

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

S.W., Appellant)	
)	
and)	Docket No. 22-0565
)	Issued: October 17, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
JOHN J. PERSHING VA MEDICAL CENTER,)	
Poplar Bluff, MO, 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 March 8, 2022 appellant filed a timely appeal from a March 3, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 9, 2021, 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, following the March 3, 2022 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.*

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, 2019 appellant, then a 48-year-old medical technologist, filed an occupational disease claim (Form CA-2) alleging that he sustained an emotional condition due to factors of his federal employment, specifically, harassment by coworkers, and disciplinary actions by supervisors. He noted that he first became aware of his condition and realized its relation to his federal employment on November 14, 2014. Appellant alleged that he remained exposed to the identified employment factors until he stopped work on January 18, 2019. In accompanying statements, he attributed his condition to coworkers A.O. and P.C. swearing at him during training; a pattern of discrimination; disparate treatment and hostility by supervisor B.N. on the basis of disability related to a mold allergy; being denied reasonable accommodations during mold remediation; frustration over not being able to meet the requirements of his position; and discrimination on the basis of sex.³

In letters dated March 12 and 25, 2019, the employing establishment controverted appellant's claim.

In a series of statements, appellant further alleged a pattern of harassment and discrimination in retaliation for his complaints about mold in the laboratory area, supervisory e-mails, disciplinary letters, personnel documents, investigative reports, and Equal Employment Opportunity (EEO) forms dated November 14, 2014 through August 8, 2019. He also submitted medical evidence.

By decision dated September 3, 2019, OWCP denied appellant's emotional condition claim, finding that the evidence of record was insufficient to establish a compensable employment factor. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 4, 2019 appellant requested reconsideration. He submitted additional evidence, including documentation concerning his EEO complaints, documentation concerning respiratory conditions related to occupational mold exposure, and narrative statements wherein he

³ Appellant previously filed an occupational disease claim (Form CA-2) on January 15, 2019, alleging that he sustained an allergic reaction with respiratory, neurologic, and visual symptoms when exposed to mold at the employing establishment beginning on March 1, 1990. He noted that he first became aware of his condition on March 1, 1990 and realized its relationship to his federal employment on February 1, 2015. Appellant alleged that he thereafter remained exposed to mold. OWCP assigned that claim OWCP File No. xxxxxx158. Additionally, appellant previously filed a traumatic injury claim (Form CA-1) on January 18, 2019, alleging that he sustained respiratory and neurologic conditions due to exposure to mold while at work on January 14, 2019. OWCP assigned that claim OWCP File No. xxxxxx215. It has administratively combined appellant's claims, with OWCP File No. xxxxxx158 serving as the master file.

further alleged that there was mold found on several floors of the employing establishment's facility.

By decision dated February 28, 2020, OWCP denied modification.

On January 12, 2021 appellant requested reconsideration. He submitted additional evidence including, statements regarding his allegations of harassment and mold exposure; environmental studies; and further documentation regarding his EEO complaints. Appellant also submitted additional medical evidence.

By decision dated August 9, 2021, OWCP denied modification.

On January 9, 2022 appellant requested reconsideration. He submitted additional documentation regarding the presence of mold at the employing establishment and his efforts to obtain reasonable accommodations due to his mold allergy.

On January 14, 2022, OWCP received an August 9, 2021 union grievance arbitration decision, which found that appellant was a qualified individual with a disability based on his mold allergy, and that the employing establishment had discriminated against him by not providing reasonable accommodations. It further found that the employing establishment had failed to maintain a safe working environment.

By decision dated March 3, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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 compensation at any time on his own motion or on application.⁴

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.⁵

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to 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.⁸

ANALYSIS

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

In support of his January 9, 2022 reconsideration request, appellant submitted an August 9, 2021 union grievance arbitration decision, which found that appellant was a qualified individual with a disability based on his mold allergy, and that the employing establishment had discriminated against him by not providing reasonable accommodations. It further found that the employing establishment had failed to maintain a safe working environment. The Board finds that this is new and relevant evidence regarding the underlying merit issue of whether appellant has established a compensable employment factor.

As the August 9, 2021 union grievance arbitration decision meets the criteria for a merit review under criteria the third criteria under 20 C.F.R. § 10.606(b)(3), the Board finds that OWCP improperly denied appellant's request for reconsideration.⁹ The Board shall, therefore, remand the case for a merit review.¹⁰ Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

⁶ *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 (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.

⁷ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *J.B.*, Docket No. 22-1166 (issued April 3, 2023); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *Supra* note 5 at § 10.606(b)(3)(iii). *See also C.B.*, Docket No. 15-0337 (issued May 1, 2015).

¹⁰ *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2022 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: October 17, 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