

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARREL W. UPTERGROVE and DEPARTMENT OF THE NAVY,  
NAVY AIR WARFARE CENTER, WEAPONS DIVISION, Point Mugu, CA

*Docket No. 00-1861; Submitted on the Record;  
Issued February 11, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On November 4, 1996 appellant, then a 66-year-old electronics technician, filed an occupational disease claim, alleging that exposure to cigarette smoke at work caused disorientation, blurred vision, throat pain, hoarseness, headaches, knots behind his ears and chest discomfort. He stated that he encountered smoke upon entering and exiting the workplace, in hallways and common areas, and in security, human resources, safety and the dispensary. He further alleged that personnel with smoke on their clothes and breath caused his condition, noting that he had a severe reaction on October 25, 1996. He further stated that he had returned to work on September 30, 1996 after a 20-year absence due to an accepted hypersensitivity to tobacco.<sup>1</sup>

In support of his claim, appellant submitted medical evidence indicating that he should avoid cigarette smoke. He missed intermittent periods of work and retired on January 11, 1997.

The employing establishment provided a statement that was received by the Office on November 8, 1996, advising that all buildings were smoke-free and the smoking area was 300 yards from the entrance of the building where appellant worked. The employing establishment further indicated that appellant did not complain about smoke exposure or indicate that he was having an allergic reaction and on October 25, 1996 did not mention that he was having any problems.

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<sup>1</sup> The instant claim was adjudicated by the Office under file number 13-1119506. Appellant also has an outstanding appeal, Docket No. 00-1439, regarding a wage-earning capacity decision on the 1976 claim. This was adjudicated by the Office under file number 13-477406. Appellant has a third claim which was adjudicated by the Office under file number 13-1119420 for the incident that occurred on October 25, 1996. Appellant also filed an appeal with the Board for the denial of this claim, Docket No. 00-1387. The latter claims will be separately adjudicated by the Board.

By decision dated May 6, 1997, the Office denied the claim on the grounds that the medical evidence did not establish that appellant sustained an injury causally related to employment factors. On May 17, 1997 appellant requested a hearing and on May 26, 1998 requested a review of the written record. He also submitted additional evidence. In a September 28, 1998 decision, an Office hearing representative affirmed the prior decision. On September 7, 1999 appellant requested reconsideration and submitted additional evidence. By decision dated February 9, 2000, the Office denied appellant's reconsideration request, finding that the evidence submitted was immaterial and repetitious. The instant appeal follows.

The Board finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated February 9, 2000 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated September 28, 1998 and the filing of appellant's appeal on May 8, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>2</sup>

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>3</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

In the instant case, with his request for reconsideration, appellant put forward a number of arguments that he had previously presented to the Office.<sup>6</sup> The submission of a legal argument which duplicates an argument previously presented does not constitute a basis for reopening a case.<sup>7</sup>

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<sup>2</sup> 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>4</sup> 20 C.F.R. § 10.608(b)(1) and (2) (1999).

<sup>5</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>6</sup> These included that the Office erred in returning him to work in an unsuitable environment that was not smoke-free, that case management errors were made by both the Office and the employing establishment, and that the Office erred in managing his case medically.

<sup>7</sup> *David E. Newman*, 48 ECAB 305 (1997).

As new evidence, he submitted information obtained from the Internet. The Board has long held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee. Thus, appellant's submission of an excerpt from medical information from the Internet did not warrant the reopening of his claim for review on the merits.<sup>8</sup>

Appellant further submitted a number of medical reports that either predated his reemployment on September 30, 1996 and are, therefore, irrelevant to the issue in the instant claim, or were previously of record and are, therefore, duplicative. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. Likewise, evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>9</sup>

Appellant further contended that his three claims should have been consolidated.<sup>10</sup> Office procedures, however, provide that doubling of case files should be avoided if possible and that cases should be doubled only where correct adjudication of the issues depends on frequent cross-reference between files.<sup>11</sup> The Board finds that the issues of appellant's three cases are discrete<sup>12</sup> and it is, therefore, not necessary that they be consolidated.

The Board therefore finds that as the evidence and argument submitted by appellant were either repetitious or did not bear direct relevance to the particular issue of the instant case involved,<sup>13</sup> his evidence and argument are insufficient to warrant merit review. The Office, therefore, properly denied appellant's request for reconsideration.

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<sup>8</sup> See *Dominic E. Coppo*, 44 ECAB 484 (1993).

<sup>9</sup> *Alton L. Vann*, 48 ECAB 259 (1996).

<sup>10</sup> See *supra* note 1.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8 (February 2000).

<sup>12</sup> The issue in the instant case is whether the Office abused its discretion in denying merit review of the denial of an occupational disease claim. The issue found in Docket No. 00-1439 is whether the Office abused its discretion in denying merit review of a wage-earning capacity decision. The issue found in Docket No. 00-1387 is whether the Office abused its discretion in denying merit review of the denial of a traumatic injury claim for an incident that occurred on October 25, 1996.

<sup>13</sup> To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. *Ruth Seuell*, 48 ECAB 188 (1996).

The decision of the Office of Workers' Compensation Programs dated February 9, 2000 is hereby affirmed.

Dated, Washington, DC  
February 11, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member