

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

_____)	
J.M., Appellant)	
)	
and)	Docket No. 19-0011
)	Issued: April 10, 2019
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Bagram, Afghanistan,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 1, 2018 appellant filed a timely appeal from a May 25, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 9, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 5, 2016 appellant, then a 66-year-old construction representative, filed an occupational disease claim (Form CA-2) alleging that, while in the performance of duty, he "came down with Acute [Pancreatitis] which has now led to my becoming a Diabetic" due to his exposure to toxic air quality for 14 months during his deployment to Afghanistan. He indicated that he did not realize that the air was that toxic until he received a copy of a memorandum from the employing establishment dated April 15, 2011 detailing the toxic air quality in Bagram, Afghanistan. Appellant asserted that he first became aware of his condition on April 3, 2014 and first realized it was caused or aggravated by his federal employment on February 2, 2016. On the reverse side of the claim form, an employing establishment supervisor indicated that appellant did not have or report any medical issues until after he retired in 2011.

Appellant submitted a copy of the April 15, 2011 memorandum from the employing establishment indicating that its purpose was to summarize the results of air samples taken on the Bagram Air Field (BAF) over the last eight years. The results showed that "there may be an increased risk of long[-]term adverse health conditions as a result of the poor air quality here on BAF." The primary contributor to the elevated levels of particular matter was a burn pit which burned the trash generated on BAF with a population of up to 40,000 service members and contractors. The employing establishment stated that the long-term health risk associated with air conditions on BAF indicated that exposure at these levels "may increase the risk for developing chronic health conditions such as reduced lung function or exacerbated chronic bronchitis, chronic obstructive pulmonary disease (COPD), asthma, atherosclerosis, or other cardiopulmonary diseases." It noted that this did not mean that service members that served on BAF would acquire adverse long-term pulmonary or heart conditions, but that the risk for such was increased. It further advised service members exposed during their employment should seek medical care from the Department of Veterans Affairs health care facilities in their local area and medical providers at those facilities would have access to the data compiled by Public Health Command and would be able to make a determination if the adverse health condition that the service was concerned about was a result of the exposure they received during their time on BAF.

In a March 24, 2016 report, Dr. Todd H. Baron, a gastroenterologist, related that appellant was initially transferred to University of North Carolina Hospitals on April 22, 2014 for complications of acute idiopathic pancreatitis and he believed that the case of his pancreatitis was secondary to exposure to air toxins while deployed at Bagram, Afghanistan for the period October 2005 to December 2006. Dr. Baron opined that appellant's condition did not appear to be caused by some of the most common causes of pancreatitis which included gallstones (as appellant had previously had his gallbladder removed), alcohol, or hypercalcemia. He explained that acute pancreatitis "could be" caused by toxic exposure and had been linked to exposure to ethanol, methanol, and organophosphates. Dr. Baron noted that he did "not have knowledge of what particular toxins that [appellant] was exposed to while in Afghanistan."

By decision dated April 25, 2016, OWCP found that appellant had established that he was exposed to toxic fumes, but the medical evidence of record failed to establish a causal relationship between his diagnosed condition and the accepted exposure.

On May 12, 2016 OWCP received appellant's request for a review of the written record by a representative of OWCP's Branch of Hearings and Review. The request was postmarked May 9, 2016.

Appellant subsequently submitted two narrative statements dated April 30 and May 25, 2016 reiterating the factual history of his claim.

By decision dated November 22, 2016, an OWCP hearing representative affirmed the prior OWCP decision, finding that the medical evidence of record was insufficient to establish causal relationship.

On November 13, 2017 appellant requested reconsideration and submitted additional medical evidence in support of his claim. The evidence consisted of a May 22, 2014 report from Dr. Baron discussing the upper endoscopic ultrasound and related operative records, as well as consultations and treatment for pancreatic necrosis.

By decision dated February 9, 2018, OWCP denied modification of its prior decision.

On April 2, 2018 appellant requested reconsideration. In an accompanying narrative statement dated March 28, 2018, he reiterated the factual and medical history of his claim. Appellant further submitted a number of articles regarding "Gulf War Illness" and military exposure to toxic burn pits in Iraq and Afghanistan and possible links to various medical conditions. He also submitted documents concerning his retirement from the employing establishment.

By decision dated May 25, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

³ 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).

⁴ 20 C.F.R. § 10.607.

⁵ *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 (iFECS). Chapter 2.1602.4b.

A timely application 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; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ When a timely application 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.⁷

ANALYSIS

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

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, he did not advance a relevant legal argument. On reconsideration, appellant submitted a statement wherein he reiterated the factual and medical history of his claim. These contentions are not legal arguments that address the underlying issue of whether he submitted sufficient medical evidence to establish a causal relationship between his diagnosed condition and the accepted exposure to burn pits at work. The Board has held that the submission of evidence or an argument which does not address the particular issue involved does not constitute a basis for reopening a case. As such, appellant's statements are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.⁸ As appellant did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP, he is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(3).⁹

Appellant also submitted documentation concerning his retirement from federal employment and a number of articles regarding "Gulf War Illness," and possible links between various medical conditions and military exposure to toxic burn pits in Iraq and Afghanistan. The Board finds that submission of this evidence does not require reopening appellant's case for merit review. First, the documentation regarding appellant's retirement is not relevant to his claim. The Board has held that submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ Second, the Board has also held that newspaper clippings, medical texts, and excerpts from publications are of no evidentiary value as such materials are of general application and are not determinative the particular employment factors

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *See J.G.*, Docket No. 16-1576 (issued November 18, 2016); *S.C.*, Docket No. 11-1395 (issued September 22, 2011).

⁹ *D.D.*, Docket No. 18-0648 (issued October 15, 2018).

¹⁰ *L.K.*, Docket No. 14-1722 (issued September 29, 2015) (where the Board held that copies of collective bargaining agreements, articles concerning the firing of air traffic controllers in the 1980s, and copies of a supervisor's divorce papers did not constitute a basis for reopening the claimant's case because they failed to address his traumatic injury claim for internal bruising on his right lower back while at work on September 2, 2005).

alleged by the employee.¹¹ Therefore, the articles submitted do not constitute relevant and pertinent new evidence.¹² OWCP denied appellant's occupational disease claim because he had not submitted evidence from a physician which sufficiently explained how the accepted exposure to toxic fumes caused or aggravated his pancreatitis (and later diabetes); therefore, the Board finds that these documents do not constitute pertinent new and relevant evidence. Consequently, appellant has not established a basis for reopening the merits of his case.¹³

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

¹¹ *H.H.*, Docket No. 17-1545 (issued December 18, 2017).

¹² *Id.* See also *L.K.*, *supra* note 10.

¹³ *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2019
Washington, DC

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

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

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