

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

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M.C., Appellant)	
)	
and)	Docket No. 21-1081
)	Issued: March 14, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL EMERGENCY MANAGEMENT)	
AGENCY, Berryville, VA, Employer)	
)	

Appearances:
 Stephen D. Scavuzzo, Esq., for the appellant¹
 Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
 ALEC J. KOROMILAS, Chief Judge
 PATRICIA H. FITZGERALD, Deputy Chief Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

On July 12, 2021 appellant, through counsel, filed a timely appeal from a June 2, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 21-1081.

On April 23, 2019 appellant, then a 68-year-old emergency management specialist, filed an occupational disease claim (Form CA-2) alleging that she developed a cough, red and itchy eyes, and tongue swelling on various occasions beginning 2018 due to factors of her federal employment, including exposure to strong fumes. She noted that she first became aware of her condition on January 29, 2018 and realized its relation to her federal employment on January 10, 2019. Appellant did not stop work.

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 a 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.

In an undated statement, appellant's coworker, C.G., related that she noticed the smell of propane and felt dizzy while working on July 16, 2018.

In a subsequent, undated statement, an unidentifiable coworker related that appellant reported being ill in September, October, and December 2018 and that there was a noticeable chemical odor at her workstation on January 10, 2019.

In a medical note dated May 29, 2019, Dr. Reha Pokharel, a Board-certified internist, noted that appellant related a history of tongue and extremity swelling, coughing, dizziness, and a tight band around her chest, which she attributed to exposure to various fumes at work.

By decision dated June 27, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted employment exposure. Consequently, it found that the requirements had not been met to establish an injury as defined by FECA.

On August 13, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 26, 2020, OWCP denied appellant's untimely request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence supporting that she sustained an injury due to the accepted factors of her federal employment.

On November 23, 2020 appellant, through counsel, requested reconsideration of the August 26, 2020 decision. In support of her request, appellant argued that she did not receive OWCP's June 27, 2019 decision until July 23, 2020 and, therefore, her August 13, 2020 request for an oral hearing was timely.

By decision dated June 2, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

The Board, having duly considered the matter, finds that this case is not in posture for decision.

Section 10.607(a) of OWCP's regulations provides that a request for reconsideration must be received within one year of the date of OWCP's last merit decision for which review is sought.² 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).³

Appellant, through counsel, requested reconsideration of the August 26, 2020 denial of hearing. However, that is not a merit decision. The last merit decision of record was dated June 27,

² 20 C.F.R. § 10.607(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

2019 and it explained that the only right of appeal was to the Board. Appellant's request for reconsideration was untimely filed as it was not received until November 23, 2020, which is more than one year from the June 27, 2019 merit decision.

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of its most recent decision. The request must establish, on its face, that such decision was erroneous.⁴ The standard utilized by OWCP in its June 2, 2021 decision is appropriate only for timely reconsideration requests. Because appellant filed an untimely reconsideration request, the case will be remanded to OWCP for application of the correct standard for reviewing untimely reconsideration requests, the clear evidence of error standard.⁵ Following any further development as deemed necessary, OWCP shall issue an appropriate decision. Accordingly,

IT IS HEREBY ORDERED THAT the June 2, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: March 14, 2023
Washington, DC

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

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

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

⁴ 20 C.F.R. § 10.607. *See also C.B.*, Docket No. 17-0933 (issued July 17, 2017); *A.B.*, Docket No. 15-0521 (issued June 13, 2016).

⁵ *Id.* at § 10.606(b). *See also M.D.*, Docket No. 19-1957 (issued June 22, 2021); *E.G.*, Docket No. 19-0236 (issued August 22, 2019).