

# Decisions, decisions, decisions, Part 7: Reconsiderations, continued

**T**his month's column continues our discussion of reconsideration as an avenue of appeal for adverse decisions. As noted in January's column, for OWCP to grant reconsideration, the claimant must meet in timely fashion at least one of the requirements found in the implementing regulations found at 20 CFR 10.606(b)(3). The application must set forth arguments and contain evidence that either:

- Shows that OWCP erroneously applied or interpreted a specific point of law;
- Advances a relevant legal argument not considered by OWCP; or
- Constitutes relevant and pertinent new evidence not previously considered by OWCP.

Let's consider each one of these in turn.

## Erroneous application or interpretation of a specific point of law

**One way that claimants can obtain reconsideration is by demonstrating that OWCP erroneously applied or interpreted a specific point of law.** Claimants should have someone with expertise in OWCP from their branch or national business agent's office review the decision being appealed to determine if a specific point of law has been erroneously applied or interpreted.

The *FECA Procedure Manual 2* gives only the following examples of the erroneous application of law:

The CE [fails] to use the Shadrack formula when calculating a loss of wage earning capacity (LWEC), or [fails] to include all appropriate elements of pay when determining a pay rate for compensation purposes.<sup>1</sup>

As the cited examples make clear, showing the erroneous application of law can require detailed and specific knowledge of the FECA and its implementing regulations along with OWCP procedures. Most claimants, for example, wouldn't know what the Shadrack formula is.

Understanding the correct application of a specific point of law also may require research in FECA bulletins, circulars and transmittals published by OWCP. Most importantly, claimants or their representatives should research decisions by the Employees' Compensation Appeals Board (ECAB) that have interpreted the point of law in question.

In addition to understanding the specific point of law, claimants also must provide evidence that the point of law applies to the facts of their case. For example, *FECA Procedure Manual 2* 1602.6(b) establishes that when a request for reconsideration is accompanied by new evidence, the senior claims examiner must review the evidence to determine whether it is sufficient to review the case on its merits. ECAB has established that this holds true even if OWCP

receives new evidence the day a decision is rendered. OWCP commits an error of law if it fails to consider this new evidence.<sup>2</sup> However, to successfully make this argument, a claimant would have to provide evidence that OWCP received the new evidence before the decision was rendered.

## Legal argument not previously considered

**Another way that claimants can obtain reconsideration is by making a relevant legal argument not previously considered.** Again, claimants should have someone with expertise in OWCP review their case to determine if there are legal arguments not previously considered.

*FECA Procedure Manual 2* gives the following example of a legal argument not previously considered: "In a case that was denied on the basis of a medical opinion of a referee specialist, the introduction of evidence to support a prior connection between the referee physician and the employing agency would be sufficient to require the Office to reopen the case for a review of the merits."<sup>3</sup> In this example, the legal argument—that a referee specialist may not have a prior connection with the employing agency<sup>4</sup>—must be supported by evidence.

Pointing out errors in the Statement of Accepted Facts (SOAF) or in the questions to resolve in Second Opinion Exams (SECOPs) or Impartial Medical Exams (IMEs) is another example of advancing legal arguments not previously considered.<sup>5</sup>

While OWCP may reopen a case based solely on a legal argument not previously considered, such arguments must have what OWCP and ECAB call "a reasonable color of validity." Here is how *FECA Procedure Manual 2* explains "reasonable color of validity":

An application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application for reconsideration.<sup>6</sup>

Cases involving legal arguments not previously considered are fact-specific and often arise in connection with new evidence. Most successful applications for reconsideration come as a result of the third criterion listed above: the addition of relevant and pertinent new evidence not previously considered by OWCP. Next month's column will discuss how this works.

1. FECA PM 2 1602.6(a).1

2. Couch 41 ECAB 548 (1990), J.C. 11-1038 (2012)

3. FECA PM 2 1602.6(a).2

4. FECA PM 2 810.12(a).1

5. See the Compensation columns from April and May 2012 for a detailed discussion of the SOAF and questions to be resolved.

6. FECA PM 2 1602.6(a).2