United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 14-1904**
	)	**Issued: May 18, 2015**
DEPARTMENT OF ENERGY, NATIONAL NUCLEAR SECURITY ADMINISTRATION, Washington, DC, Employer	)	

Appearances:
Stephen Domenic Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 26, 2014 appellant, through counsel, filed a timely appeal from an April 24, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed between the last merit decision, dated August 5, 2013, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's counsel contends that the record establishes that appellant timely filed his occupational disease claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 7, 2012 appellant, then a 48-year-old budget analyst, filed a Form CA-2 claim for occupational disease, alleging that on May 4, 2009 he first became aware of his nonischemic cardiomyopathy and lymphoma condition. He noted that he also became aware that the condition was due to his work on May 4, 2009. On the back of the form, appellant's supervisor stated that appellant had abandoned his position and was removed from employment on April 29, 2012 due to inability to perform his work duties.

In a December 21, 2011 Family and Medical Leave Act (FMLA) health care provider form, appellant's treating physician, Dr. David C. Pearle, a Board-certified cardiologist, found appellant totally disabled from performing his job duties as they caused emotional and physical stress. Diagnoses included Hodgkin's lymphoma and cardiomyopathy. Dr. Pearle related that appellant's heart condition began in May 2009 and that he had treated appellant from May 2009 to the present. He found that appellant's heart function/failure was exacerbated by his employment.

On October 2, 2012 appellant claimed wage-loss compensation for the period December 12, 2011 to the present. On the form he noted the date of his injury as November 28, 2011 and his last workday as April 29, 2012.

In a statement dated November 7, 2012, appellant related that, as a budget analyst, his job required that funding be appropriately aligned to field and site locations. It also required that he meet deadlines on requests for financial data. Appellant claimed that this caused considerable pressure and stress. He alleged that working on budgets which were managed under congressional continuing resolutions added to the stress of his position. While under these conditions, appellant was asked by directors and program managers to move or realign funding, which further increased his stress level. He also experienced stress from being routinely contacted by employees from other departments, who demanded "that their funding be obligated." Appellant related that the constant stress impacted his ability to sleep, as he was only able to sleep three or four hours a night and woke up exhausted.

As a result of all this stress from performing the duties of his position, appellant found himself unable to breathe on May 4, 2009 and was admitted to Georgetown University Hospital. During his hospitalization, he was diagnosed with a stroke and nonischemic cardiomyopathy.

Appellant related that another episode of his condition occurred on November 28, 2011 when he was unable to sleep due to worrying about his job. He awakened with shortness of breath and could not get back to sleep. The following day appellant saw his physician who returned him to work. A few days later, he underwent additional heart tests and was advised that he needed a left ventricular assist device because his heart was damaged.

In a November 9, 2012 work capacity evaluation (Form OWCP-5b), Dr. Cynthia Crawford-Green, a treating Board-certified internist, diagnosed nonischemic cardiomyopathy. Although she found appellant unable to work at this date-of-injury job, she found him capable of working eight hours per day with restrictions. Dr. Crawford-Green opined that a deadline-driven, high-paced job significantly aggravated his cardiomyopathy.

By letter dated February 1, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Specifically, it advised that the evidence failed to show that he had timely filed his claim. Appellant was advised as to the medical and factual evidence to submit and given 30 days to provide this information.

In a February 20, 2013 report, Dr. Crawford-Green provided a medical history with respect to treatment for appellant's Hodgkin's lymphoma and heart condition. She noted that appellant's cardiologist had attributed his cardiomyopathy in 2009 to the Adriamycin therapy which appellant had received for treatment of his 2007 Hodgkin's lymphoma. Dr. Crawford-Green noted that Adriamycin was "a known potentially cardiotoxic drug." She related that appellant's symptoms gradually worsened such that he received an implantable cardioverter device on August 5, 2010. Appellant was believed to have had a transient ischemic attack (TIA) in June 2011 (treated in the emergency room) at a time when he was under extreme stress at work. A November 30, 2011 myocardial perfusion scan revealed severe left ventricular systolic function deterioration and that on December 6, 2011 he underwent diagnostic cardiac catheterization which revealed no significant epicardial coronary artery disease but severe left ventricular dysfunction ejection fraction measured at 20 percent. Dr. Crawford-Green noted that, at that time, appellant was advised that job stress was exacerbating his heart failure and he was advised not to return to work.

