

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

)	
Appellant)	
)	
and)	Docket No.
)	Issued: September 25, 2019
)	
)	
Employer)	
)	

Appearances:
Paul H. Felser, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 13, 2019 appellant, through counsel, filed a timely appeal from a January 4, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated October 2, 2017, 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.

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.*

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 _____ appellant, then a _____-year-old financial institution examiner, filed an occupational disease claim (Form CA-2) alleging that his preexisting hypertrophic obstructive cardiomyopathy (HOCM) with ventricular tachycardia (VT) worsened due to stress from his federal employment. He noted that he first became aware of his claimed condition on _____ and first realized its relationship to his federal employment on _____.

In an undated statement accompanying appellant's claim form, appellant explained that his job entailed traveling over 50 percent of the time, and serving as a union president which caused him to be put under Congressional and public scrutiny with little or no protection from the employing establishment.

In a development letter dated _____ OWCP requested that appellant submit additional evidence in support of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate letter of even date, OWCP also requested additional information from the employing establishment. It afforded both appellant and the employing establishment 30 days to respond.

In a statement dated _____ appellant responded to OWCP's development questionnaire. He asserted that he began his position in _____ and that it required travel with little or no supervision, demanding deadlines, and he had no training until _____. Appellant began working for the union with partial official time on _____ and noted from _____ through _____ he was assigned 100 percent official time to work for the union. He reported that in his capacity as union president he was frequently required to testify before Congress. Appellant alleged that he was accused of mistreating women, being a dictator, compared to Hitler, threatened with physical violence, and chastised in the press. He alleged a hostile work environment. Appellant also asserted that he had been diagnosed with post-traumatic stress disorder (PTSD). He noted that he had filed an Equal Employment Opportunity (EEO) complaint due to sexual orientation discrimination, that he was never promoted while he was union president, and that there was an ongoing investigation regarding pay at the employing establishment. Appellant stopped work in _____ and was hospitalized.

On _____ and _____ appellant provided additional factual and medical evidence in support of his occupational disease claim, including a _____ e-mail informing coworkers that the employing establishment had granted him 100 percent official time for his service as union president.

On _____ the employing establishment approved leave under the Family Medical Leave Act (FLMA) including from _____ through _____ and _____ through _____.

Appellant also used annual leave from _____ through _____

On _____ and _____ Dr. _____ a cardiologist, diagnosed HOCM. On _____ appellant underwent placement of an implantable cardioverter defibrillator (ICD). On _____ he was hospitalized due to chest pain and Dr. _____ Board-certified in emergency medicine, diagnosed VT.

In a note dated October 13, 2015, Dr. _____ diagnosed severe hypertrophic cardiomyopathy and sustained _____. She noted that appellant was unable to travel or be under stress and that he could not drive. In an undated report, Dr. _____ opined that appellant's work environment contributed to the degradation of his _____ with _____. She specifically mentioned appellant's increased stress levels due to travel, tight deadlines, demanding work requirements, and being in the spotlight under public scrutiny as contributing to his rapid increased heartbeats and stress levels within his heart. Dr. _____ recommended that appellant reduce stress to prevent a recurrence of VT. She opined that appellant could not tolerate his work environment on any level and that reduction in stress and lifestyle changes were necessary to avoid a potential relapse, which appellant was unlikely to survive. On _____ Dr. _____ again noted appellant's stressful work and work-required travel. She opined that this exacerbated appellant's cardiac condition and that he was unable to work due to the nature of his illness.

By decision dated February 17, 2016, OWCP denied appellant's claim finding that he had not established causal relationship between his accepted employment factors and his diagnosed condition.

On March 1, 2016 appellant, through counsel, requested an oral hearing from an OWCP hearing representative.

By decision dated September 1, 2016, OWCP's hearing representative set aside OWCP's February 17, 2016 decision and remanded the case for further adjudication of the factual aspect of appellant's claim, specifically a determination of whether he had substantiated a compensable factor of employment as causing or contributing to his diagnosed condition.

In a development letter dated September 14, 2016, OWCP requested that the employing establishment address the employment events implicated by appellant. It afforded 30 days for a response.

In a response dated November 16, 2016, the employing establishment indicated that appellant's decision to testify before Congress on June 25, 2015 was voluntary and not part of his official duties. It further noted that appellant took his story of alleged discrimination to the public, to Congress, and to the press and that it had not commented on his story. The employing establishment indicated that appellant's tenure as union president was from _____, when he was appointed interim president, until _____ when he was not reelected. While appellant officially remained in his examiner position, and was assigned work, he did not perform this work. Instead, appellant requested FMLA leave beginning _____ and informed the employing establishment on _____ that he would not be returning to work due to his medical conditions. Appellant requested disability retirement effective _____. The

employing establishment also provided appellant's position description, which provided that the position required extensive travel. It noted travel was required 75 percent of the time or more than 11 nights per month.

