter, wherein appellant noted that she was resubmitting 49 pages of content, as she had been advised the prior package had not been received. Submitted with this letter was a USPS tracking receipt dated May 22, 2019 which indicated that an item had arrived at the London, KY post office on May 22, 2019 and was ready for pick-up. OWCP did not receive 49 pages of attachment with this letter.

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]

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.[8] Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employees Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.[9]

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[10] The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[11]

ANALYSIS

The Board finds that the case is not in posture for decision.

The most recent merit decision of OWCP was the May 23, 2018 decision. One year from May 23, 2018 elapsed on May 23, 2019. OWCP received into iFECS appellant's request for reconsideration on August 27, 2019, more than one year after the May 23, 2018 merit decision.

[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 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. *Id*. at Chapter 2.1602.4b.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.a (February 2016).

[9] *Id.* at Chapter 2.1602.4b (February 2016); *see also S.J.*, Docket No. 19-1864 (issued August 12, 2020); *W.A.*, Docket No. 17-0225 (issued May 16, 2017).

[10] *W.A., id.*; *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

[11] *Supra* note 7 at Chapter 2.1602.5(a) (October 2011).

Pursuant to OWCP's procedures appellant's request was therefore untimely filed. OWCP's procedures provide that timeliness is determined by the date that the request is received into iFECS and that if the request for reconsideration has a document received date greater than one year, the request must be considered untimely.[12] The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.[13] In denying her request, OWCP, however, applied the standard of review for timely requests for reconsideration.[14] The Board will, consequently, remand the case for application of the proper standard for untimely reconsideration requests,[15] to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: January 4, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[12] *Supra* note 9.

[13] *See* 20 C.F.R. § 10.607(b); *see also P.H.*, Docket No. 19-1354 (issued March 13, 2020); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[14] *P.H., id.*

[15] *Supra* note 13 at § 10.607(b).