Dr. Crawford-Green noted that appellant provided to the employing establishment a December 22, 2011 FMLA form, completed by appellant's cardiologist, which attributed the exacerbation of appellant's heart condition to his job stress. She noted that, when appellant presented to her care on August 23, 2012, he showed impressive improvement. Dr. Crawford-Green stated that "[n]early one year after he presented with overt pulmonary edema well on [appellant's] way to a left ventricular assist device and or cardiac transplantation, he is symptomatically markedly improved with very good exercise tolerance. It also conclusively demonstrates that his high stress work environment contributed to and exacerbated his severe heart failure."

On March 1, 2013 appellant completed OWCP's development questionnaire. He stated that he first exhibited symptoms of his condition on May 9, 2009 when he was admitted to the emergency room after having difficulty walking from the Metro to work and was diagnosed with heart failure. In August 2010, a defibrillator was implanted in appellant's chest. During the next two years, following the implantation of the defibrillator, he continued experiencing heart racing, chest tightness, and difficulty breathing at work. On November 28, 2011 the symptoms culminated in a diagnosis of decompensated congestive heart failure. Appellant alleged that his heart condition was aggravated by the performance of his stressful work duties, as well as worrying about his work. He noted his disagreement with OWCP's statement that his claim was untimely as he continued to experience heart problems while working and was not aware of the connection to his employment until his second cardiac catheterization on December 8, 2011.[2] Appellant submitted a copy of his medical records.

[2] The record reflects that this procedure actually took place on December 6, 2011.

Appellant submitted several reports from Dr. Pearle. In a December 6, 2011 report, Dr. Pearle noted performing a repeat outpatient cardiac catheterization that day, which demonstrated a left ventricular ejection fraction of 20 percent to 25 percent. He noted that "[appellant] is clearly under considerable job stress at present which is affecting his health."

In a further, more detailed report dated May 1, 2012, Dr. Pearle provided a history of appellant's heart condition. He explained that appellant had initially been evaluated in May 2009 with heart failure and a TIA. Dr. Pearle performed a cardiac catheterization which demonstrated mild coronary disease. Appellant was diagnosed with cardiomyopathy which was determined to be secondary to Adriamycin, which he was receiving for Hodgkin's lymphoma in 2007. Dr. Pearle noted that, due to the failure of the left ventricular ejection fraction to improve significantly, he implanted a cardioverter defibrillator on August 5, 2010. He noted that appellant again presented in November 2011 with significantly increased symptoms. At that time Dr. Pearle noted: "I have restricted [appellant's] physical activity, limiting maximal physical exertion, working in conditions of unusal heat or cold, and limitations in stress, which is clearly associated with his job in recent years." He later performed a repeat catheterization on December 6, 2011, which demonstrated further failure in his left ventricular ejection fraction, and he suggested that appellant consider retiring.

On March 5, 2013 OWCP received a March 28, 2012 removal letter from the employing establishment. It noted that appellant had not performed the duties of his position since December 1, 2011 and that his treating physician, on an FMLA request form, indicated that he was disabled due to medical and emotional stress and due to his medical condition. Based on his inability to perform the duties of his position, the employing establishment removed him from his position in order to promote the efficiency of the organization.

By decision dated March 8, 2013, OWCP denied appellant's claim as he had failed to timely file his claim, which OWCP characterized as a traumatic injury. It stated that, under 5 U.S.C. § 8122, he should have filed his claim within three years of the date of his injury or submit evidence that his supervisor had actual knowledge of the connection between the alleged condition and his employment duties within 30 days of the date of injury. OWCP found that, as appellant had noted on the CA-2 form that he first became aware of the disease or illness and first realized the disease or illness was caused or aggravated by his employment on May 4, 2009, and as he had not filed his claim until November 7, 2012, his claim was untimely filed. It further noted that in October 2007 appellant had received chemotherapy treatment for a diagnosis of Hodgkin's lymphoma. OWCP had reviewed Dr. Crawford-Green's February 20, 2013 report and noted that she had stated her belief that his condition, cardiomyopathy, was secondary to the treatment he was receiving for his lymphoma.