On _____ appellant responded to the employing establishment's assertions and alleged that the employing establishment had commented publically on press reports about him and that Congress had required him to testify as the union president.

By decision dated December 30, 2016, OWCP denied appellant's occupational disease claim finding that he had not substantiated a compensable factor of employment.

On January 24, 2017 appellant, through counsel, requested an oral hearing from an OWCP hearing representative. A hearing was held on July 18, 2017.

In an additional narrative statement dated August 1, 2017, appellant attributed his condition to his job duties of working in financial institutions, writing and scrutinizing work papers, as well as his union duties of filing complaints for employees, negotiating new performance standards, and reviewing other employees' complaints. He further alleged that testifying before Congress was one of his job duties on official time and that the employing establishment paid for his travel. Appellant asserted that his contact with the press was not voluntary, but was in response to the employing establishment's attempts to undermine his integrity in the press.

By decision dated October 2, 2017, OWCP's hearing representative affirmed the December 30, 2016 OWCP decision with modification, finding that appellant had established the following compensable factors of employment: (1) that he worked full time as an examiner from _____ until _____ and part time from _____ to _____ while union president; (2) that appellant traveled extensively while working as an examiner spending 75 percent of his time in travel status from _____ to _____ and (3) that appellant's performance of solely representational functions during his service as a union president from _____ to _____ was also a compensable work factor. OWCP's hearing representative found, however, that the medical evidence of record did not establish causal relationship between appellant's diagnosed HOCM with VT and his accepted employment factors.

In a report dated December 6, 2017, Dr. Cordero repeated appellant's diagnosis of HOCM with malignant VT. She noted that this condition was related to stress. Dr. Cordero opined that information from appellant's ICD showed that from 2012 when he began work at the employing establishment until his ventricular storm in October 2015 appellant's incidences of sustained VT significantly increased over the four years of his employment at the employing establishment. She opined that the worsening of appellant's cardiac condition over time was due to work factors including travel which involved carrying up to 50 pounds on 2 flights twice a week, his work as an examiner in the financial regulatory sector, and his work as union president. Dr. Cordero also opined that appellant had severe anxiety, PTSD, and other mental conditions as a result of his ICD firing in October 2015. She noted that near-death experiences, combined with the fact that appellant was awake during the episodes of ICD firings, resulted in these conditions. Dr. Cordero concluded that appellant's compensable work factors directly related and were the cause of the degradation of appellant's condition to the point that he could no longer work. She opined that his

work and compensable work factors caused his condition to deteriorate to the point that he was on the verge of death.

On October 2, 2018 appellant, through counsel, requested reconsideration of the October 2, 2017 OWCP hearing decision. Counsel contended that Dr. Cordero's December 6, 2017 report was sufficient to establish his occupational disease claim. In the alternative, he contended that the medical evidence submitted was sufficient to require referral to a second opinion physician.

By decision dated January 4, 2019, 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 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 be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

³ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

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

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 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. Chapter 2.1602.4b.

⁶ *Id.* at § 10.608(a); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

In support of a request for reconsideration, an appellant is not required to submit all evidence, which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

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).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. He continued to argue that the medical evidence of record supported his claim that he sustained an emotional condition resulting in aggravation of his underlying cardiac conditions. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

OWCP accepted three compensable factors of his federal employment. The underlying issue in this case, therefore, is whether appellant submitted medical evidence sufficient to establish causal relationship between his accepted employment factors and his diagnosed medical condition. This is a medical issue which must be addressed by relevant medical evidence.¹¹

In support of his request for reconsideration appellant submitted an additional report from Dr. Cordero dated December 6, 2017. Dr. Cordero repeated appellant's diagnosis of HOCM with VT and again attributed this condition to stress due to the three accepted factors. She offered new information that appellant's ICD showed that from 2012, when he began work at the employing establishment, until his ventricular storm in October 2015 his incidences of sustained VT significantly increased over the four years of his employment.

The Board finds that the findings and opinions expressed in Dr. Cordero's December 6, 2017 report constitute relevant and pertinent new evidence not previously considered by OWCP. These notes directly address the basis upon which OWCP denied his claim, the causal relationship between his diagnosed condition, and his accepted factors of employment. Appellant's request for reconsideration met one of standards for obtaining merit review of his case.¹²

⁸ *D.P.*, Docket No. 19-0001 (issued June 13, 2019); *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

⁹ *Id.*; *Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

¹¹ *B.T.*, Docket No. 18-1397 (issued January 15, 2019); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹² *D.P.*, Docket No. 19-0001 (issued June 13, 2019).

The Board will therefore set aside OWCP's January 4, 2019 decision and remand the case for a merit review of appellant's claim. After such further development of the evidence as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 25, 2019
Washington, DC



Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board



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



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