

# Decisions, decisions, decisions, Part 8: Reconsiderations, continued

**F**or OWCP to grant reconsideration, a claimant must meet in timely fashion at least one of the three requirements listed in the implementing regulations found at 20 CFR 10.606(b)(3). Last month's column discussed the first two possible requirements: (1) that the application set forth arguments and contain evidence that shows that OWCP erroneously applied or interpreted a specific point of law, or (2) that the application advance a relevant legal argument not considered by OWCP.

This month's column continues with a discussion of the third possible requirement: (3) that the application contain relevant and pertinent new evidence not previously considered by OWCP.

The relevant and pertinent new evidence should address the deficiencies in the claim outlined by OWCP in its adverse decision or disallowance. Evidence, even if new, that does not address the identified deficiencies or particular issue involved in the denial, will not be sufficient for OWCP to grant reconsideration.

For example, if OWCP has denied a claim because the claim lacks a medical rationale that establishes a causal relationship between work factors and the diagnosed condition, new detailed medical notes regarding treatment, diagnosis or disability would not be sufficient for OWCP to grant reconsideration.

According to FECA Procedure Manual 2-1602.6.3.b.,<sup>1</sup> the following types of evidence are not sufficient to reopen a claim for merit reconsideration:

- **a.)** Cumulative evidence, which is substantially similar to material on file that has already been considered, such as chart notes with new dates but similar content to those already of record and considered previously.
- **b.)** Repetitious evidence, which consists of copies of previously submitted evidence already considered in the contested decision.
- **c.)** Irrelevant or immaterial evidence, which has no bearing on the issue.<sup>1</sup>

In addition, ECAB has long held that excerpts from medical publications have no value as new evidence for granting merit reconsideration because they are general in nature and do not determine whether a specific claimant's condition is causally related to employment.<sup>2</sup>

ECAB also has held that acceptance of a claim for disability by the Social Security Administration does not constitute new evidence sufficient to warrant reconsideration, since the Social Security Act and the FECA have different standards of medical proof on the question of disability. Furthermore, under the FECA, the claimant's conditions must be shown to be causally related to his or her federal employment.<sup>3</sup>

**New evidence should be relevant to the issue that triggered the denial.** It can involve any of the elements that an injured employee has the burden of proof to establish in connection with his or her claim. For example, the submission of a witness statement would be considered relevant if the claim has been denied because fact of injury had not been established in the case of a traumatic injury.<sup>4</sup> A detailed description of the job duties also might constitute new evidence in an occupational disease case where fact of injury has not been established.

If OWCP has denied a claim as untimely because it was filed more than three years after the injury had occurred, submission of evidence demonstrating that written notice had been provided to employer within 30 days of the injury or that the employer had actual knowledge of the injury within 30 days of the its occurrence would be considered relevant new evidence since it would meet the exceptions to the three-year rule provided for by the FECA at 5 USC 8122.

Most new evidence in reconsideration cases will be medical in nature. In cases where OWCP has denied the claim because the claimant has not established the medical fact of injury, the claimant must provide OWCP with a definitive diagnosis from the attending physician supported by detailed medical reports containing objective clinical findings, including the results of diagnostic procedures such as X-rays, MRIs and CAT scans.

In cases where OWCP has denied the claim because of the lack of a medical rationale that establishes the causal relationship between work factors and the diagnosed condition, the claimant must provide OWCP a conclusive opinion from the attending physician describing the physiological mechanism by which work factors caused the diagnosed condition. This should include a discussion of the pathological or other medical relationship between the diagnosis and the injury or conditions of employment, and an explanation of how any test results formed a basis for the opinion.

**Next month's column will continue our series on the appeals process with a discussion of merit versus non-merit decisions.**

<sup>1</sup> FECA PM 2-1602.6.3.b.2, however, advises claims examiners to use caution in characterizing medical evidence as "cumulative" or "irrelevant" because a rationalizing supporting statement from a physician not previously of record requires a merit review when the denial of the claim rests on medical issues.

<sup>2</sup> Ernest J. Lebreux, 42 ECAB 736, 746 (1991), citing Gaetan F. Valenza, 35 ECAB 763, 767 n.4 (1984)

<sup>3</sup> Ronnie G. Irvin Dockett #99-113 (June 2001)

<sup>4</sup> FECA PM 2-1602.6.3