On May 15, 2013 appellant requested reconsideration and, in support of his request, submitted a May 14, 2013 report by Dr. Crawford-Green, who reported that it was not until December 2011 that he had been notified that the stress from his employment duties exacerbated his heart condition and heart failure. Dr. Crawford-Green contradicted OWCP's characterization of her previous report that she had believed that his cardiomyopathy was secondary to the treatment he had received for his lymphoma. In fact, she argued, "my position is exactly the opposite of that." Dr. Crawford-Green noted that her earlier report had stated: "[i]t also

conclusively demonstrates that [appellant's] high stress work environment contributed to or exacerbated his severe heart failure."

By decision dated August 5, 2013, OWCP denied modification. It noted that appellant had filed an occupational disease claim on November 7, 2012 noting that on May 4, 2009 he first became aware that his employment duties had caused or aggravated his nonischemic cardiomyopathy and lymphoma. OWCP listed the new evidence received, but found that it provided no additional dates to support the date he first realized the disease or illness was caused or aggravated by his employment. It noted that the May 4, 2009 date had first been provided by appellant on the CA-2 form and advised that it could not "infer what your date of injury should be based on." OWCP also found that he failed to submit any "clear cut evidence" showing error on the part of it in finding that his claim had been untimely filed. It reiterated the requirements for timely filing a claim under 5 U.S.C. § 8122.

On February 11, 2014 OWCP received appellant's request for reconsideration along with additional evidence. In a February 8, 2014 statement, appellant related that on his original CA-2 form he had incorrectly identified the date when he first realized his employment had aggravated or caused his illness. He provided a corrected Form CA-2 with a revised date of December 6, 2011. Appellant stated that it was not until Dr. Pearle told him on December 6, 2011 that he was disabled from performing the duties of his job that he became aware of the causal connection between his condition and his employment. He contended that he would have quit his job in May 2009 if he had been informed then that his work exacerbated or contributed to his diagnosed heart condition.

By decision dated April 24, 2014, OWCP denied reconsideration. It found that the evidence submitted by appellant failed to show that it had erroneously interpreted or applied a point of law. OWCP also failed to advance a legal argument not previously considered. It noted that none of the evidence submitted established that appellant timely filed his claim as he filed his occupational disease claim on November 7, 2012, which was more than three years after May 4, 2009, the date he identified as first becoming aware that his condition had been caused or aggravated by his employment.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[3] OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[4] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year

[3] *Id.* Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[4] 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

of the date of that decision.[5] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[6]

ANALYSIS

The Board finds that OWCP improperly denied appellant's claim without reviewing the merits.

By decision dated April 24, 2014, OWCP denied a review of the merits of appellant's request for reconsideration. The underlying issue was the timeliness of his claim. On reconsideration appellant provided new evidence to establish that his claim had been timely filed. He provided a revised Form CA-2 reflecting a new date of December 6, 2011 as to when he first realized the connection between his condition and his employment. Appellant noted that he had previously incorrectly identified May 4, 2009 as the date that he first became aware of the causal connection between his diagnosed condition and his employment on his original CA-2 form. He further clarified that it was not until December 6, 2011, following his second cardiac catheterization, when Dr. Pearle informed him that his disability was due to his job stress. Appellant noted that he had been told that on May 4, 2009, he would have quit his job then.

The Board finds that OWCP improperly found that appellant's request for reconsideration did not warrant further review of the merits of his claim. The Board finds that the submission of the revised CA-2 form, with an explanation as to why he had incorrectly identified May 4, 2009 on his original CA-2 form, is new evidence warranting a merit review.

The standard for reopening a claim for merit review does not require the claimant to submit all evidence that may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP. In this case, as noted above, appellant has submitted new, relevant, and pertinent evidence not previously considered by OWCP.[7] Therefore, the case shall be remanded for a review of the merits. After such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[5] *Id*. at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

[6] *Id*. at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[7] *See Charles A. Jackson*, 53 ECAB 671 (2002), *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 24, 2014 is remanded for further proceedings consistent with the above opinion.

Issued: May 18, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board