

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

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E.W., widow of N.W., Appellant)	
)	
and)	Docket No. 24-0283
)	Issued: May 10, 2024
DEPARTMENT OF THE AIR FORCE, JOINT)	
BASE SAN ANTONIO-MARCH AIR FORCE)	
BASE, CA, Employer)	
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Appearances:
Appellant, pro se
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
JANICE B. ASKIN, Judge

On January 20, 2024 appellant filed a timely appeal from a November 13, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 24-0283.¹

On December 8, 2021 the employee, then a 50-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he developed non-small cell lung cancer due to factors of his federal employment. He noted that he first became aware of his condition on November 24, 2021 and realized its relationship to his federal employment on December 8, 2021. Appellant stopped work on November 29, 2021.

OWCP received a position description for a unit program coordinator.

¹ The Board notes that, following the November 13, 2023 decision, appellant submitted additional evidence to OWCP. 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.*

In a development letter dated December 16, 2021, OWCP informed the employee 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 the same date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding the employee's claim. It provided both parties 30 days to respond.

By decision dated January 19, 2022, OWCP denied the employee's occupational disease claim, finding that the evidence of record was insufficient to establish that he sustained an injury in the performance of duty, as alleged. It noted that, as the employee did not respond to its development questionnaire, it was unable to determine the factual component of his claim. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a January 19, 2022 letter, the employing establishment contended that it did not have enough information to concur or disagree with the employee's allegations. It related that the employee's actual duties did not vary from the official job description and none of the employee's tasks resulted in the claimed exposure or contact. The employing establishment explained that the employee was a unit program coordinator and his duties included office automation, coordinating e-mails, processing requests, and responding to telephone calls. It noted the position was mostly sedentary.

On August 15, 2022, appellant informed OWCP that the employee passed away on December 15, 2021. She submitted a copy of the death certificate noting a date of death of December 15, 2021. The cause of death was listed as cardiac arrest, hypoxic respiratory failure, and stage 4 lung cancer with brain metastasis.

In an undated, handwritten statement received by OWCP on September 12, 2023, appellant requested reconsideration. She indicated that on November 24, 2021 the employee was diagnosed with lung cancer and died shortly thereafter. Appellant noted that the employee was a soldier and Gulf War veteran who served in the military for 21 years. She referenced a January 19, 2023 decision from the Department of Veteran's Affairs, which determined that the employee's death was service related. Appellant indicated that her English was not very good and advised that she might have made incorrect statements when trying to explain herself to OWCP.

Appellant submitted a copy of her marriage certificate, documenting her March 29, 2021 marriage to the employee, her California driver license, a January 19, 2023 decision from the Department of Veterans Affairs, and a record of honorable discharge from active duty. She also submitted medical records from November 2021 through late-2023, noting the employee's treatment for lung cancer, which was diagnosed on November 16, 2021.

On October 12, 2023, appellant requested reconsideration of OWCP's January 19, 2022 decision.

By decision dated November 13, 2023, OWCP summarily denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error. OWCP noted only that, "We did consider your request under

20 C.F.R. § 10.607(b) to determine whether you presented clear evidence that [OWCP's] last merit decision was incorrect.... You did not present clear evidence of error. Therefore, your request for reconsideration is denied because it was not received within the one-year limit. The basis for the decision is outlined in the enclosure.” No such enclosure is found in the case record.

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

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.² Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.³ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.⁴ As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.⁵

In denying appellant's reconsideration request, OWCP failed to analyze whether it was sufficient to demonstrate clear evidence of error. The November 13, 2023 decision simply noted: “We did consider your request under 20 C.F.R. § 10.607(b) to determine whether you presented clear evidence that [OWCP's] last merit decision was incorrect... You did not present clear evidence of error. Therefore, your request for reconsideration is denied because it was not received within the one-year limit. The basis for the decision is outlined in the enclosure.” However, no such enclosure is found in the case record. OWCP therefore did not address appellant's contentions raised in her reconsideration request. Furthermore, it provided no discussion relative to the evidence submitted.⁶

The Board thus finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect.⁷ The Board will, therefore, set aside OWCP's November 13, 2023 decision and remand the case for findings of fact

² *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

³ 5 U.S.C. § 8124(a).

⁴ 20 C.F.R. § 10.126.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

⁶ *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

⁷ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (September 2020).

and a statement of reasons, to be followed by an appropriate decision regarding appellant's reconsideration request.⁸ Accordingly,

IT IS HEREBY ORDERED THAT the November 13, 2023 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this order of the Board.

Issued: May 10, 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

⁸ See *T.P.*, *supra* note 2; see also 20 C.F.R. § 10.607.