

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

R.S., Appellant)	
)	
and)	Docket No. 22-0087
)	Issued: April 19, 2022
DEPARTMENT OF THE AIR FORCE, TINKER)	
AIR FORCE BASE, Tinker, OK, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for Appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 28, 2021 appellant filed a timely appeal from a September 23, 2021 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 1, 2021, 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 this case.

ISSUE

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 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.

² 5 U.S.C. § 8101 *et seq.*

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 December 10, 2020 appellant, then a 59-year-old production machinery mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed cancer due to factors of his federal employment, including exposure to hazardous chemicals such as chromium and cadmium. He noted that he first became aware of his condition on July 28, 2020 and realized its relation to his federal employment on November 20, 2020. Appellant did not stop work.

OWCP received a sample analysis report dated October 30, 2017.

In a standard core personnel document (SCPD) dated June 12, 2018, the employing establishment identified appellant's official duties and work conditions as a production machinery mechanic.

A notification of personnel action, Standard Form (SF) 50 dated October 13, 2019 noted appellant's position and employee information.

In an undated statement, appellant related that he was exposed to hazardous chemicals on a daily basis as part of his official duties. He explained that a computerized tomography (CT) scan of the kidneys revealed cancer, which also affected his spleen, limp nodes, and lower abdomen. Appellant further noted that he had several filter air sample tests which came back as "high" on several readings. He claimed he was exposed to chemicals while performing his official duties.

In a development letter dated December 22, 2020, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

On July 22, 2020 appellant was seen by Dr. Joseph Parkhurst, a Board-certified urologist, for his condition. Dr. Parkhurst performed a kidney ultrasound and diagnosed mass effect on the right kidney.

A July 28, 2020 diagnostic report from Dr. Parkhurst noted that a CT scan of appellant's abdomen and pelvis revealed a mass-like infiltrative process in both kidneys.

In a follow-up note dated August 6, 2020, Dr. Parkhurst recommended that appellant undergo a biopsy due to mass-like infiltrative process in both kidneys.

A diagnostic report dated September 2, 2020 from Dr. Vance McCollom, a Board-certified radiologist, examined appellant for his condition and diagnosed a perinephric renal mass.

In a medical report dated September 4, 2020, Dr. You Lu, a Board-certified pathologist, diagnosed a retroperitoneal mass and small B-cell lymphoma.

A September 10, 2020 note from Dr. Parkhurst indicated that appellant was being referred for evaluation and treatment for lymphoma.

In medical notes dated September 14 and 30, 2020, Dr. Robert Reynolds, a Board-certified oncologist, examined appellant and diagnosed marginal zone lymphoma.

An October 28, 2020 note from Dr. Reynolds noted that appellant was experiencing side effects from lymphoma, including fatigue and hip/leg pain. In a diagnostic report of even date, Dr. Michelle Powers, a Board-certified pathologist, examined appellant for his lymphoma diagnosis.

In a November 23, 2020 note, Dr. Reynolds diagnosed an extra nodal in the right and left kidney. In a note of even date, he indicated that an exposure to environmental hazards could cause lymphoma and further opined that appellant's exposure to cadmium, chromium as well as other environmental hazards may have contributed to his lymphoma diagnosis.

On December 18, 2020 Dr. Scott Prater, a Board-certified radiologist, performed a CT scan of appellant's abdomen and pelvis, which revealed a six-millimeter pulmonary nodule.

A December 23, 2020 narrative report from Dr. Reynolds noted that appellant worked around chemicals such as cadmium and chromium for 11 years. Dr. Reynolds opined that his diagnosis of low-grade lymphoma "*could* be related to exposure" to these chemicals. (Emphasis in the original.) He further indicated that appellant had gone through three cycles of chemotherapy and is now in remission.

In an undated statement, appellant noted that he worked in controlled areas in the presence of cadmium and chromium and that despite taking preventative measures, he began experiencing pain in his kidneys. He further indicated that he was diagnosed with cancer of the kidneys, spleen, and lymph nodes, and that he was experiencing side effects from chemotherapy.

In an undated statement, B.W., an employing establishment supervisor noted that appellant is a production machinery mechanic and that he was required to wear personal protective equipment (PPE) while working in controlled areas.

By decision dated February 1, 2021, OWCP denied appellant's occupational disease claim, finding that he had not established that his medical condition was causally related to the accepted factors of his federal employment. Consequently, it found that he had not met the requirements to establish an injury or medical condition causally related to the accepted employment factors.

On July 15, 2021 appellant, through counsel, requested reconsideration of OWCP's February 1, 2021 decision and submitted additional evidence.

In an amended narrative report dated June 21, 2021, Dr. Reynolds reiterated that appellant worked with cadmium, chromium, and other chemicals for 11 years as part of his official duties. He opined that appellant "has developed a low-grade lymphoma and it would be reasonable to conclude that this exposure played a role in development of that lymphoma."

In an undated statement, appellant recounted the details of his exposure to carcinogens at the workplace. He related that he sought medical attention and that his cancer diagnosis was not revealed until a biopsy.

In an undated statement, appellant reiterated that he has worked at his federal employment for approximately 12 years and that he was exposed to various hazardous chemicals during this time period. He further noted that he continued to perform his official duties despite his medical condition.

By decision dated September 23, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA 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 payment of compensation at any time on his own motion or on application.³

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.⁴

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to

³ 5 U.S.C. § 8128(a); *see D.G.*, Docket No. 20-1203 (issued April 28, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁵ *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 OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 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 2.1602.4b.

⁶ *Id.* at § 10.608(a); *D.G., supra* note 3; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007)

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.⁷

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).

Along with the July 15, 2021 reconsideration request, appellant submitted Dr. Reynolds' amended June 21, 2021 narrative report, which included his opinion that the accepted factors of his federal employment played a role in the development of his diagnosed lymphoma. As Dr. Reynolds' amended report addresses the underlying issue of whether the medical condition was causally related to the accepted employment factors, this report constitutes relevant and pertinent new evidence that was not previously considered. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).⁸

Consequently, the Board will set aside OWCP's September 23, 2021 decision and remand the case for an appropriate merit decision on appellant's 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).

⁷ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *Supra* note 4; *see also F.K.*, Docket No. 21-0998 (issued December 29, 2021); *J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 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: April 19, 2022
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