



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 28, 2019 appellant, then a 61-year-old Assistant United States Attorney, filed an occupational disease claim (Form CA-2) alleging that he developed Meniere's disease due to factors of his federal employment. He explained that Meniere's disease was an inner ear disorder, which was caused by stress and other factors, and that his work was stressful. Appellant indicated that he first became aware of his condition and its relationship to his federal employment on November 16, 2007. He also noted that he had retired from his federal employment in November 2013. On the reverse side of the claim form appellant's supervisor, H.Z., asserted that appellant first reported his condition on November 16, 2007, but that he was unaware that appellant's condition was caused by his federal employment.

In support of his claim, appellant attached a statement alleging that he experienced sudden vertigo and hearing loss, primarily in his left ear, beginning in November 2007. He was diagnosed with Meniere's disease, an inner ear disorder substantially caused by stress and other factors. Appellant also stated that, in November 2007, he was assigned violent crimes and narcotics case at work; however, due to his medical condition, his supervisor assigned another attorney to assist him and later assigned him to work on less stressful cases. In November 2010, he underwent surgery, which eliminated his vertigo, but did not restore his hearing loss. Appellant assumed a new position handling forfeiture cases in November 2010 in order to further reduce his stress and in November 2013 he accepted early retirement. He alleged that his immediate supervisor, H.Z., had actual, contemporaneous knowledge of his disease and took steps to accommodate him.

By decision dated October 21, 2019, OWCP denied appellant's occupational disease claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122.

On October 26, 2019 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 11, 2020. During the hearing, appellant testified that, while his supervisor, H.Z., had admitted knowledge of appellant's Meniere's disease diagnosis, that H.Z. denied knowledge of the cause of appellant's condition.

OWCP subsequently received a letter dated April 9, 2020 from the employing establishment controverting appellant's claim. It did not contest that appellant's supervisor had been aware of appellant's medical condition, but stated that his supervisor was not aware of any causal connection with his federal employment.

In a letter dated May 5, 2020, appellant responded that the employing establishment's representative did not know him nor had personal knowledge of the facts. He also asserted that his supervisor acknowledged that his claim was timely filed. Appellant explained that he accepted

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<sup>3</sup> Docket No. 21-0107 (issued May 4, 2021).

early retirement because it was an opportunity to reduce his stress level and manage his Meniere's disease.

By decision dated May 12, 2020, OWCP's hearing representative affirmed the October 21, 2019 decision.

On November 2, 2020 appellant filed a timely appeal to the Board. By decision dated May 4, 2021, the Board affirmed the May 12, 2020 decision, finding that appellant's occupational disease claim was untimely filed pursuant to 5 U.S.C. § 8122.<sup>4</sup>

On May 3, 2021 appellant requested reconsideration. In support of his request, he again alleged that his supervisor, H.Z., and the employing establishment were aware of his work-related illness. Appellant also submitted an April 12, 2021 letter he wrote to Dr. Timothy Queen, an otolaryngologist, asking if he was on the right track in attributing his Meniere's disease to stress caused by his federal prosecutor job. Dr. Queen responded to appellant's letter indicating his approval by writing "Yes" on the same document.

By decision dated July 30, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>5</sup> vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>6</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.<sup>7</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Id.*; see *A.A.*, Docket No. 20-1564 (issued August 30, 2021); *J.C.*, Docket No. 20-0614 (issued February 10, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); see also *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3); see *A.A.*, *id.*; *L.D.*, *id.*; see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>10</sup>

### ANALYSIS

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

In the case of *William A. Couch*,<sup>11</sup> the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

OWCP's July 30, 2021 decision found that the only evidence submitted in support of appellant's reconsideration request was his May 3, 2021 statement. However, the record indicates that on May 19, 2021 OWCP also received appellant's April 12, 2021 letter to Dr. Queen, which also contained the doctor's affirmative response on the same document.

It is crucial that OWCP address all evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.<sup>12</sup> The Board finds that this case is not in posture for decision, as OWCP did not review and address the above-noted evidence in its July 30, 2021 decision.<sup>13</sup> On remand OWCP shall review and address all evidence of record, and following any further development as it deems necessary, it shall issue an appropriate decision.

### CONCLUSION

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

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<sup>8</sup> *Id.* at § 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 the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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). Chapter 2.1602.4(b).

<sup>9</sup> *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> *Id.* at § 10.608(b); *see B.S.*, Docket No. 20-0761 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> 41 ECAB 548 (1990); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

<sup>12</sup> *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch, id.*

<sup>13</sup> *R.C.*, Docket No. 20-1321 (issued July 7, 2021); *see also V.C.*, Docket No. 16-0694 (issued August 19, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2021 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: July 19, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board