

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

S.M., Appellant)	
)	
and)	Docket No. 23-1113
)	Issued: August 12, 2024
DEPARTMENT OF VETERANS AFFAIRS, VA)	
MEDICAL CENTER, Houston, TX, Employer)	
)	

Appearances:
Appellant, pro se
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
JANICE B. ASKIN, Judge

JURISDICTION

On June 8, 2021 appellant filed a timely appeal from a February 2, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated September 6, 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

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that on appeal, appellant submitted 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.*

FACTUAL HISTORY

On April 27, 2018 appellant, then a 55-year-old health system specialist, filed an occupational disease claim (Form CA-2) alleging that she developed cancer of the hard and soft palates of the mouth, which migrated to her nervous system, from exposure to radioactive waste and material in the performance of duty. She further alleged that her work area had been deemed to be unsafe. Appellant noted that she first became aware of her illness on November 10, 2017, and realized its relation to her federal employment on April 10, 2018.

In support of her claim, appellant submitted medical evidence dated November 21, 2017 through June 19, 2018.

By decision dated September 6, 2018, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed condition and the accepted employment exposure.

On August 25, 2019 appellant requested reconsideration of OWCP's September 6, 2018 decision. In support thereof, she alleged that the documentation submitted by the employing establishment was incomplete, altered, and/or insufficient. Appellant also asserted that the employing establishment had intentionally misrepresented the location of her cancer. She explained that her medical providers had inquired as to what cancer-causing radiation she was exposed to; however, the employing establishment refused to provide that information. Appellant further alleged that product sheets from the employing establishment's safety office were manipulated, and the concentration of cancer-causing agents was intentionally removed from the safety reports. She also asserted that the statement from Kayla Matlock, a physician assistant, was inconclusive; however, a reasonable interpretation was that her cancer was more likely than not due to radiation exposure. No additional medical evidence was received.

By decision dated February 2, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), finding that it neither raised substantial legal questions, nor included new or relevant evidence.

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 [or her] 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 its 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). *Id.* at Chapter 2.1602.4b.

A timely request 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 request 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 improperly denied appellant's request for reconsideration of the merits of the claim.

On reconsideration appellant asserted that the documentation submitted by the employing establishment was incomplete, altered, and/or insufficient. She alleged that the employing establishment had intentionally misrepresented the location of her cancer. Appellant explained that her medical providers had inquired as to what cancer-causing radiation she was exposed to; however, the employing establishment refused to provide this information. She further alleged that product sheets from the employing establishment's safety office were manipulated, and the concentration of cancer-causing agents were intentionally removed from the safety reports. The Board finds that has raised a new legal argument, which is relevant to the underlying issue of whether the medical evidence of record was sufficient to establish causal relationship between her diagnosed condition and the accepted employment exposure.⁸

As appellant has advanced a new and relevant legal argument, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.⁹ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of the claim.

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *Supra* note 6; *see also* *L.C.*, Docket No. 23-0986 (issued December 8, 2023).

⁹ *Id.*; *see also* *M.L., (E.L.)*, Docket No. 20-0605 (issued January 27, 2021); *D.T., (L.S.)*, Docket No. 19-1060 (issued October 20, 2020); *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018); *L.K.*, Docket No. 15-0659 (issued September 15, 2016).

ORDER

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

Issued: August 12, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board